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In This Issue

Journalist Audit Underscores Lack of Transparency

An audit by journalist groups found that public access to Comprehensive Emergency Response Plans (CERP), as required by law, was inconsistent and unreliable around the country. Only 44 percent of the requests for the CERP were granted in full, whereas 20 percent were partially released and 36 percent were completely denied.

CERPs are required under the Emergency Planning and Community Right-to-Know Act of 1986, which was passed in response to the world's most devastating chemical plant disaster in Bhopal, India. According to the March 11 report, CERPs "must identify facilities and transportation routes of hazardous substances, describe emergency procedures, outline notification procedures, describe areas potentially affecting, outline

evacuation plans, list available resources and designate emergency response coordinators." To ensure that citizens are properly informed about what to do in cases of emergencies, the law mandates that the plans be publicly available.

Participants requested the 404 CERPs from the more than 3,000 Local Emergency Planning Committees (LEPC) in place around the country. Of the requests made, 177 requests (44 percent) were granted, 82 requests (20 percent) were partially granted, and 145 (36 percent) were denied in full. Officials gave various reasons for denying access to CERPs, many of which were illegitimate or misinterpretations. A director of one LEPC incorrectly stated that the USA PATRIOT Act barred public access to the information. Several reporters were told that state laws now prevented access to the emergency response plans, even though federal law supersedes state law. The threat of terrorism was one of the most often cited reasons for denying access to the plans.

The experiences of those granted access or partial access included other problems. Some reporters were followed by local police or subjected to criminal background checks. One reporter noted, "Someone was running my name through NCIC, a national database that contains criminal histories and is available only to law enforcement. Besides my name, they [had] my home address and plate number."

The audit underscores the lack of government transparency concerning important health and safety information. The law required public involvement in developing CERPs and public access to the document so that the process could be used to inform and prepare the public. Emergency planning is not as useful when the public, who must also be prepared to act in response to emergencies, is not informed as to the appropriate actions or procedures.

The audit was organized to coincide with Sunshine Week, an effort by the media, civic groups, libraries, universities, legislators and others to highlight the importance of open government. Members of the American Society of Newspaper Editors-Sunshine Week, the Coalition of Journalists for Open Government, the National Freedom of Information Coalition, and the Society of Environmental Journalists participated in the audit.

Open Government Legislation the Focus of Sunshine Week

Sunshine Week is an annual effort by the media, civic groups, libraries, universities, legislators and others to highlight the importance of open government. During this year's Sunshine Week (March 11-17), many legislative proposals to increase government oversight and transparency moved forward in Congress. The bills address contractor responsibility, environmental information, Freedom of Information Act reform, whistleblower protections, and other important aspects of an open and accountable government.

Contractor Responsibility

Federal contracting is growing at a rapid and dangerous pace. In the past six years, the amount spent on federal contracts has nearly doubled, from $207 billion in FY 2000 to almost $400 billion in FY 2005. For all the federal government work contractors perform, they remain essentially unaccountable to the public. The increase in federal contracts and lack of accountability contributed to last year's passage of the Federal Funding Accountability and Transparency Act (P.L. 109-282), co-sponsored by Sens. Tom Coburn (R-OK) and Barack Obama (D-IL). The bill requires the Office of Management and Budget (OMB) to create a searchable website that provides information about all federal spending, including government contracts, grants, loans, etc. In October 2006, OMB Watch launched FedSpending.org which provides access to much of the contract and grant information that the new law would cover.

More needs to be done to increase oversight and accountability of contractors. In particular, the following three types of information should be made publicly available:

- Information on contractor performance on past contracts
- Contractors' record of compliance with federal laws and regulations, especially health, environmental, environmental, civil rights, and employment laws
- Information on lawsuits and legal actions brought against contractors and their subdivisions

Public disclosure of such information will increase public oversight for federal contractors and help ensure that the public's money is being spent wisely. The Honest Leadership and Accountability in Contracting Act of 2007 (S. 606), introduced by Sen. Byron Dorgan (D-SD), is a good first step in eliminating fraud and abuse in federal contracts. Also, the Accountability in Contracting Act (H.R. 1362), sponsored by Rep. Henry Waxman (D-CA), would "change federal acquisition law to require agencies to limit the use of abuse-prone contracts, to increase transparency and accountability in federal contracting, and to protect the integrity of the acquisition workforce." The bill was passed by the House 347 to 73 on March 15. Take action to support Congress' efforts to increase contractor responsibility.

Environmental Information

The U.S. Environmental Protection Agency (EPA) finalized rules in December 2006 that weaken toxic reporting under the Toxics Release Inventory (TRI) program, despite enormous opposition to the changes. The changes allow facilities to avoid detailed reporting of toxic pollution of less than 5,000 pounds as long as less than 2,000 pounds are released to the environment. The EPA is also permitting facilities that manage up to 500 pounds of persistent bioaccumulative chemicals such as lead and mercury to avoid detailed reporting of the waste. The proposed changes have been met with stiff resistance throughout the rulemaking process. As documented in an OMB Watch report, over 122,000 public comments were submitted in response to EPA's plans to cut TRI

reporting, and more than 99.9 percent opposed the agency's proposals.

On Feb. 14, Sen. Frank R. Lautenberg (D-NJ) and Reps. Frank Pallone (D-NJ) and Hilda Solis (D-CA) announced companion bills to restore TRI and undo the EPA's recently finalized reporting rollbacks. Take action to support these bills.

Freedom of Information Act Reform

The mounting problems regarding the Freedom of Information Act (FOIA) are well-documented. The Coalition of Journalists for Open Government found that even though FOIA requests were down in 2005, the backlog of unanswered requests rose from 20 percent of total requests made in 2004 to 31 percent in 2005. In addition to the increase in unanswered requests, requesters had to wait longer for replies. In response to increasing pressure to relieve agency backlogs and improve FOIA procedures, President Bush issued Executive Order 13392 on Dec. 14, 2005. The order, though, does not go far enough to relieve agency backlogs. The Government Accountability Office (GAO) recently stated, "Despite increasing the numbers of requests processed, many agencies did not keep pace with the volume of requests that they received."

