

Comment

Curbing Lettermarks

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This Comment explores the troubling phenomenon of “lettermarking,” which occurs when Members of Congress write to personnel in administrative agencies to request appropriations that would benefit their donors and constituents. Although lettermarking has exploded in popularity since both houses of Congress adopted a moratorium on earmarking in 2011, nothing has been written about this practice in legal scholarship.

This Comment fills that gap by providing a descriptive account of lettermarking and by suggesting ways to curb this pernicious practice. Part I documents the rise of lettermarking and explains how lettermarks damage American democracy. Part I also discusses Executive Order 13,457, promulgated by President George W. Bush in an attempt to control lettermarking. We explain why EO 13,457 has not been enforced and suggest that some supplementary control mechanism—preferably one that relies on private actors—will be needed to curb lettermarks.

Part II suggests that unsuccessful grant applicants may be able to fill this role by suing agencies that considered lettermarks when deciding which projects to fund. Indeed, since lettermarks induce agencies to act on the basis of extraneous political pressure, they violate several legal rules that require agencies to make decisions through merits-based processes.

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Introduction

Under pressure from Tea Party groups frustrated with the largesse of government spending, Congress banned earmarking in early 2011.¹ But this wasn't the end of handouts. Stripped of their power to directly insert earmarks into legislation, lawmakers quietly began asking agency personnel for appropriations that would benefit their donors and constituents. These requests—called “lettermarks”—have been described as “cattle prods to agency heads,”² forcing them to fund Members' pet projects or else incur their ire.³

Lettermarks come in all shapes and sizes. Some have served the personal interests of politicians, as when then-Senator Mark Pryor wrote to the Department of Transportation to request \$12 million for a bike path outside his Senate office in Little Rock.⁴ Others are indicative of quid pro quo dealings between politicians and their donors. Representative Brad Ellsworth, for example, wrote to the Department of Energy encouraging the Secretary to award grant funds to the Duke Energy Company; only months before, Ellsworth had collected thousands of dollars in campaign donations from that company's political action committee.⁵ Most lettermarks, however, are motivated by Members' persistent desire to bring home the bacon. The problem with this type of lettermarking is that it sometimes results in the funding of undeserving projects. Moreover, since lettermarks are not public, Members can pressure agencies without fear that their behavior will later be discovered. Unsurprisingly, the gulf between politicians' public positions and private communications is often considerable. For example, recent investigative reporting has exposed the hypocrisy of dozens of Members who wrote to federal agencies to request stimulus funding for pet projects after having vocally opposed the passage of the stimulus.⁶ In an

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1. Erik Wasson, *Watchdogs Fear Rise of Backdoor Earmarking in the Next Congress*, THE HILL (Dec. 28, 2010), <http://thehill.com/blogs/on-the-money/appropriations/135291-spending-watchdogs-home-in-on-lettermarking-as-threat-next-year>; see Scott Wong, *Senate Dems Give In on Earmark Ban*, POLITICO (Feb. 1, 2011), <http://www.politico.com/news/stories/0211/48623.html>.

2. Maryls Harris, *Are 'Lettermarks' Congress' New End-Around on the Earmarks Ban?*, MINN. POST (Sept. 20, 2013), <http://www.minnpost.com/politics-policy/2013/09/are-lettermarks-congress-new-end-around-earmarks-ban>.

3. See TOM A. COBURN, THE DEBT BOMB 48 (2012) (noting that Members often “call[] agency heads to cajole them to fund certain grants or risk budget cuts to their agenc[ies]”).

4. Thomas Jones, *Senator Pryor Seeks \$12 Million Secret Lettermark for Bike Path*, 339 GROUP LLC, <http://339groupllc.com/blog/2013/8/30/senator-pryor-seeks-12-million-secret-lettermark-for-bike-path> (last visited Sept. 7, 2014).

5. John Solomon & Aaron Mehta, *Stimulating Hypocrisy: Scores of Recovery Act Opponents Sought Money out of Public View*, CENTER FOR PUB. INTEGRITY (Oct. 19, 2010), <http://www.publicintegrity.org/2010/10/19/2421/stimulating-hypocrisy-scores-recovery-act-opponents-sought-money-out-public-view>.

