Earmarks Executive Order: Legal Issues

Thomas J. Nicola
Legislative Attorney

T. J. Halstead
Deputy Assistant Dir/Specialist American Law

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Summary

On January 29, 2008, President George W. Bush signed Executive Order 13,457, "Protecting American Taxpayers from Government Spending on Wasteful Earmarks." The order states that it is the policy of the federal government "to be judicious in the expenditure of taxpayer dollars." In order "[t]o ensure the proper use of taxpayer funds," the order provides that the number and cost of earmarks should be reduced, that their origin and purposes should be transparent; and that they should be included in the text of bills voted upon by Congress and presented to the President. For appropriations laws and other legislation enacted after the date of the order, it directs executive agencies not to commit, obligate, or expend funds on the basis of earmarks included in any non-statutory source, including requests in reports of committees of Congress or other congressional documents or communications on behalf of Members of Congress, or any other non-statutory source, except when required by law or when an agency itself has determined that a project, program, grant, or other transaction has merit under statutory criteria or other merit-based decision-making.

In the context of the order, an "earmark" is defined as any

> funds provided by Congress for projects, programs, or grants where the purported congressional direction (whether in statutory text, report language, or other communication) circumvents otherwise applicable merit-based or competitive allocation processes, or specifies the location or recipient, or otherwise curtails the ability of the executive branch to manage its statutory and constitutional responsibilities pertaining to the funds allocation process.

There is a long tradition of congressional inclusion of, and agency compliance with, spending directives that are delineated in committee report language or in joint explanatory statements issued by conference committees. If applied rigorously, the provisions of Executive Order 13,457 could significantly alter this traditional dynamic. Accordingly, this report provides an overview of the provisions of the order; addresses questions that have arisen regarding both the President's authority to control executive branch activity in this context and the effect of non-statutory congressional spending directives; and considers and evaluates potential congressional responses to the executive order. The report will be updated as events warrant.

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Introduction

On January 29, 2008, President George W. Bush signed Executive Order 13,457, "Protecting American Taxpayers from Government Spending on Wasteful Earmarks."[1] The order states that it is the policy of the federal government "to be judicious in the expenditure of taxpayer dollars." In order "[t]o ensure the proper use of taxpayer funds," the order provides that the number and cost of earmarks should be reduced, that their origin and purposes should be transparent, and that they should be included in the text of bills voted upon by Congress and presented to the President.[2] For appropriations laws and other legislation enacted after the date of the order, it directs executive agencies not to commit, obligate, or expend funds on the basis of earmarks included in any non-statutory source, including requests in reports of committees of Congress or other congressional documents or communications on behalf of Members of Congress, or any other non-statutory source, except when required by law or when an agency itself has determined that a project, program, grant, or other transaction has merit under statutory criteria or other merit-based decision-making.[3]

Under the executive order, an "agency" is an executive agency defined in section 105 of title 5 of the United States Code and includes the United States Postal Service and the Postal Regulatory Commission, but excludes the Government Accountability Office.[4] This section states that an "executive agency" means a "department, a government corporation, and an independent establishment." An "independent establishment" is defined in section 104 of title 5.[5]

An "earmark" in the executive order means

> funds provided by Congress for projects, programs, or grants where the purported congressional direction (whether in statutory text, report language, or other communication) circumvents otherwise applicable merit-based or competitive allocation processes, or specifies the location or recipient, or otherwise curtails the ability of the executive branch to manage its statutory and constitutional responsibilities pertaining to the funds allocation process.[6]

The executive order identifies four duties of agency heads relating to earmarks. With respect to all appropriations laws and other legislation enacted after the date of the order, it directs the each agency head to take all necessary steps to ensure, first, that

> (1) agency decisions to commit, obligate, or expend funds for any earmark are based on the text of laws, and are not based on language in any congressional committee report, joint explanatory statement of a committee of conference, statement of managers concerning a bill in Congress, or any other non-statutory statement or indication of views of Congress or a House of Congress, committee, Member, officer, or staff thereof;

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[1] Exec. Order 13,457, 73 Fed. Reg. 6417 (February 1, 2008).