Legislative reform of FOIA was deemed necessary to relieve these problems and restore open government. By a vote of 308 to 117, the House passed the Freedom of Information Act Amendments of 2007 (H.R. 1309) on March 14. The bill restates the 20-day response requirement and imposes penalties on agencies that fail to meet the requirement. The bill also creates a FOIA ombudsman at the National Archives to serve as a resource for the public in requesting documents and to exercise oversight of FOIA compliance. Additionally, the bill offers a needed correction and expansion of access to attorney's fees for those whose FOIA requests are unjustly denied. Finally, the bill would restore the presumption of disclosure under FOIA that was eliminated by the John Ashcroft memorandum soon after 9/11. In a letter submitted to the committee in support of the bill, OMB Watch stated, "The increasingly dire state of FOIA procedures and backlogs across government agencies and the inadequacy of the agency improvement plans calls for congressional reform, and we wish to add our support of H.R. 1309 in the hopes that it is eventually signed into law."

Other Important Pieces of Open Government Legislation

In addition to the Accountability in Contracting Act and the FOIA Amendments Act, the House has passed two important pieces of legislation:

By a vote of 333 to 93, the House on March 14 passed the Presidential Records Act Amendments of 2007 (H.R. 1255), which would ensure that presidential records are made available to the public and would nullify President Bush's order that gave former presidents the authority to withhold documents.
By a vote of 331 to 94, the House on March 14 passed the Whistleblower Enhancement Protection Act of 2007, which would offer additional protections to federal government

employees who bring forward evidence of corruption, fraud, and abuse at their agencies.

Sunshine Week promotes the importance of an open and transparent government. Access to accurate information is at the foundation of a well-functioning democracy, and the legislative efforts over this past week are great strides in the effort to provide greater access to government information. OMB Watch encourages individuals to preserve and protect an open and accountable government by taking action and encouraging their representatives and senators to support the important open government legislative initiatives.

EPA Looking at Labs

The U.S. Environmental Protection Agency (EPA) has begun a review of its laboratory network that may result in significant closures, according to some early agency plans. In response to budget cuts, EPA intends to reduce costs at least 20 percent by 2011. According to EPA officials in a phone briefing on March 15, the review is to assess the efficacy of the lab network, eliminate duplicative programs or efforts, and increase overall efficiency. Given the FY 2007 and 2008 budget cuts to research and development, there is concern that the review and potential closures of labs are budget driven rather than reflecting a substantive management plan to create a more effective EPA.

One review plan, introduced to the House Committee on Science and Technology's Subcommittee of Energy and Environment during a hearing on March 15, proposes consolidating 39 agency laboratories. According to the Bureau of National Affairs, Dr. George Gray, the Assistant Administrator for Research and Development, pledged that no laboratories would be closed "during the tenure" of EPA administrator Stephen Johnson. However, how long Johnson, appointed by President Bush, will remain in his position remains to be seen. The review is expected to take up to three years to complete, although details are unclear, as no official plan has been finalized.

A June 8, 2006, EPA memo indicated that an early plan unquestionably included significant closings. In the memo, released in September 2006 by Public Employees for Environmental Responsibility, Chief Financial Officer Lyons Gray directed agency officials to cut laboratory infrastructure costs by at least 10 percent by 2009 and another 10 percent by 2011. Closing, relocating and consolidating labs were highlighted as core components of the plan. The more than 2,000 scientists employed at EPA labs would also be subject to staff buy-outs and targeted attrition. According to EPA's Gray's March 15 remarks to both the House subcommittee and to interested stakeholders in a phone briefing, laboratory consolidation does remain part of the plan.

The budget cuts and potential consolidation of labs strikes chords very similar to the EPA's recent scandal of closing regional libraries. In response to severe FY 2007 budget cuts, five (out of 27) EPA libraries were closed, documents with no other copies were

destroyed, and access to EPA materials has been limited. Though Congress intervened and halted any subsequent closings pending their review of EPA's plans, the president's FY 2008 budget calls for even larger cuts at EPA, making reductions to research and information facilities increasingly likely.

Using budget purse strings to discreetly implement a political agenda may be part of the strategy at work in the EPA labs review. For instance, even though climate change is currently the most prominent environmental issue, the current administration's budget cuts appear to be undermining efforts to address this emerging threat. EPA's own Science Advisory Board observed that the proposed FY 2008 budget will focus research programs "more on yesterday's issues and less on new and emerging environmental problems." Given the increasing scrutiny that EPA and other agencies are under for politically motivated manipulation of science, such a result from budget changes must be questioned. At a hearing on March 19, the House Committee on Government Oversight and Reform continued its investigation into whether the current administration pressured scientists to minimize the importance of climate change.

EPA's libraries and laboratories are crucial to understanding and addressing a myriad of health and environmental issues currently facing our country, including climate change. Strong science requires an arena free from political pressures, and with sufficient funding for strategic, not just reactive, research. OMB Watch will be closely following EPA actions on its management of agency libraries and laboratories to ensure that their "efficiency improvements" do not impede important scientific progress.

Report Finds Underreporting and Abuse of USA PATRIOT Act Powers

The Office of the Inspector General (OIG) at the Department of Justice (DOJ) reported on March 9 that the Federal Bureau of Investigation (FBI) has been systematically underreporting National Security Letter (NSL) requests and has repeatedly violated federal law and agency policies in collecting personal information. The report unleashed a firestorm on the Hill, with calls for reform of the USA PATRIOT Act.

The Patriot Reauthorization Act of 2006 directed the OIG at DOJ to review the FBI's use of the NSL powers under Section 505 of the USA PATRIOT Act and to report any improper or illegal use of such powers. Without court approval, the FBI can issue NSL requests that require Internet service providers, telephone companies, credit reporting agencies, and banks to disclose information relating to individuals':

- Internet use: websites visited and the email addresses to which and from which emails were sent or received
- Telephone use: the times and durations of calls and the numbers to which or from which calls were received or dialed
- Financial transactions: checking and savings account information, credit card

transactions, loan information, credit reports and other financial information

Previously restricted to suspected terrorists or spies, the USA PATRIOT Act significantly broadened the NSL provision to cover any information that is "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." The USA PATRIOT Act also expanded approval authority of NSLs beyond senior FBI Headquarters officials to all special agents in charge of the FBI's 56 field offices. In October 2005, President Bush issued Executive Order 13388, which expanded access to NSL records to state and local governments and "appropriate private sector entities."