6. *Id.* Representative Michele Bachmann—who brags about voting against “the failed Pelosi trillion-dollar stimulus”—wrote at least half a dozen lettermarks requesting stimulus money. *Id.*;

even more stunning display of hypocrisy, Representative Jeff Flake went on record as opposing earmarks; several months later, his rampant lettermarking was exposed by documents obtained under the Freedom of Information Act.⁷

Lettermarking has exploded in popularity since the adoption of the earmark moratorium.⁸ In 2011 alone, the Department of Transportation received over one thousand lettermarks.⁹ “Phonemarking,” which occurs when Members *call* agencies to request appropriations,¹⁰ has also become common. While it’s impossible to know exactly how many lettermarks and phonemarks have been made in the last four years, the figure likely numbers in the tens of thousands.

Despite the prominence of lettermarking, nothing has been written about this practice in legal scholarship. Although lettermarking has received some attention in the press and in political science articles, a Westlaw search for “lettermark” returns no results from either case law or secondary legal literature.

This Comment fills that gap by providing a descriptive account of lettermarking and by suggesting ways to curb this pernicious practice. Part I documents the rise of lettermarking and explains how lettermarks damage American democracy. Part I also discusses Executive Order 13,457, promulgated by President George W. Bush in an attempt to control lettermarking. Alas, EO 13,457 has not been enforced against executive agencies. Since it is unlikely that *any* Executive Order would ever be meticulously enforced, some supplementary control mechanism—preferably one that relies on private actors—will be needed to curb lettermarks. Part II suggests that unsuccessful grant applicants may be able to fill this role by suing agencies that considered lettermarks when deciding which projects to fund. Indeed, since lettermarks induce agencies to act on the basis of extraneous political pressure, they cannot be squared with legal rules that require agencies to make decisions through merits-based processes.

see also Suzy Khimm, *The Danger of Driving Earmarks Underground*, MOTHER JONES (Dec. 28, 2010), <http://www.motherjones.com/mojo/2010/12/danger-driving-earmarks-underground>.

7. John Celock, *Jeff Flake, Arizona Senate Candidate, Wrote Federal Agencies About Local Projects*, HUFFINGTON POST (June 27, 2012), http://www.huffingtonpost.com/2012/06/27/jeff-flake-arizona-senate-earmarks_n_1631682.html.

8. See Kevin Bogardus, *Obama Administration Draft Memo Could Shed Light on ‘Lettermarking’*, THE HILL (Nov. 9, 2011), <http://thehill.com/business-a-lobbying/192497-obama-administration-draft-memo-could-shed-light-on-lettermarking>; Wasson, *supra* note 1; see also John Solomon & Jeffrey H. Birnbaum, *In the Democratic Congress, Pork Still Gets Served*, WASH. POST (May 24, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/23/AR2007052301782.html>.

9. James R. Carroll, *Critics: Congressional Spending Requests Less Open*, USA TODAY (Apr. 1, 2013), <http://www.usatoday.com/story/news/politics/2013/04/01/congressional-letter-mark-spending-requests/2044095/>.

10. ROGER H. DAVIDSON, WALTER J. OLESZEK & FRANCES E. LEE, CONGRESS AND ITS MEMBERS 407 (14th ed. 2014); see Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519, 550 n.157 (2009).

I. A Brief Primer on Lettermarks

By 2010, frustration with earmarks had reached a fever pitch. After securing control of the House by promising to reign in government spending, House Republicans voted to ban earmarks altogether. The Democratic-controlled Senate soon followed suit. Once they realized that they could no longer insert earmarks directly into legislation, many Members turned to the lettermark process. Indeed, congressional insiders agree that lettermarking has become substantially “more prevalent because of the earmark ban.”¹¹ When asked in 2011 whether the earmark ban had curtailed the power of the Appropriations Committee’s Members to direct funds to their favored projects, Congressman Jim Moran scoffed. “[T]he appropriators are going to be okay,” he said. “[W]e know people in agencies.”¹²

The rise of lettermarking presents a number of troubling problems. First and most importantly, lettermarks curb agency independence. Much ink has been spilled extolling the virtue of independent agency decision-making,¹³ and those arguments need not be rehashed here. Put simply, agencies cannot bring to bear their substantial experience and expertise if their personnel are awarding funding in response to political pressure rather than merits-based criteria.