[2] *Id.* at § 1.

[3] *Id.* at § 1.

[4] *Id.* at § 3.

[5] This provision defines an "independent establishment" as "an establishment in the executive branch (other than the United States Postal Service or the Postal Regulatory Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment," and "the Government Accountability Office." 5 U.S.C. § 104(1)-(2).

[6] *Id.* at § 4.

> (2) agency decisions to commit, obligate, or expend funds for any earmark are based on authorized, transparent, statutory criteria and merit-based decisionmaking, in the manner set forth in section II of Office of Management and Budget (OMB)Memorandum M-07-10, dated February 15, 2007,[7] to the extent consistent with applicable law; and
>
> (3) no oral or written communications concerning earmarks shall supersede statutory criteria, competitive awards, or merit-based decisionmaking.[8]

Second, the executive order provides that an agency shall not consider the views of a House of Congress, committee, Member, officer, or staff of Congress with respect to commitments, obligations, or expenditures to carry out any earmark unless such views are in writing, to facilitate consideration in accordance with the requirement to base spending decisions on authorized, transparent statutory criteria and merit-based decision making to the extent consistent with applicable law. All written communications from Congress, a House of Congress, committee, Member, officer, or staff thereof, recommending that funds be committed, obligated, or expended on any earmark shall be made publicly available on the Internet by the receiving agency, not later than 30 days after such communication is received, unless otherwise specifically directed by the agency head, without delegation, after consulting with the OMB Director, to preserve appropriate confidentiality between the executive and legislative branches.[9]

Third, it requires that agency heads otherwise shall implement within their respective agencies the policy set forth in § 1 of the executive order consistent with any instructions that the Director of OMB may prescribe.[10]

The fourth duty is to provide to the OMB Director any information about earmarks and compliance with the executive order that the Director requests.[11]

Executive Order 13,457 has some general provisions which state that nothing in it shall be construed to impair or otherwise affect: (a) authority granted by law to an agency or agency head;[12] or (b) functions of the OMB Director relating to budget, administrative, or legislative proposals.[13] Moreover, it provides that the order shall be implemented in a manner consistent with applicable law and subject to the availability of appropriations.[14] Finally, the order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States, its agencies, instrumentalities, its officers, employees, or agents, or any other person.[15]

In his State of the Union address on January 28, 2008, the President explained the reason for issuing the executive order:

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[7] OMB Memorandum M-07-10 is available at Memoranda at http://www.whitehouse.gov/omb by number and date, February 15, 2007.

[8] Exec. Order 13,457, § 2(a).

[9] *Id*. at § 2(b).

[10] *Id*. at § 2(c).

[11] *Id*. at § 2(d).

[12] *Id*. at § 4(a)(I).

[13] *Id*. at § 4(a)(ii).

[14] *Id*. at § 4(b).

[15] *Id*. at § 4(c).

> The people's trust in their government is undermined by congressional earmarks—special interest projects that are often stuck in at the last minute, without discussion or debate. Last year I asked you to voluntarily cut the number of earmarks and the cost of earmarks in half. I also asked you to stop slipping earmarks into committee reports that never come to a vote. Unfortunately, neither goal was met. So this time, if you send me an appropriations bill that does not cut the number or cost of earmarks in half, I'll send it back to you with my veto. And tomorrow, I will issue an executive order that directs federal agencies to ignore any future earmark that is not voted on by Congress. If these items are truly worth funding, Congress should debate them in the open and hold a public vote.[16]

Presidential Authority to Issue Executive Orders and Their Legal Effect

There is a long tradition of congressional inclusion of, and agency compliance with, spending directives that are delineated in committee report language or in joint explanatory statements issued by conference committees. If applied rigorously, the provisions of Executive Order 13,457 could significantly alter this traditional dynamic, raising questions regarding the President's authority to control executive branch activity in this context via executive order.