Inaccurate Reporting

Pursuant to requirements of the USA PATIROT Act, the FBI reported to Congress that 39,000 NSL requests were issued in 2003, 56,000 in 2004 and 47,000 in 2005. The OIG investigation found that the FBI significantly underreported the requests. "Overall, we found approximately 17 percent more national security *letters* and 22 percent more national security *requests* in the case files we examined in four field offices . . . As a result, we believe that the total number of NSL requests issued by the FBI is significantly higher than the FBI reported." (emphasis original). The OIG also found systematic errors regarding the status of NSL requests and the classification of targets of NSLs, specifically, whether the target was a U.S. citizen or non-U.S. citizen.

Violation of Federal Law and Policy

The OIG investigated abuse of NSL powers and found that approximately one-fifth of the reviewed files contained unidentified violations of NSL legislation and policy. "In our review of 77 FBI investigative files, we found that 17 of these files — 22 percent — contained one or more violations relating to national security letters that were not identified by the FBI. These violations . . . included instances in which the FBI issued national security letters for different information than what had been approved by the field supervisor. Based on our review . . . we believe that a significant number of NSL violations are not being identified or reported by the FBI."

The OIG also found that over 700 "exigent letters" were used to collect information from three telecommunications companies on over 3,000 telephone numbers in violation of law and policy. "We concluded that the FBI's acquisition of this information circumvented the requirements of the [Electronic Communications Privacy Act] NSL statute and violated the Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection and internal FBI policy. These actions were compounded by the fact that the FBI used the exigent letters in non-emergency situations, failed to ensure that there were duly authorized investigations to which the requests could be tied, and failed to ensure that NSLs were issued promptly after the fact pursuant to existing or new counterterrorism investigations. In addition, the exigent letters inaccurately represented that the FBI had already requested subpoenas for

information when, in fact, it had not."

Political Fallout of the Report

The report elicited an immediate response from the director of the FBI, Robert S. Mueller III, who took full responsibility for the underreporting, "Who is to be held accountable? And the answer to that is I am to be held accountable." He attributed the reporting inaccuracies to "deficiencies in the database" and assured, "We have already taken steps to correct these deficiencies."

President Bush also responded to the report, stating that the OIG "justly made issue of FBI shortfalls [and] also made clear that these letters were important to the security of the United States." Bush stated that he would ensure that the FBI quickly corrects the mistakes, "My question is, 'What are you going to do to resolve these problems?'"

Republicans and Democrats on the Hill expressed outrage in response to the findings and promised a full investigation. Sen. John Sununu (R-NH), who in response to the United States attorneys scandal and the NSL report called for the replacement of Attorney General Alberto Gonzales, stated that the report "has shown that our worst fears regarding the documentation and oversight of National Security Letters were all too real."

Legislators called for reform of the USA PATRIOT Act in order to resolve the problems. Sen. Arlen Specter (R-PA) stated that Congress may have to "change the law . . . to impose statutory requirements and perhaps take away some of the authority which we've already given to the FBI, since they appear not to be able to know how to use it."

The House Judiciary Committee held a hearing March19 on the report, and the Senate Judiciary Committee has scheduled a hearing for today, March 20. A representative of the FBI and the Inspector General of DOJ, Glenn A. Fine are expected to testify at both hearings.

House Proposal for Grassroots Lobbying Disclosure Due Soon

While House Speaker Nancy Pelosi's (D-CA) office is still working on the details of grassroots lobbying disclosure as part of a package of Lobbying Disclosure Act (LDA) reforms, both supporters and opponents have continued to debate the merits of the idea.

The contentious debate over whether big dollar federal grassroots lobbying should be disclosed has continued, despite a general understanding that a House provision is likely to be significantly scaled back from the version rejected by the Senate. On March 7, six reform groups sent a letter to House members outlining support for four major LDA reforms. These include disclosure of bundled campaign contributions from lobbyists and

lobby firms, disclosure of grassroots lobbying activities by lobby firms, an increase in the cooling off period before former members of Congress can engage in lobbying activities from one to two years, and a prohibition on lobbyist-paid parties at national political conventions. The six groups are the Campaign Legal Center, Common Cause, Democracy 21, the League of Women Voters, Public Citizen, and U.S. PIRG.

The scaled-back grassroots disclosure proposal from the reform groups would only apply to firms hired to carry out grassroots lobbying campaigns if they collect more than $100,000 for such campaigns in a quarter. The firms would be required to register and file reports identifying each client paying more than $50,000 per quarter and the issue involved. The proposal would exempt communications between an organization and its members and those that are primarily aimed at membership recruitment.

This limited approach has been criticized from two different perspectives. OMB Watch has supported bill language that, in addition to requiring grassroots lobby firms to report, also would require firms and groups that already are required to register and report direct lobbying expenses under LDA to also report grassroots expenditures and activities. In a March 19 op-ed in *The Hill*, Executive Director Gary Bass said, "Disclosure requirements should not and cannot single out particular groups of people, even if a specific segment of people has been the most heavily involved in phony grassroots lobbying campaigns. A better way to approach grassroots lobbying disclosure is to require all actors who meet defined thresholds to disclose their grassroots lobbying activity. This can be done so as not to create burdens on small groups."

Many conservative groups oppose any kind of disclosure regime. At a Cato Institute briefing on March 9, speakers from the ACLU, Cato Institute, American Target Advertising and the Center for Competitive Politics outlined their objections. Their criticisms addressed constitutional issues, claiming registration and disclosure would impose a burden on citizen-to-citizen communications that present no threat of corruption to the system. They also opposed the proposal to limit disclosure to grassroots lobbying firms, saying government regulation should not favor one kind of speaker over another.

Many expect the House Democratic leadership to make a decision as to whether they will support a provision requiring grassroots lobbying disclosure and the scope of such a provision, if included, some time this week. It is not clear when a bill would be brought to the House floor.

Committee Votes Down Faith-Based Hiring Amendment to Head Start Bill

On March 14, the House Education and Labor Committee approved the Improving Head Start Act of 2007 (H.R.1429) after defeating an amendment that would have allowed faith-based organizations to hire teachers for the Head Start program based on religion.

Attempts to insert such language into Head Start were unsuccessful in the past. This is the first time the issue has come up in the 110th Congress. The controversial provision was defeated 26-19 on a party line vote, and the overall bill passed 42-1. However, the amendment could be brought up again when the bill is considered on the House floor, which may occur before Congress' April recess.