Second, a lettermark—unlike an earmark—is nearly impossible to track.¹⁴ Thus, lettermarking allows for quid pro quo dealings between politicians and their donors. These types of transactions are well-documented in both the political science literature on earmarking¹⁵ and in anecdotal reports in the popular press.¹⁶ Indeed, Senator Tom Coburn has noted that the reason that Members use lettermarks is precisely because this strategy “avoid[s] a paper trail and transparency rules”¹⁷ and therefore allows them to cultivate “the culture of parochialism and careerism” without any consequences.¹⁸

11. Bogardus, *supra* note 8.

12. Daniel Strauss, *House Appropriator: We Know How to Get Around Earmark Ban*, THE HILL (Mar. 3, 2011, 7:31 PM), <http://thehill.com/blogs/blog-briefing-room/news/147347-house-appropriator-we-know-how-to-get-around-earmark-ban>.

13. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2352-58 (2001); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 106-20 (1994); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578-87 (1984).

14. Under current law, citizens cannot FOIA records of Members’ communication with agencies from Members’ offices. They must instead FOIA these records directly from the agencies, which is often prohibitively inconvenient or time consuming. When agencies do respond to requests for the lettermarks, they are often heavily redacted. See Carroll, *supra* note 9.

15. See, e.g., Kenneth N. Bickers & Robert M. Stein, *The Electoral Dynamics of the Federal Pork Barrel*, 40 AM. J. POL. SCI. 1300 (1996); Matz Dahlberg & Eva Johansson, *On the Vote-Purchasing Behavior of Incumbent Governments*, 96 AM. J. POL. SCI. 27 (2002).

16. See Solomon & Mehta, *supra* note 5; see also Michael Luo & Mike McIntire, *Donors Gave as Santorum Won Earmarks*, N.Y. TIMES (Jan. 15, 2012), <http://www.nytimes.com/2012/01/16/us/politics/as-rick-santorum-secured-earmarks-2006-donations-flowed-in.html>.

17. COBURN, *supra* note 3, at 48.

18. *Id.*

As reformers have long recognized, forcing the disclosure of lettermarks would disincentivize these quid pro quo transactions. Instead of spending time on the hopeless task of limiting the money that flows from donors to politicians,¹⁹ the more sensible strategy is to limit the pork that flows from politicians to donors. Disclosure of lettermarks would stop the flow of pork by naming and shaming politicians who engage in quid pro quo dealings with donors.

In the last year of his presidency, George W. Bush recognized that lettermarking had gotten out of hand. His response was Executive Order 13,457, which attempted to promote the disclosure of lettermarks by mandating that “no oral or written communications concerning earmarks shall supersede statutory criteria, competitive awards, or merit-based decision-making.”²⁰ EO 13,457 also mandated that “[a]ll written communications from the Congress . . . recommending that funds be committed, obligated, or expended on any earmark shall be made publicly available on the Internet by the receiving agency” within thirty days of their receipt.²¹ And, to cut down on phonemarking, EO 13,457 also called for agencies to ignore all congressional requests for funding unless they were made in writing.²²

Unfortunately, EO 13,457 has been all but ignored by agencies. Although it remains on the books, observers who study lettermarks have concluded that agencies seldom post lettermarks online.²³ The impotence of EO 13,457 is not surprising. When agency personnel receive a phone call from the Member who controls their budget, they cannot reasonably be expected to rebuff a funding request on the basis of an executive order that is purely aspirational. If an executive order is not a priority of the President, it will not be a priority of the agency.

For a brief moment in early 2011, it appeared that President Obama had made ending lettermarking a priority. In February of that year, the Obama Administration circulated a draft executive order that was designed to “implement EO 13,457 and to build upon that Order by providing additional transparency and promoting greater efficiency in the allocation of federal monies.”²⁴ This draft would have forced all executive agencies to “make available to the public in searchable form on the Internet [within thirty days] all written communications from any Member of Congress” that “request[] that agencies give special consideration to any specific person, organization, or other entity or group

19. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1713 (1999).

20. Exec. Order No. 13,457, 73 Fed. Reg. 6417 (Feb. 1, 2008).

21. *Id.*

22. *Id.*

23. John Wonderlich, *Where Is Obama on Bush's Earmark Transparency Executive Order*, SUNLIGHT FOUND. (Mar. 17, 2011, 9:47 AM), <http://sunlightfoundation.com/blog/2011/03/07/where-is-obama-on-bushs-earmark-transparency-executive-order/>.