The President's ability to issue and implement executive orders may stem from both constitutional and statutory authority. In the constitutional context, presidential power to issue such orders has been derived from Article II, which states that "the executive power shall be vested in a President of the United States," that "the President shall be Commander in Chief of the Army and Navy of the United States," and that the President "shall take care that the laws be faithfully executed."[17] The President's power to issue executive orders and proclamations may also derive from express or implied statutory authority.[18] Irrespective of the nature of the authority to issue executive orders and proclamations, these instruments have been employed by every President since the inception of the Republic, and Presidents have not hesitated to wield this power over a wide range of often controversial subjects.[19] Furthermore, if issued under a valid claim of authority and published, these instruments may have the force and effect of law, requiring courts to take judicial notice of their existence.[20]

While these principles establish the authority of the President to issue executive orders generally, the question of whether a particular order comports with constitutional and statutory provisions requires a more nuanced analysis. The framework for analyzing the validity of an executive order was delineated in *Youngstown Sheet & Tube Co. v. Sawyer*.[21] There, the Supreme Court dealt with President Truman's executive order directing the seizure of steel mills, which was issued in an effort to avert the effects of a workers' strike during the Korean War. Invalidating this action, the majority held that under the Constitution, "the President's power to see that laws are faithfully

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[16] The State of the Union transcript is available at http://www.whitehouse.gov, *see* Newsm, by date, January 28, 2008.

[17] U.S. Const., Art. II, §1, 2, & 3.

[18] *See* Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[19] *See* CRS Report RS20846, *Executive Orders: Issuance and Revocation*, by (name redacted) (2001).

[20] Armstrong v. United States, 80 U.S. 154 (1871); *see also,* Farkas v. Texas Instrument, Inc., 372 F.2d 629 (5th Cir. 1967); Farmer v. Philadelphia Electric Co., 329 F.2d 3 (3rd Cir. 1964); Jenkins v. Collard, 145 U.S. 546, 560-61 (1893).

[21] 343 U.S. 579 (1952).

executed refutes the idea that he is to be a lawmaker."[22] Specifically, Justice Black maintained that Presidential authority to issue such an executive order "must stem either from an act of Congress or from the Constitution itself."[23] Applying this reasoning, Justice Black's opinion for the Court determined that as no statute or Constitutional provision authorized such presidential action, the seizure order was in essence a legislative act. The Court further noted that Congress had rejected seizure as a means to settle labor disputes during consideration of the Taft-Hartley Act. Given this characterization, the Court deemed the executive order to be an unconstitutional violation of the separation of powers doctrine, explaining "the founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."[24]

While Justice Black's majority opinion in *Youngstown* seems to refute the notion that the President possesses implied constitutional powers, there were five concurrences in the case, four of which maintained that implied presidential authority adheres in certain contexts.[25] Of these concurrences, Justice Jackson's has proven to be the most influential, even surpassing the impact of Justice Black's majority opinion. Specifically, Justice Jackson established a tri-partite scheme for analyzing the validity of presidential actions in relation to constitutional and congressional authority.[26]

Justice Jackson's first category focuses on whether the President has acted according to an express or implied grant of congressional authority. If so, according to Jackson, presidential "authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate," and such action is "supported by the strongest of presumptions and the widest latitude of judicial interpretation."[27] Secondly, Justice Jackson maintained that, in situations where Congress has neither granted nor denied authority to the President, the President acts in reliance only "upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[28] In the third and final category, Justice Jackson stated that in instances where presidential action is "incompatible with the express or implied will of Congress," the power of the President is at its minimum, and any such action may be supported pursuant only the President's "own constitutional powers minus any constitutional powers of Congress over the matter."[29] In such a circumstance, presidential action must rest upon an exclusive power, and the Courts can uphold the measure "only by disabling the Congress from acting upon the subject."[30]

With regard to President Truman's order, Justice Jackson determined that analysis under the first category was inappropriate, due to the fact that seizure of steel mills had not been authorized by Congress, either implicitly or explicitly. Justice Jackson also determined that the second category was "clearly eliminated," in that Congress had addressed the issue of seizure, through statutory

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[22] *Id.* at 587.