The amendment, offered by Resident Commissioner Louis Fortuno (R-PR), dominated the debate during the markup hearing. Head Start is the federal early education program for disadvantaged children. Currently, faith-based groups that offer Head Start programs cannot consider religious preferences when hiring. The Fortuno amendment would have repealed that rule but still restricted groups from religious proselytizing with federal funds. The amendment states that the religious organization "shall retain its religious character and control over the definition, development, practice, and expression of its religious beliefs."

If passed, the amendment would have undermined civil rights laws, removed religious liberty protections, and thus allowed religious discrimination in an essential early education program, where children have diverse religious backgrounds. In short, the amendment would have granted religious organizations that participate in the Head Start program the right to discriminate with federal funds. Currently, many Head Start grantees are faith-based organizations, and they may use religion as criteria for hiring with their non-federal funds.

Rep. Dale Kildee (D-MI) expressed his opposition to the amendment during the hearing. "Head Start teachers should be chosen because they are qualified and effective teachers who will help children succeed and thrive. Hiring and firing decisions should not be made because of the teacher's religion."

The proposal was included in last year's Head Start reauthorization bill, but it stalled in the Senate. However, support has stubbornly re-merged. Republican members on the committee, led by Ranking Member Howard P. McKeon (R-CA) issued a fact sheet outlining why the amendment should be supported. It states, "Faith-based organizations have a federally protected right to maintain their religious nature and character through those they hire. These organizations willing to serve their communities by participating in federal programs should not be forced to give up that right." Supporters argued that religious groups should be able hire based on religion as a way to better serve the community and to maintain their religious identity.

McKeon's stance ignores some fundamental factors in the debate. As Rep. Dennis Kucinich (D-OH) commented, "I see this as being a real constitutional question. Repealing civil rights protections that have been in Head Start for more than 20 years could cause already at risk 3- to 4-year-olds to lose teachers with whom they've built close bonds simply because of a teacher's religion."

Religious, civil rights, labor, health, and advocacy organizations, acting through the

Coalition Against Religious Discrimination (CARD), sent a letter to the committee calling on members to oppose the Fortuno amendment. OMB Watch is a part of this coalition and signed on to the letter. There was a short time period for groups to react, yet thanks to these efforts and to those on the committee who recognized the measure's dangerous implications, the amendment was voted down. The reauthorization bill did not include a problematic provision that was introduced but failed to pass in 2005. It would have created barriers to voter registration by nonprofits sponsoring Head Start programs by extending a ban on use of Head Start funds for voter registration to encompass the privately funded activity. Twenty percent of Head Start monies are private funds. For details of the 2005 proposal, see the Nov. 29, 2005, *OMB Watcher* article Fate in Senate of Nonprofit Gag Provision Uncertain.

Appeals Court Upholds USAID Pledge Requirement for HIV/AIDS Grantees

On Feb. 27, a three-judge panel of the U.S. Circuit Court for the District of Columbia overturned a lower court ruling that voided a USAID requirement that grantees under an HIV/AIDS program adopt certain policies on prostitution. The ruling in *DKT International v. USAID* is the first decision in two cases in separate federal appeals courts that involve the same issue. DKT expects to seek a re-hearing before the entire Circuit Court. An appeal from another lower court ruling that overturned the same requirement is pending in the U.S. Court of Appeals for the Second Circuit in New York. Conflicting rulings in the two appeals courts could increase the likelihood the issue will reach the Supreme Court.

The legal issue in both cases is whether Congress can mandate policy statements outside the scope of the grant project. In this case, DKT International (DKT) sued to block enforcement of Section 7631(f) of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, which requires that no grants go to any group "that does not have a policy explicitly opposing prostitution and sex trafficking." It also bars funds from being used to "promote or advocate for legalization" of sex trafficking and prostitution.

DKT lost a $60,000 subgrant from Family Health International to market condoms in Vietnam because they refused to certify that they had such a policy. Their refusal was based on concerns that the policy might stigmatize and alienate many of the people it targeted for its HIV/AIDS prevention services. DKT also refused because the group says the certification requirement in Section 7631(f) of the Act violates its First Amendment rights because it applies to other programs that are not federally funded.

DKT did not challenge the government's right to control the message funded in the grant program or to prohibit use of federal funds to advocate for legalization of prostitution. Its challenge focused on the requirement that it have a policy that applies beyond the government funded project. The lower court agreed with DKT, finding that the required

policy statement and certification "constitute viewpoint based restrictions on speech and they are not narrowly tailored to further a compelling government interest." (Opinion, p. 27) The lower court also noted that, "the Supreme Court has repeatedly held that the government may not compel private individuals or organizations to speak in a content-specific, view-point specific manner as a condition of participating in a government program." (Opinion p. 14)

In reversing the lower court, the appeals court stressed the government's right to fund its message. The 2003 Act at Section 7611(a)(4) says, "the reduction of HIV/AIDS behavioral risks shall be a priority of all prevention efforts in terms of funding, educational messages, and activities by promoting abstinence from sexual activity and substance abuse, encouraging monogamy and faithfulness, promoting the effective use of condoms, and eradicating prostitution, the sex trade, rape, sexual assault and sexual exploitation of women and children." Congress also found private organizations to be "critical to the success" of the program. (Opinion p. 3)

The appeals court found that because of the Act's educational message, USAID has the right to discriminate based on viewpoint regarding who conveys that message. However, the court applies this principle beyond the government program, based on its interpretation of the Supreme Court case *Rust v. Sullivan* (500 U.S. 178). In *Rust*, the Supreme Court said a clinic could provide abortion counseling "through programs that are separate and independent from the project that receives Title X funds." (*Rust* at p. 196)

DKT argued that the *Rust* case involved projects, not the entire grantee's organization. However, the DKT ruling extends the *Rust* rationale to cover the entire organization, relying on the Supreme Court's ruling in *Regan v. Taxation Without Representation* (461 U.S. 540), which upheld limits of legislative lobbying activities of 501(c)(3) organizations because of their ability to create 501(c)(4) affiliates that have no lobbying limits. The court said, "We see no difference here", noting that DKT could set up a subsidiary organization that could adopt the required policy and sign the pledge, thus qualifying for the federal grant "as long as the two organizations' activities were kept sufficiently separate. The parent organization need not adopt the policy."