24. *Text of Draft Executive Memo*, NAT'L J. (Nov. 5, 2011), <http://www.nationaljournal.com/whitehouse/text-of-draft-executive-memo-20111105>.

of entities” when making appropriations decisions.²⁵ This proposed reform made good sense, and it might have gone a long way toward closing some of the loopholes created by the flexible and ambiguous text of EO 13,457.²⁶ Alas, under pressure from special interests, this draft proposal was quietly withdrawn.²⁷

II. A Novel Solution to the Lettermarking Problem

Unfortunately, executive orders simply are not a workable means of curbing lettermarks. EO 13,457 has been flatly ignored by executive agencies. Even if EO 13,457 were replaced by a carefully drafted executive order, it probably would not be enforced by every agency or in every instance of a violation. In order to stamp out the lettermarking problem, private litigants must begin suing agencies that consider lettermarks when making decisions.²⁸

Such a litigant could pursue multiple legal theories. Indeed, although EO 13,457 demonstrates an admirable *political* commitment to ending lettermarking, executive proposals to curb this practice are, *legally* speaking, superfluous. EO 13,457, for example, directed agencies to ignore lettermarks and engage only in “merit-based decision making” when deciding which projects to fund.²⁹ But this was already a legal requirement well before the order was promulgated. There are already several legal rules—any of which could provide the basis for judicial review³⁰—that require agencies to use only merits-based processes.

25. *Id.*

26. If the Obama administration wants to get serious about lettermarking, it must make several changes to the text of its 2011 proposal. Several of these alterations are nothing more than low-hanging fruit. First, by its own terms, the draft applied only to *written* communications. In order to help reign in phonemarks, an improved executive order might require agencies to begin keeping (and disclosing) substantive records of calls from Members or their staffs that relate to the funding of any project. Second, a more carefully worded executive order would mandate disclosure of *all* communications in which any specific project is mentioned by a Member. After EO 13,457 was implemented, at least one Member argued that his lettermarks were not “requests” for funding, but rather a neutral and good-faith attempt to inform the agency of opportunities to fund worthy projects. Carroll, *supra* note 9. If Obama’s draft executive order were implemented, many Members might parse its language, arguing that lettermarks are merely informational documents and are not intended to pressure agencies. Third, the executive order could explicitly call for limitations on redactions so that as much of the letters as possible could be made public.

27. COBURN, *supra* note 3, at 48.

28. One potential problem with this solution is that potential litigants will not know when agencies have considered a lettermark and, therefore, will not know whether or not they could sue the agency. Ideally, EO 13,457 or a similar executive order would be aggressively enforced, leading to the disclosure of lettermarks. Litigants could then sue on the basis of these disclosed documents. We emphasize, however, that disclosure of lettermarks through an executive order is not a prerequisite to litigation. Plenty of lettermarks have already been disclosed—some by Members, some by leaks, and some by investigative reporting. Any of these lettermarks might provide a basis for litigation.

29. Exec. Order No. 13,457, *supra* note 20.

30. The APA provides for general review of nearly all agency action. 5 U.S.C. §§ 702, 704 (2006); see *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). But, if sued, the agency will likely point to section 701(a)(2) of the APA, which bars judicial review of decisions “committed to agency discretion by law.” In *Lincoln v. Vigil*, the Supreme Court held that “[t]he allocation of funds from a lump-sum appropriation is [an] administrative decision traditionally regarded as committed to

First, many agencies' organic statutes specifically list the criteria that can and cannot be considered when agency personnel make funding decisions. These provisions provide a clear justification for courts to "inquire into the content of political reasons considered by agencies to determine whether those reasons are consistent with the agency's authorizing statute."³¹ Second, decision-making restraints may be imposed by the language of particular spending bills. Third, agencies must also follow memoranda from the Office of Management and Budget that require "merit-based decision making" and "competitive awards."³² Fourth, agencies are bound by the Administrative Procedure Act, which prevents them from making any decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."³³

Moreover, lettermarking may constitute improper congressional interference with agency decision-making. Under the *Pillsbury* doctrine, federal courts have not hesitated to intervene in adjudications when the rights of private litigants have been imperiled by undue congressional influence.³⁴ However, courts have been much more hesitant to interfere with non-adjudicatory agency proceedings.³⁵ But even in this context, the D.C. Circuit has indicated that "Congressional intervention which occurs during the still-pending decisional process of an agency endangers, and may undermine, the integrity of the ensuing decision, which Congress has required be made by an impartial agency."³⁶