[23] *Id.* at 585.

[24] *Id.* at 586-589.

[25] *Id.* at 659 (Burton, J., concurring); *Id.* at 661 (Clark, J., concurring in result only); *Id.* at 610 (Frankfurter, J., concurring); *Id*. at 635 (Jackson, J., concurring).

[26] *Id.* at 635-638.

[27] *Id.* at 635, 637.

[28] *Id.* at 637.

[29] *Id.* at 637.

[30] *Id*. at 637-638.

policies conflicting with the President's actions.[31] Employing the third category, Justice Jackson noted that President Truman's actions could only be sustained by determining that the seizure was "within his domain and beyond control by Congress."[32] Justice Jackson concluded that such matters were not outside the scope of congressional power, reinforcing his declaration that permitting the President to exercise such "conclusive and preclusive" power would endanger "the equilibrium established by our constitutional system."[33]

Applying these principles to the case at hand, there does not appear to be any discernible basis upon which it could be asserted that Executive Order 13,457 runs contrary to constitutional or statutory precepts. While the potential centralization of control over agency treatment of non-statutory earmarks raises significant policy issues, E.O. 13,457 appears to fall within the accepted parameters of presidential authority in the executive order context, particularly when viewed in relation to other executive orders that have asserted similar and arguably more expansive centralization authority.

For instance, in 1981, President Reagan issued Executive Order 12,291, ushering in a new era of presidential control over agency rulemaking activity.[34] E.O. 12,291 required cost-benefit analyses and established a centralized review procedure for all agency regulations. E.O. 12,291 delegated responsibility for this clearance requirement to the Office of Information and Regulatory Affairs, which had recently been created within the Office of Management and Budget as part of the Paperwork Reduction Act of 1980. The impact of E.O. 12,291 on agency regulatory activities was immediate and substantial, generating controversy and criticism. Opponents of the order asserted that review thereunder was distinctly anti-regulatory and constituted an unconstitutional transfer of authority from the executive agencies.[35] Despite these concerns, courts considering OMB involvement in agency rulemaking under the executive order did not address the constitutionality of such review,[36] and Congress did not act to countermand the executive order. The review scheme established in the Reagan Administration has been employed and modified by subsequent Administrations in a manner that conveys a conception of presidential authority consonant with that of the Reagan order.[37] However, arguments against the constitutionality of these executive orders have largely diminished, to the point that presidential review of agency rulemaking has

[31] *Id*. at 638-639.

[32] *Id*. at 640.

[33] *Id*. at 638, 640-645.

[34] Exec. Order 12,291, 46 Fed. Reg. 13,193 (February 17, 1981).

[35] For a thorough overview of the criticisms leveled at the Reagan order, *see* Richard H. Pildes, Cass R. Sunstein, "Reinventing the Regulatory State," 62 U. Chi. L. Rev. 1, 4-6 (1995); Elena Kagan, "Presidential Administration," n.10, *supra*, at 2279-80. *But see*, Frank B. Cross, "Executive Orders 12,2291 and 12,498: A Test Case in Presidential Control of Executive Agencies," 4 J.L & Pol. 483 (1988) (supporting constitutionality and utility of review under the order).

[36] In Public Citizen Health Research Group v. Tyson, 796 F.2d 1479 (D.C. Cir. 1986), for instance, the court addressed the validity of a rule promulgated by OSHA governing ethylene oixide, including a challenge based on the argument that a critical portion of the proposed rule had been deleted based on a command from OMB. While stating that "OMB's participation in the rulemaking presents difficult constitutional questions concerning the executive's proper role in administrative proceedings and the appropriate scope of delegated power from Congress to certain executive agencies," the court nonetheless found that it had "no occasion to reach the difficult constitutional questions presented by OMB's participation." *Id*. at 1507.