In making this point, the court refers to the government's statements in oral argument, which answered "yes" to the court's question: "All their complaints could be solved by a corporate reorganization?" However, the opinion does not go on to cite further government statements in the oral argument that qualify that answer. At pages 8-9, the government's attorney says, "There could be circumstances in which in order to protect the government's interest here, USAID might seek to impute the speech of one entity to another", saying the government could look at "how separate is separate enough..."

There is a long running dispute over such separation requirements in the context of legal services programs. The Second Circuit is currently considering an appeal from a U.S. District Court that found the separation requirements imposed on legal services to be an

unconstitutional burden. See Background: *Dobbins v. Legal Services Corporation*. The government has taken a more flexible approach to separation of religious programs from government programs by faith-based government grantees. See HHS Gives Guidance on Keeping Federal Funds Out of Religious Programs.

The policy question of whether grantees should condemn prostitution and sex trafficking has been controversial and has divided some nonprofits. The *Chronicle on Philanthropy* noted that over 200 charities sent a letter to President Bush opposing the policy, while a coalition of religious groups has supported the policy. Whatever one's view on the policy, nonprofits should beware mixing the policy question with the First Amendment question. The bottom line is whether awarding a federal grant gives the government the right to reach beyond the grant project to dictate the speech and activities it does not fund, thus imposing its will on private donors and the organization as a whole. This expansive government power would seriously undermine the independence of the nonprofit sector, turning government grantees into little more than mini-agencies of the federal government.

The second case involving the anti-prostitution pledge is pending in the Court of Appeals for the Second Circuit. The plaintiffs are the Alliance for Open Society International (AOSI) and its affiliate, the Open Society Institute (OSI) and Pathfinder International. Details on that case are available on the Brennan Center for Justice website.

Senate Votes Down Effort to Expand Definition of Material Support

The Senate bill designed to implement recommendations of the 9/11 Commission, S. 4, had almost 200 amendments and took over two months to complete. One amendment, introduced by Sen. Jon Kyl (R-AZ), could have potentially weakened humanitarian work of U.S. charities overseas but was defeated as part of a package of amendments that did not pass.

Kyl's amendment, SA 317, sought to increase the maximum penalties for those who give material support to suspected terrorists and a designated foreign terrorist organization. The text of the amendment would have broadened the definition of material support to anyone who "provides material support or resources to the perpetrator of an act of international terrorism, or to a *family member or other person associated with* such perpetrator, with the intent to facilitate, reward, or encourage that act or other acts of international terrorism." (emphasis added) The penalty for violating this provision would have been a fine, up to 25 years in prison, or both, or if death results, a prison term of any number of years to life.

The terms "family member" or "person associated" were not defined in the amendment. Under this language, it may have been possible that someone who provided water or medical care to the child of a suicide bomber would have been subjected to criminal

penalties. This legislative vagueness, combined with severe penalties, had the potential to discourage humanitarian aid and development programs, particularly in high-risk areas where such aid is greatly needed.

While defending this provision on the Senate floor, Kyl commented, "The material-support statutes have been the Justice Department's workhorse in the war against terrorists, accounting for a majority of prosecutions. These statutes are also very effective at starving terrorist groups of resources."

Nonprofits became aware of the language in the Kyl amendment and quickly acted. Muslim Advocates, the charitable arm of the National Association of Muslim Lawyers, sent out a call to action to nonprofits to oppose the amendment. OMB Watch submitted a document urging senators to vote no. The measure became part of a package of amendments, which Sen. John Cornyn (R-TX) introduced. Cornyn's amendment, SA 312, had to be voted down in order for the Kyl provision to be removed from the overall bill. Fortunately, Cornyn's amendment was defeated by a vote of 49-46.

What remains in federal statutes is still is an overly expansive definition of material support that potentially harms victims of terror and aid workers. As the Ninth Circuit Court of Appeals ruled in November 2006, part of the language in Executive Order 13224 that allows designation of people and groups "otherwise associated" with terrorism is "unconstitutionally vague on its face." The case was brought by the Humanitarian Law Project, and the Justice Department has not yet decided to appeal the case.

Mine Safety Concerns Remain after Sago

One of America's largest miners' unions has released a report faulting the coal industry and the federal government for the Sago mine incident of 2006. The report comes as mine safety legislation passed in the wake of the incident has yet to be fully enforced.

On March 15, the United Mine Workers of America (UMWA) released *Report on the Sago Mine Disaster of January 2, 2006*. The report claims friction within the mine caused the explosion in Sago, WV, which killed 12 miners (none of whom were union members). The report states the accident was completely preventable and blames the mine's owner and federal and state regulatory bodies for the incident. UMWA also includes recommendations for improved mine safety.

Claiming friction as the cause of the explosion runs contrary to the position of the mine's owner, the International Coal Group (ICG), and the State of West Virginia. ICG claims "overwhelming evidence" that lightning was the cause of the explosion. A panel writing on behalf of the West Virginia government found a lightning strike to be "involved." However, UMWA claims the strike occurred at too great a distance and without a conduit through which an electric surge could reach the mine. UMWA claims "frictional activity

from the roof, roof support or support material" caused the methane gas explosion.

The report also claims the accident would not have occurred if federal law had been properly enforced. UMWA primarily blames ICG and the federal agency in charge of enforcing mine safety laws, the Mine Safety and Health Administration (MSHA), for conditions which contributed to the deaths of the 12 miners. According to the report, ICG and MSHA did not adequately recognize or enforce statutory provisions related to mine seals, two-way communication in to and out of the mine, mine rescue teams, fresh air ventilation, oxygen supplies within the mine, safety chambers, and tracking devices to determine the exact location of trapped miners.

In response to the report, ICG's president and CEO said in a statement, "The UMWA has rolled out this so-called report with its usual bombast; however, upon closer review the report is simply a propaganda piece designed to criticize and undermine the state and federal mine regulators and ICG, whose miners continue to work union free."

In the report, UMWA recognizes Congress's efforts to improve mine safety through the Coal Act of 1969, the Mine Act of 1977 and most recently the MINER Act. UMWA places future responsibility on MSHA, recommending the agency adopt a more robust regulatory agenda in order to prevent future disasters from occurring. The report states, "The Agency's decisions over the past several decades to promulgate regulations, grant petitions for modiÂ¬fication and create policies that contradict the intent of Congress by reducing or eliminating the legislated protections played a major role in the tragic events of January 2, 2006."