D.C. Federation of Civic Ass'ns v. Volpe is instructive. In that case, Representative William Natcher threatened to block funds for D.C.'s rapid-transit system unless the Secretary of Transportation approved funding for a bridge over the Potomac. Chief Judge Bazelon of the D.C. Circuit found that this pressure tainted the Secretary's decision to approve the bridge and therefore invalidated the agency's action. Chief Judge Bazelon's opinion emphasized that the agency's "decision would be invalid if based in whole or in part on the pressures emanating from Representative Natcher" and remanded the case to the Secretary with instructions to "make new determinations based *strictly on the*

agency discretion." 508 U.S. 182, 192 (1993). *Vigil*, however, does not bar all judicial review of funding decisions. Importantly, an agency's own rules are a source of law to apply under section 701(a)(2) even if the substantive statute provides a lump sum and no criteria for spending. See *Miami Nation of Indians of Ind. v. U.S. Dep't of the Interior*, 255 F.3d 342 (7th Cir. 2001).

31. Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1174 (2010); see *Aera Energy LLC v. Salazar*, 642 F.3d 212, 224 (D.C. Cir. 2011) ("[S]ometimes political pressure crosses the line and prevents an agency from performing its statutorily prescribed duties."); CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 176-77 & n.12 (1990).

32. Memorandum to Heads of All Agencies from Rob Portman, Dir., The Office of Mgmt. & Budget (Feb. 15, 2007), <http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-10.pdf>.

33. 5 U.S.C. § 706(2)(A) (2012).

34. *Pillsbury Co. v. FTC*, 354 F.2d 952, 963 (5th Cir. 1966).

35. JERRY L. MASHAW, RICHARD A. MERILL & PETER M. SHANE, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM, CASES AND MATERIALS* 172-75 (6th ed. 2009).

36. *Am. Pub. Gas Ass'n v. Fed. Power Comm'n*, 567 F.2d 1016, 1068-69 (D.C. Cir. 1977).

merits and completely without regard to any considerations not made relevant by Congress in the applicable statutes.”³⁷

Under *D.C. Federation*, courts may set aside agency actions that result from improper congressional influence.³⁸ Importantly, such decisions are subject to “judicial invalidation even when federal legislators push agency officials to make policy choices that fall squarely within the agency’s statutory mandate.”³⁹ Exactly what must be shown to prove undue congressional influence is an open question. Recent case law from the courts of appeals has sometimes required litigants to show that agency decisionmakers acted with an “actual bias” resulting from extraneous political pressure.⁴⁰ Although the particulars of the “actual bias” inquiry vary between different jurisdictions, this standard is generally understood to imply that “political pressure invalidates agency action only when it shapes, in whole or in part, the judgment of the ultimate agency decisionmaker.”⁴¹

Many funding decisions made in response to lettermarks could be invalidated under the “actual bias” standard. Assume, for example, that a civil servant at the Department of Transportation receives a letter from the Member who chairs the Senate Committee on Commerce, Science, and Transportation. Assume further that this letter requests that a competitive grant be awarded to an applicant seeking to build a bridge in the Senator’s home state. Before closing, the letter implies that the agency will face funding reductions if it does not comply with the Senator’s request. In a follow-up phone call, a member of the Senator’s staff tells the civil servant that, unless the Senator gets his way, he will oppose an agency initiative unrelated to the bridge project. The civil servant then decides to award the grant to the bridge project even though she admits that she would not have done so in the absence of the letter and the phone call.

It is at least arguable that this civil servant has acted with “actual bias” and that an unsuccessful applicant for the same grant could sue the agency to

37. *D.C. Fed’n of Civic Ass’ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1971) (emphasis added).

38. See Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 MICH. L. REV. 1, 43-46 (1996); see also *Sierra Club v. Costle*, 657 F.2d 298, 409 (D.C. Cir. 1981) (holding that, before *rulemakings* can be set aside, challengers must show that the administrative decisionmaker was affected by congressional pressure designed to force her to consider “factors not made relevant by Congress in the applicable statute”); *Am. Pub. Gas Ass’n*, 567 F.2d at 1070 (“We consider the intervention through the Subcommittee [by Congress] regrettable and quite inconsistent with that due regard for the independence of the Commission which Congress and the courts must maintain. Nevertheless, when weighed in the context of the record as a whole, the possibility of influence upon the Commission is too intangible and hypothetical a basis for this court of its own motion to nullify [the agency action].”).