[37] *See* CRS Report RL32855, *Presidential Review of Agency Rulemaking*, by (name redacted) (2005).

become a widely used and increasingly accepted mechanism by which a President can exert significant and sometimes determinative authority over the agency rulemaking process.[38]

The implicit acquiescence of Congress and the courts regarding the constitutionality of 12,291 and its successors indicates that a President may successfully utilize executive orders to exert significant, centralized control over executive branch activity that has traditionally been exercised at the departmental or agency level. This rationale seems fully applicable to Executive Order 13,457, particularly in light of the fact that non-statutory earmarks are not legally binding on executive branch agencies.

Consistency Between Executive Order and Existing Case Law Regarding Report Language

Art. I, sec. 9, cl. 7 of the Constitution states that, "No money shall be drawn from the treasury, but in consequence of appropriations made by law." With respect to all appropriations laws and other legislation enacted after the date of the order, the executive order directs each agency head to take all necessary steps to ensure that agency spending decisions are based on the text of laws and not on language in legislative history documents or other congressional communications to agencies and otherwise to implement the policy that earmarks should be included in the text of bills voted upon by Congress and presented to the President.

The Supreme Court in *Lincoln* v. *Vigil*[39] unanimously acknowledged a premise upon which the executive order appears to be based: Language in legislative history documents does not legally bind agencies unless it is enacted in the text of a statute.

> [A] fundamental principle of appropriations law is that where "Congress merely appropriates lump sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how funds should or are expected to be spent do not establish any legal requirements on" the agency. *LTV Aerospace Corp.*, 55 Comp. Gen. 307, 309 (1975); *cf.*, *American Hospital Assn. v. NLRB*, 499 U.S. 606, 616 (1991) (statements in committee reports do not have the force of law); *TVA v. Hill,* 437 U.S. 153, 191 (1978) ("Expressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress.") Put another way, a lump sum appropriation reflects a congressional recognition that an agency must be allowed "flexibility to shift ... funds within a particular ... appropriation account so that" the agency "can make necessary adjustments for 'unforeseen developments' and 'changing requirements.'" *LTV Aerospace Corp., supra*, at 318 (citation omitted.)" ... Of course, an agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes (though not, as we have seen, just in the legislative history).[40]

[38] *Id*.

[39] 508 U.S. 182 (1993).

[40] 508 U.S. at 192-193.

A year later in *Shannon* v, *United States*,[41] the Court emphasized this point when it observed that, "We are not aware of any case ... in which we have given authoritative weight to a single passage of legislative history that is in no way anchored in the text of a statute.... We agree with the D.C. Circuit that "Courts have no authority to enforce [a] principl[e] gleaned solely from legislative history that has no statutory reference point."[42]

The Court in the *Lincoln* case quoted from *LTV Aerospace Corp*., a decision of the Comptroller General, who heads the Government Accountability Office (GAO), formerly the General Accounting Office. In that decision, the Comptroller General said that

> with respect to appropriations, there is a clear distinction to be made between the imposition of statutory restrictions or conditions which are intended to be legally binding and the technique of specifying restrictions or conditions in a nonstatutory context.
>
> In this regard, Congress has recognized that in most instances it is desirable to maintain executive flexibility to shift around funds within a particular lump sum so that agencies can make necessary adjustments.... This is not to say that Congress does not expect that funds will be spent in accordance with budget estimates or in accordance with restrictions detailed in committee reports. However, in order to preserve spending flexibility, it may choose not to impose those particular restrictions as a matter of law, but rather to leave it to the agencies to "keep faith" with the Congress.... There are practical reasons why agencies can be expected to comply with these congressional expectations....
>
> On the other hand, when Congress does not intend to permit agency flexibility, but intends to impose a legally binding restriction on an agency's use of funds, it does so by means of explicit statutory language.[43]