Shortly after the Sago mine explosion — and the May 2006 Darby mine explosion in Kentucky which killed five miners — Congress passed the Mine Improvement and New Emergency Response Act of 2006 (MINER Act). The legislation requires the regular development of accident preparedness plans, improved availability of rescue teams and equipment, and increased amounts of breathable air. Several provisions of the law are accompanied by deadlines for their implementation. President Bush signed the MINER Act into law in June 2006.

On Feb. 1, Rep. George Miller (D-CA), chairman of the House Education and Labor Committee, sent a letter to Secretary of Labor Elaine Chao concerning implementation of the MINER Act. Miller's letter identified three areas where the Department of Labor has missed deadlines for the implementation of the MINER Act. The provisions are availability of self-rescuing equipment; improved evacuation training; and availability of caches of breathable air. In the letter, Miller says, "I think your progress in these three areas is a critical bellwether of your commitment to the law."

Since the initial letter of Feb. 1, MSHA has issued guidance recommending a minimum amount of breathable air but did not directly address Miller or the committee. The committee has sent three follow-up letters. No one at the Department of Labor has

replied to any of the correspondence, according to committee staff.

Miller's committee also released a report on implementation of the MINER Act. The report details Miller's concerns and faults MSHA and the mining industry for inadequate progress.

On Feb. 28, the Senate held a hearing to investigate the progress of the MINER Act and the overall state of mine safety. MSHA administrator Richard Stickler defended the agency's progress and called implementation of the MINER Act the agency's "top priority." However, J. Davitt McAteer, former MSHA administrator and mine safety expert from Wheeling Jesuit University, said, "In the months since the Sago disaster, much has changed and much more is in progress, but unfortunately for the average miner underground today not much has improved from the day-to-day safety and health standpoint."

Miller has scheduled a House Education and Labor Committee hearing on March 28. The hearing, *Protecting the Health and Safety of America's Mine Workers*, is likely to address the enforcement of the MINER Act as well as the UMWA report. Witnesses have not been announced. The hearing indicates Miller's desire for the committee "to take a thorough look at mine safety and health in this country, including the need for additional policies, regulations or legislation."

Leaders of Finance Committee Respond to IRS Outsourcing Program

Sens. Max Baucus (D-MT) and Chuck Grassley (R-IA), Chairman and Ranking Member of the Senate Committee on Finance, sent letters to IRS officials March 15 questioning an Internal Revenue Service (IRS) pilot program allowing outside experts to draft guidance documents for the IRS. The letters follow the controversy raised by a March 9 *New York Times* story [subscription] detailing the project, which allows tax lawyers and accountants to draft the documents rather than IRS officials.

The IRS program, described in Notice 2007-17, calls for publication of a "notice for each guidance project selected for the program. The notice would identify research, background documents, drafts of proposed guidance and other work products, and ask interested parties to provide them." The IRS expects the projects will relate to "guidance in a narrow, technical area of the tax law, where the need for guidance is driven by market changes with which taxpayers may be more familiar than are the IRS and Treasury."

The letters from Baucus and Grassley to the Treasury Department and IRS officials express concern about whether these departments are putting "special interests before the public interest" and whether "the process would result in some practitioners and taxpayers having undue influence over government regulations that would lead to

beneficial outcomes for their clients or their own tax matters." The letters ask Treasury and the IRS to assess this guidance process and provide specific information about the program to the Finance committee.

The *New York Times* story quotes Donald L. Korb, Chief Counsel at the IRS and one of the recipients of the letter, as supportive of the program and justifying it based on fairness to taxpayers and on the fact that these are technical issues of low priority. He is quoted as saying the pilot program does not change the current process.

There is truth to Korb's statement. For six years, the Bush administration has provided access to special interests in unprecedented ways, as OMB Watch has documented often. (See, for example two reports, here, and here.) Establishing a pilot program to allow regulated parties to write tax regulations is an extension of existing practice elsewhere in federal agencies.

Corporate interests have had a seat at the Bush administration's table to help write or frame policy and regulations, ranging from energy policy to consumer and work place safety to securities regulations to voluntary food safety guidelines. For example, a *Seattle Times* story from March 2004 describes how the U.S. Environmental Protection Agency used industry language verbatim in writing a proposed mercury rule under Bush's Clear Skies initiative, which would have capped mercury emissions without requiring any additional costs to industry.

Compliant Congresses before the 110th chose to ignore these trends or helped advance them. This may be changing as these issues garner media attention. For example, in the committee's press release about the Senators' letters, Grassley is quoted as saying:

We don't need K Street lawyers writing enforcement regulations to help their clients create tax shelters. That would be worse than a camel's nose under the tent. It would be the whole caravan. We might as well have the Justice Department let defense counsels write sentencing guidelines. If the IRS is that short on resources, the commissioner needs to tell Congress.

Bush's 2008 budget request for the IRS doesn't do a lot to help with the problem. The regulatory budget request is $157.4 million, down from $209.6 million enacted in 2006, when the IRS experienced across-the-board cuts. As happened in the Reagan administration, Bush is attempting to limit the size of government and abdicate its responsibilities by defunding federal agencies. OMB Watch Executive Director Gary Bass sarcastically summed up the trend in the New York Times article: "Why don't we just privatize Congress and outsource the development of our laws?"

Contracting Reform Bills Move in Congress

Congress is moving forward on bills to reform the federal contracting system, as the

House approved a bill that improves contracting procedures, and the Senate introduced a comprehensive contract reform bill. The bills are an encouraging sign that Congress is working to fix some of the broken parts of the contracting system, but it will need to do much more to address the full scope of the problem.

The $400 billion-a-year federal contracting industry is the fastest growing area of discretionary federal spending, accounting for roughly 40 cents of every dollar spent and having jumped 83 percent since FY 2000. Yet the public does not have reliable access to information regarding the contracting system of the federal government. While this system has operated in relative obscurity, numerous scandals have entangled lawmakers, executive branch officials and private companies in connection with contract waste, fraud and abuse.

On March 15, the House passed the "Accountability in Contracting Act" (H.R. 1362), co-sponsored by Oversight and Government Reform Committee Chairman Rep. Henry Waxman (D-CA), by a vote of 347-73.

The wide margin by which the bill passed reflects a consensus on the need for procedural reforms and greater transparency. It requires agencies that do over $1 billion in annual contracting to devise and implement a plan to minimize sole-source contracts, which are not subject to competition, and cost-plus contracts, which have relaxed controls on contractor spending. It would also limit sole-source contract term-lengths to no more than 240 days.