39. Jamelle C. Sharpe, *Judging Congressional Oversight*, 65 ADMIN. L. REV. 183, 209 (2013).

40. *DCP Farms v. Yeutter*, 957 F.2d 1183, 1188 (5th Cir. 1992); see *Dirt, Inc. v. Mobile Cnty. Comm’n*, 739 F.2d 1562 (11th Cir. 1984); Levin, *supra* note 38, at 43-46; Richard McMillan, Jr., *The Permissible Scope of Hearings, Discovery, and Additional Factfinding During Judicial Review of Informal Agency Action*, 1982 DUKE L.J. 333, 367-68 & n.190 (collecting cases).

41. *Aera Energy LLC v. Salazar*, 642 F.3d 212, 220 (D.C. Cir. 2011).

have the funding decision invalidated. Admittedly, such a lawsuit would be an uphill battle. As an initial matter, the unsuccessful grant applicant would have to learn of the existence of the lettermark either through a FOIA request or a leak. The applicant would then have to sue the agency in order to discover details about the process used to award the grant.⁴² If the case advanced to the merits, the agency would likely argue that the lettermark had been sent for “informational purposes only”⁴³ and that such communications are a proper form of congressional oversight. The unsuccessful grant applicant would probably respond by citing *D.C. Federation* for the principle that, when a congressional threat is the but-for cause of an agency decision, that decision must be invalidated. The judge, finding little precedent on point, would likely find this case to be a difficult one.

A more promising route for unsuccessful grant applicants would be to argue for an easing of the “actual bias” standard. Although a full discussion of this standard is beyond the scope of this Comment, many academics feel that the “actual bias” threshold is much too high.⁴⁴ On this view, the “actual bias” standard protects more congressional bullying than it should. Practically speaking, agency personnel have no choice but to buckle when they receive lettermarks from Members. One former appropriations staffer has noted, “When you have people who control your budget[] that you have to appear before on an annual basis to ask for funding, you listen to what they have to say.”⁴⁵ Thus, even if civil servants who considered lettermarks when making funding decisions did not act with “actual bias,” there is still reason to be skeptical of their objectivity. The law must evolve to appreciate this reality. Such an evolution is necessary to promote agency independence, stamp out corruption, reinforce merits-based decisionmaking, and protect lay grant applicants who lack the money necessary to secure special access to their Members of Congress.

Conclusion

In this Comment, we have suggested a number of legal theories that might be used to curb the practice of lettermarking. To some extent, these theories are mutually reinforcing. For example, litigation may succeed in sparking public outcry even if the lawsuit itself is not successful in court. Similarly, a lawsuit based on a leaked lettermark may generate pressure to disclose even more lettermarks, which in turn may generate even more lawsuits.

42. The applicant might also be forced to exhaust the agency’s own review processes.

43. Some Members include language in their lettermarks insisting that their communication is intended for “informational purposes only,” and is not intended in any way to be a “congressional directive.” See Celock, *supra* note 7 (discussing Representative Flake’s lettermarks).

44. See, e.g., Levin, *supra* note 38, at 51-54.

45. Ron Nixon, *Lawmakers Finance Pet Projects Without Earmarks*, N.Y. TIMES (Dec. 27, 2010), <http://www.nytimes.com/2010/12/28/us/politics/28earmarks.html>. (quoting Winslow Wheeler).

Agency personnel confronted with a congressional lettermark are placed between a rock and a hard place—or, to borrow a phrase from Chief Judge Bazelon’s opinion in *D.C. Federation*, in an “extremely treacherous position.”⁴⁶ Members, however, covet the lettermark and strenuously deny that it causes any harm. Some Members have gone so far as to deny that lettermarking even exists.⁴⁷ The reality, of course, is much different. Lettermarks are alive and well—and so too is the culture of corruption that they represent.

46. *D.C. Fed’n of Civic Ass’ns v. Volpe*, 459 F.2d 1231, 1249 (D.C. Cir. 1971).

47. *See Harris, supra* note 2.