The Comptroller General added that

> as a general proposition, there is a distinction to be made between utilizing legislative history for the purpose of illuminating underlying language and resorting to that history for the purpose of writing into law that which is not there....
>
> An accommodation has developed between the Congress and the executive branch resulting in the appropriation process flexibility discussed above. Funds are most often appropriated in lump sums on the basis of mutual legislative and executive understandings as to their use and derive from agency budget estimates and testimony and expressions of intent in committee reports. The understandings reached generally are not engrafted upon the appropriation provisions enacted. *To establish as a matter of law specific restrictions covering the detailed and complete basis upon which appropriated funds are understood to be provided would, as a practical matter, severely limit the capability of agencies to accommodate changing conditions.*[44]

Both the Supreme Court and the Comptroller General have indicated the consequence for an agency if it disregards directives in legislative history documents. The Court in the *Lincoln* case said that, "And, of course, we hardly need to note that an agency's decision to ignore

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[41] 512 U.S. 573 (1994).

[42] 512 U.S. at 583, *quoting from* International Brotherhood of Electrical Workers v. National Labor Relations Board, 814 F.2d 697, 712 (D.C.Cir.1987)

[43] LTV Aerospace Corp., 55 Comp. Gen. 307, 325 (1975) (footnote omitted).

[44] *Id.* at 325-326 (Emphasis supplied.).

congressional expectations may expose it to grave political consequences."[45] Referring to a passage which indicated that Congress sometimes places restrictions in legislative history documents rather than in statutory text to permit agencies to accommodate changing conditions when allocating funds, the Comptroller General stated that, "This does not mean agencies are free to ignore clearly expressed legislative history applicable to the use of appropriated funds. They ignore such expressions of intent at the peril of strained relations with the Congress. The executive branch ... has a practical duty to abide by such expressions. This duty, however, must be understood to fall short of a statutory requirement giving rise to a legal infraction where there is a failure to carry out that duty."[46]

Congressional Response to Executive Order

The above sections have reviewed the elements of Executive Order 13,457, the legal basis for the President to issue executive orders and their legal effect, and the consistency between the substance of the order and case law which acknowledges that earmarks in legislative history documents but not in statutory text do not legally bind agencies to fund them. A primary purpose of the executive order appears to be to limit the discretion of individual executive agency heads to fund earmarks that appear only in legislative history documents and other nonstatutory sources; it expresses a uniform policy throughout the executive branch that they generally should not be funded and that agency heads should base funding decisions on "authorized, transparent, statutory criteria and merit-based decision-making."

Congress has a number of options to respond to this executive order. It can choose to operate within the new legal milieu that it appears to formalize or take steps to countermand it. One option to operate within it, of course, would be for Congress expressly to include each earmark in the text of a statute and thereby place it beyond the agency decision-making process that the executive order requires for nonstatutory ones. To become law, each earmark in a bill would have to pass the House and Senate and be presented to the President and, if the bill were vetoed, pass by two-thirds of each House to override a presidential veto. Another form of express incorporation would be for Congress to include language in a statute to the effect that, "Earmarks in a joint explanatory statement in House Report No. 110-XXX shall be effective as if enacted into law."

Another option would be for Congress to incorporate by reference in the text of a statute each earmark that appears in legislative history documents in such a way that Members and Senators voting on the incorporating textual language and the President to whom the language is presented would be made aware of the earmarks involved. An example is a provision of the Revised Continuing Appropriations Resolution, 2007,[47] which provides that, "The Office of National Drug Control Policy shall expend funds for 'Counterdrug Technology Center' by Public Law 109-115 in accordance with the joint explanatory statement of the committee of conference (H.Rept. No. 109-307) within 60 days after the date of enactment of this section."[48]

[45] 508 U.S. at 193.

[46] 55 Comp. Gen. at 326.

[47] P.L. 110-5, 121 Stat. 8 (2007).