The bill also includes provisions that would improve public access to contract management information and remove conflicts of interest from the procurement process. Agencies would be required to make available to committee chairpersons or ranking members (but not to the public) audit reports that found overcharges over $10 million. The bill would make public agency justifications for not opening up contracts to multiple bidders. Instituting a revolving door provision, the bill mandates that procurement officials must wait two years after leaving a government position before they can work for a private contractor.

The House Armed Services committee, however, stripped a few provisions from the original bill. For example, a requirement for a public audit report for questionable costs exceeding $1 million was dropped, as was a requirement that one percent of agency procurement budgets be spent on contract oversight.

The House bill also has significant omissions. It lacks strong provisions that would hold contractors accountable for contract underperformance, mismanagement and noncompliance with federal laws and regulations. It also fails to impose stronger and broader limitations on the scope of federal responsibilities available for contracting. Finally, it does not mandate comprehensive disclosure or process reforms of federal procurement policy.

The Honest Leadership and Accountability in Contracting Act of 2007 (S. 606),introduced in the Senate by Sen. Byron Dorgan (D-ND), addresses some of the more wasteful aspects of contracting that H.R. 1685 stops short of tackling. S. 606 currently has 22 co-sponsors.

Under S. 606, war profiteering or fraud would result in larger fines, and prospective contractors that exhibit a pattern of fraud, waste, or abuse will not be considered to have a satisfactory record of integrity or business ethics. Agencies would also have to make public any information regarding contractor violations of federal laws and regulations and any punishments enacted for those violations. This data would be made available through the Federal Procurement Data System, which is one source of data for FedSpending.org.

Under the Dorgan bill, the contracting process would also undergo changes, as higher standards would have to be met in order to issue non-competed contracts. Contractors would be prevented from receiving contracts to conduct government oversight, and contracting out inherently governmental responsibilities would be curtailed. However, it is unclear how strongly the bill would enforce these provisions, and consequently, how much of a difference they would make in contracting procedures.

H.R. 1632 is one of five bills relating to increasing access to government information that the House passed during Sunshine Week, an annual event to bring attention to government openness and transparency.

House Panel Passes $124 Billion Supplemental Bill

On March 19, the Bush administration said it would veto a supplemental appropriations bill being readied for a House vote the week of March 26. The White House indicated that the president opposes language that would require troop withdrawal from Iraq as well as "excessive and extraneous non-emergency spending". The supplemental appropriations bill, at $124 billion, will be the largest supplemental bill ever considered by a house of Congress and has sweeteners in it to offset a tough vote on withdrawing troops from Iraq. The Senate Appropriations Committee is scheduled to consider its own version of the supplemental on March 22.

As introduced in early March, the House bill mirrored President Bush's request for $99.6 billion in appropriations for ongoing military operations, equipment for American forces, and training and equipment of Afghan and Iraqi forces. But as the bill got caught up in internal House conflicts regarding Iraq war policy, leadership sought to ease its passage with tradeoffs that certain Members wanted, and it grew in size. On March 15, the House Appropriations Committee approved the emergency supplemental appropriations bill, but by then it had grown to $124 billion.

A week before the Committee vote, Speaker Nancy Pelosi (D-CA), seeking to bolster the

bill's chances, announced that the minimum wage bill passed by the House in January would be added to the supplemental. The wage measure consists of a $2.10 increase in the federal minimum hourly wage, from $5.15 to $7.25, over two years and a package of small business tax breaks that would cost $1.3 billion over five years. Although the minimum wage is a supplemental-sweetener, its inclusion is highly unorthodox in its timing: the Senate has passed a much-larger $8.3 billion set of tax breaks and the two tax packages are awaiting conference.

GOP Senators objected strenuously to including this minimum wage sweetener. Senate Finance Committee ranking member Charles Grassley (R-IA) told Congressional Quarterly [subscription], "Speaker Pelosi ought to know, there's another house. We are a bicameral Congress.... And there are things like the Senate Finance Committee. This is an intrusion on the prerogatives of the tax-writing committees." But it may have broken the logjam: on March 19, Grassley announced that he was dropping demands for a pre-conference agreement with House Ways and Means chair Charles Rangel (D-NY) on the wage bill's tax packages.

Congress added to the president's supplemental request about $20 billion in domestic spending, including:

- nearly $2.5 billion for Gulf Coast recovery
- $3.7 billion for agriculture disaster relief in the Midwest and California
- $750 million for the State Children's Health Care Insurance Program
- $400 million low-income energy assistance
- $400 million for timber-dependent communities in the Pacific Northwest

Other programs that received additional funds involve international food assistance, foreign aid, pandemic flu prevention, and wildfire suppression. Other late additions to the supplemental crack down on wasteful government contracting. The bill adds millions to the budgets of multiple Inspectors General to investigate contacts related to the Gulf Coast recovery. It also withholds funds from the Defense Department until it produces a report on contractors involved in the wars in Afghanistan and Iraq. And the supplemental would require that the agencies that rely heavily on contractors develop and implement a plan to minimize wasteful contracts. The House recently passed a similar provision in H.R. 1362. The president later added requests of $3 billion for the Base Relocation And Closure (BRAC) program and another $3 billion for troop increases. Notwithstanding these additions being added, the president made it abundantly clear that he intends to veto the House bill.

A key reason for the threatened veto is the controversial provision that would determine the length of the war in Iraq. The supplemental dictates that major combat operations would end, at the latest, by September 2008, and by January 2008 at the earliest. When the war would end is dependent on benchmarks specified in the bill.

The supplemental first requires that the president submit to Congress reports on the war

in Iraq by July 1 and Oct. 1, 2007. In the first report, the president must certify whether or not the war in Iraq has made progress toward achieving a host of specified goals; in the second report, the president must certify whether or not these goals have been achieved. Among these goals are sectarian reconciliation, an improved security situation and progress on economic reconstruction.

If the president reports that progress has been insufficient or that the goals have not been met, or if the president fails to issue either report, the Department of Defense would have 180 days to withdraw most military forces from Iraq. Even if the president reports that the specified goals have been accomplished, the bill requires that all armed forces begin redeployment from Iraq by March 1, 2008. American troops, with some exceptions, would have to leave Iraq by September 2008.

These provisions would be the first to restrict the duration of the Iraq war. But, due to certain exceptions and omissions, the president would still retain a great deal of authority over the course and length of the war.

First, the president would have complete discretion over what constitutes a satisfactory report on conditions in Iraq. The bill does not provide criteria by which Congress could judge the president's reports, nor does it not seem to give Congress the power to challenge the president's report.

Furthermore, the deadline for the commencement of the latest troop withdrawal — March 1, 2008 — occurs outside of the time-span for which this appropriations bill will be providing funding. Congress must pass another appropriations bill to continue the war effort in FY 2008, which could contain language that could remove or change this deadline. And the bill, in its current form, does not specify what consequences would apply if the Department of Defense does not comply with the imposed deadline, though non-compliance would seem be a clear violation of the law.

The bill also mandates that troops being sent to Iraq meet readiness standards, though the president may waive these restrictions if he provides Congress with a justification.

President Bush issued a veto threat from Air Force One as soon as news reports were out that the Democrats were adding timetables and conditions to the bill. That gave GOP House members cover to vote against it; indeed, every Republican on Appropriations opposed it. Democratic defections on the floor are also feared — estimates are in the 12-15 vote range. The Democrats' majority in the House is 15 votes. But the supplemental could well attract some scattered GOP votes. There is a broad consensus that this is must-pass legislation — it provides vital troop support, including no less than $10 billion for body armor — but may not succeed in its current form.

Senate Committee Adopts $2.9 Billion Budget Resolution; Floor Action Ahead

On March 15, the Senate Budget Committee approved a $2.9 billion budget resolution for Fiscal Year 2008 on a 12-11 party-line vote. The full Senate is expected to take up the measure on March 20, with 50 hours of debate, votes on numerous amendments, and a final vote scheduled before the end of the week. The House Budget Committee is set to mark up its own budget resolution, with floor action likely the week of March 26. (Click here for links to resolution summary and details.)

The blueprint, produced by Senate Budget Committee Chair Kent Conrad (D-ND), projects a $132 billion budget surplus by 2012, without any specified tax increases. It calls for $948 billion in discretionary spending, exceeding the FY 2008 $930 billion budget cap President Bush proposed in February, with most of the increase going toward education, veterans, and community policing programs. Conrad's plan also provides a boost of $50 billion over the next five years in mandatory spending for SCHIP, the state children's health insurance program.

In the past, Bush has threatened to veto any budget ultimately passed by Congress that exceeds his discretionary spending cap. The budget resolution is a "concurrent congressional resolution," not an ordinary bill, and it does not go to the president for signature or veto. But it sets firm budget targets and limits for 19 broad spending and revenue estimates over the next five years. Since Conrad adds three percent (a mere *one percent* over what is needed to maintain the current level of domestic program services) in spending to Bush's cap, he may be steering Congress toward an eventual presidential veto.

The plan also restores a key procedural requirement to congressional budget-making: a pay-as-you-go (PAYGO) rule, meaning that legislation with provisions hiking mandatory spending or cutting taxes must include offsets to pay for those provisions and make the bill revenue neutral. Unlike the PAYGO rule adopted by the House earlier this year, however, Conrad's version of it would not permit Congress to count latter-year savings as offsets for earlier deficit spending.

So, for example, Conrad's PAYGO rule would not allow delaying the implementation of the painful offsets required to prevent middle-class exposure to the alternative minimum tax (AMT) — cost: upward of $50 billion a year — to say nothing of AMT repeal — cost: roughly $1 trillion over ten years. Similarly, the resolution calls for extending Bush's tax cuts beyond their 2010 expiration only if they are paid for by spending cuts or by revenue from other sources, which some in Congress interpret as forcing Congress into "the largest tax increase ever," to quote Senate Finance Committee ranking member Charles Grassley (R-IA).

GOP reaction to the budget resolution has been uniformly negative, with most criticism directed at the assumptions, projections, and mechanisms used to arrive at its projected five-year surplus, as well as at the 22 reserve funds in the Committee's final version. In fact, Conrad's plan uses almost identical assumptions and projections in the president's

proposal in the areas of war spending and the AMT, so many of the criticisms echo those from Democrats when Bush issued his budget in February.

The use of reserve funds in the budget resolution is commonplace; they have been used since 1983 to direct specified or unspecified amounts of spending that an authorizing committee *may* later approve. The *New York Times* described them last week as "not funds in any normal sense, [but] a statement of intentions by lawmakers to raise the necessary money, through either spending cuts or tax increases, by the time it would be necessary to spend it."

But GOP eyebrows were raised when fund after fund was added to the resolution, 22 such funds in all — twice the previous record — specifying $70 billion in potential spending over five years. Senate Budget Committee ranking member Judd Gregg (R-NH) estimates (BNA, [subscription]) the aggregate spending amounts outlined in the 22 funds over and above the specific $70 billion at "closer to about $200 billion."

The days ahead are critical ones for the FY 2008 budget resolution. House Budget Committee Chair John Spratt (D-SC) has said little about the chairman's mark he will release on March 21, except that it will include the House version of the PAYGO rule. Meanwhile, the Conrad resolution goes to the Senate floor, where it requires only a majority vote to pass — one of the few pieces of legislation that cannot be filibustered in the Senate. On the other hand, this makes it easier to amend, and long days and nights are expected as the GOP tries to tack on tax cuts or other damaging amendments, while Democrats, with no votes to spare, seek to hold their 51 members solidly together against such amendments and keep Conrad's plan intact.

PAYGO Questions Answered

The 110th Congress has brought attention once again to a well-known but little-understood fiscal responsibility mechanism: the pay-as-you-go rule, or PAYGO. The House has already enacted a PAYGO rule. The Senate has introduced a PAYGO bill (S. 10), and is expected to pass its own PAYGO rule in the FY 2008 Budget Resolution, which is now being considered in the Senate.

The new Congress will face many challenges that will test its commitment to PAYGO rules as it considers expensive changes to tax law, notably relief from the Alternative Minimum Tax (AMT), and modest expansions of some federal programs, such as the State Children's Health Insurance Program. The challenge for the majority will be in addressing these policy issues and still paying for them without being labeled as a party that supports tax increases.

Because PAYGO will be involved in most of the major policy decisions over the next two years, it is important to understand exactly what PAYGO is, and how it impacts enacting new policies in Congress. Continue reading the full analysis of PAYGO and the Senate

provisions by clicking here.

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