[48] *Id.,* chap. 10, § 21057(b), 121 Stat. at 55.

The unambiguous language of a directive of this type—"shall expend"—would appear legally to bind an agency to expend funds in accordance with the joint explanatory statement to which the directive refers. In *Chevron, U.S.A.* v. *Natural Resources Defense Council, Inc.*,[49] the Supreme Court held that

> [w]hen a court reviews an agency's construction of a statute, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[50]

A passage in the policy section of the earmarks executive order may acknowledge this principle. It states, in relevant part, that "[f]or appropriations laws and other legislation enacted after the date of this order, executive agencies should not commit, obligate, or expend funds on the basis of earmarks included in any non-statutory source, including reports of committees of the Congress or other congressional documents ... except when required by law."

If Congress should choose to attempt to countermand the executive order, it could seek to enact language stating that it should have no force and effect. Another congressional option would be to seek to deny funds to the Office of Management and Budget to enforce the order. As noted above, § 4(b) of the order states that it "... shall be implemented in a manner consistent with applicable law and subject to the availability of appropriations." There is precedent for Congress enacting a statute to revoke an executive order. During the Administration of President William J. Clinton, Congress enacted a provision of the National Institutes of Health Revitalization Act of 1993, which stated that the provisions of Executive Order 12,806,[51] "... shall not have any legal effect."[52] This executive order, which had been issued by President George H.W. Bush the previous year, directed the Secretary of Health and Human Services to establish a fetal tissue bank. Given the highly speculative basis of any asserted constitutional authority for the President to issue such an order, there appears to be little doubt as to the legitimacy of this congressional revocation.[53] However, any congressional attempt to revoke the earmarks executive order could set the stage for a more significant confrontation, given the broad conception of presidential authority upon which its issuance appears to be premised.[54]

Ultimately, whether enacting a statute to revoke the order or enacting language denying OMB funds to enforce it would have significant legal effect is not clear because of the nature of the order. As noted in the discussion above on consistency between it and relevant case law, Executive Order 13,457 does not appear to create new law. Instead, it directs executive agencies to comply with a principle acknowledged by the Supreme Court: namely, that agencies are not legally required to fund earmarks contained in legislative documents but not in the text of statutes. Its significance appears to be in the establishment of a uniform policy throughout the executive branch and the imposition of specific duties on agency heads to foster its implementation.

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[49] 467 U.S. 837 (1984); *reh. denied*, 468 U.S. 1227 (1984).

[50] 467 U.S. at 842-843.

[51] Exec. Order 12,806, 57 Fed. Reg. 21,589 (May 21, 1992).

[52] P.L. 103-43, §121, 107 Stat. 133 (June 10, 1993).

[53] *See Youngstown*, 343 U.S. at 635-638.

[54] *See* n. 37, *supra*, at 3.

Conclusion

The provisions of Executive Order 13,457 may significantly influence the dynamic that has traditionally governed executive and legislative practice with regard to nonstatutory earmarks, but the order itself appears to fall within the accepted parameters of presidential authority in the executive order context. Courts have acknowledged a premise upon which the order appears to be based: Earmarks in legislative history documents and other sources that are not anchored in statutory text have no legal force or effect. Moreover, while the provisions of the order appear to direct executive agencies to refrain from funding nonstatutory earmarks that they may have funded as a matter of course before it was issued, Congress has options such as expressly including earmarks in the texts of statutes or statutorily incorporating by reference earmarks in legislative history documents. These congressional responses may ameliorate the impact of the order. Ultimately, the extent to which the earmarks executive order will affect agency practice pertaining to non-statutory earmarks remains to be seen, and, as the foregoing analysis indicates, may prove to be more a matter of political rather than legal significance.

Author Contact Information

(name redacted)
Legislative Attorney
[redacted]@crs.loc.gov, 7-....

(name redacted)
Deputy Assistant Dir/Specialist American Law
[redacted]@crs.loc.gov, 7-....

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