

## In This Issue

### Information & Access

[Saving Graces on Intelligence Reform Bill](#)

### Federal Budget

[Bush Plans Economy, Tax Summit Dec. 15-16](#)  
[Bush Signs Bill Extending Internet Tax Moratorium](#)  
[Economy and Jobs Watch: November Numbers Still Lag Behind Need](#)  
[New York Joins States Raising Minimum Wage](#)  
[Wealthy Congressmen Support Estate Tax](#)  
[Congress Strips Offending Tax Provision, Passes Omnibus Bill](#)

### Information & Access

[DHS Pushes Secrecy on the Hill](#)  
[Center Sues FERC Over Restricted Energy Information](#)  
[Sage Grouse Recommendation Follows Data Quality Challenge](#)  
[Reclamation Officials Withhold Dam Safety Information](#)

### Nonprofit Issues

[AU Sues to Block Funding for California Missions](#)  
[ACLU Files Info Request on Government Spying on Nonprofits](#)  
[Law Symposium Exposes Weaknesses of Anti-Terrorist Guidelines for Nonprofits](#)  
[Nonprofit Accountability Update](#)  
[Civic Engagement Conference Summary-Return the Charity to the Citizen!](#)

### Regulatory Matters

[Superfund Lacks Funds to Cleanup Toxic Waste Sites](#)  
[Panel Nixes Endangered Species Status After Politico Bashes Science](#)  
[FCC Rigs Cost-Benefit Report to Side With Industry on Cable A La Carte](#)  
[Food Supply Called 'Easy' Target for Terrorists](#)  
[Rocket Fuel Ingredient Ignites Controversy](#)

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## Saving Graces on Intelligence Reform Bill

In a surprising move, congressional and White House negotiators agreed on intelligence reform legislation that created no major victories for the public interest but could have been much worse for open government and environmental protection near the nation's borders.

The final bill still keeps secret the total intelligence budget, which the *Washington Post* estimated to be approximately \$40 billion. The 9/11 Commission had pushed Congress to catalyze stronger public oversight of the government's intelligence activities by disclosing the total annual budget.

Past history of secrecy and new authorities granted to federal agencies under law passed since 9/11 raise additional concern about the new powers granted the new Director of National Intelligence (DNI). Under the law creating the Department of Homeland Security, DHS is doing two things that significantly expand secrecy in ways not seen in recent times. First, the department is writing procedures for safeguarding both classified and unclassified information. Second, it is asking its 180,000 employees to sign nondisclosure agreements that could eventually extend to scientists and public health workers outside government that have contracts with DHS. (Daniel Ellsberg was criminally charged with unauthorized disclosure of classified information when he disclosed the *Pentagon Papers* to the *Washington Post*, but the case was thrown out.)

These moves added to advocates' concern when Congress proposed that the DNI would have authority over the handling of classified and unclassified information without strong congressional oversight. Journalism groups argued the bill empowered the DNI to criminalize leaks of classified material, which would hurt news reporting.

The legislation did advance, albeit in a baby-step fashion, congressional oversight in a significant way. The bill sets up a board appointed jointly by the president and Congress to resolve disputes when Congress accuses federal agencies of keeping too many secrets. Specifically, the Public Interest Declassification Board, which supercedes an existing board created by Congress that never got off the ground, could hear appeals of federal agency classification decisions. The re-vamped board can initiate reviews of agency decisions and must respond to requests from Congress to do so. While the Board clearly has the authority to take up appeals from historians or other members of the public, the legislation did not specifically mandate that the Board respond to public requests in a manner similar to those from Congress. Some members, including Sens. Trent Lott (R-MI) and Ron Wyden (D-OR), were angered by the increasing cost of secrecy and intelligence agencies' efforts to black out key sections of a Senate committee report on pre-war Iraq intelligence.

Those close to the negotiations over the legislation expect Congress will exercise greater oversight on the legislation's impact on government secrecy and the free flow of information in society. One of the Republican holdouts who needed to be appeased, according to most news accounts, was Rep. Duncan Hunter (R-CA). Hunter and Rep. David Dreier (R-CA) both led the way in the conference committee on efforts to sneak in an amendment that would have empowered the Secretary of Homeland Security to waive any federal law in the course of completing barriers and roadways along the nation's southern border.

Current law allows the DHS Secretary to waive the Endangered Species Act and National Environmental Policy Act, if necessary, to complete securing the border, but that provision has never been needed. As originally proposed in the House by Rep. Doug Ose (R-CA), the amendment would have expanded the waiver authority to a more exhaustive list of environmental laws. When [Dreier](#) and [Hunter](#) pushed this amendment in conference, they expanded the proposed waiver power to include all federal law. A number of public interest groups, including a [coalition of environmental groups](#) and [Citizens for Sensible Safeguards](#), opposed the amendment.

Most accounts suggest that Hunter was appeased by House leadership with the offer of a major effort to address immigration and border control in the next Congress. Although there is no specific evidence yet that this amendment was discussed, it does seem likely that a border security bill in the upcoming 109th Congress will include some form of amendment to place the DHS secretary above the law.

**Note:** This version of the above article correctly describes who may request that the Public Interest Declassification Board review agency decisions to classify documents. The original version incorrectly asserted that only the chairs of certain congressional committees could make requests.

## Bush Plans Economy, Tax Summit Dec. 15-16

The White House will host a two-day summit in Washington, DC, to gather expert opinions on a variety of topics related to the economy, including budget and tax reform, Social Security, extending expiring tax cuts and health care. The Dec. 15-16 summit will solicit input from the business community, including small businesses.

While details are not yet final, White House spokesman Scott McClellan said the summit will "feature four to six panels on a variety of issues, aimed at making sure America is the best place in the world to do business..." He also specified President Bush would invite business leaders from different sectors of the economy in an attempt to attract a variety of views. It is unclear whether the commitment to embracing different views, even views from outside the business community, will be realized as the list of invitees has not been finalized.

One of the major topics for the conference will be proposals to overhaul the tax code. President Bush has yet to name members to a bipartisan panel to examine options to overhaul the tax code and will most likely postpone any announcement until after the summit. Senate Finance Committee Chairman Chuck Grassley (R-IA) has recently made statements in the press (Financial Times, Nov. 17 — subscription only), alluding to the importance of having a tax reform proposal from the President early in 2005 to have any hope of it gaining traction next year in Congress. The White House has not outlined any dates by which it would expect a report from the panel, but Grassley and other leaders on Capitol Hill are doubtful about the prospect of the bipartisan panel producing recommendations before next summer.

In addition to tax reform, Social Security is likely to be a central aspect of the agenda of the summit. President Bush will use the two-day conference to help build support for his proposal to allow people to invest a percentage of their social security taxes in private accounts. This plan has received heavy criticism, particularly for the estimated \$1 to \$2 trillion dollars that would be borrowed to cover transition costs.

Office of Management and Budget Director Josh Bolten downplayed concerns about the additional borrowing. Bolten said regardless of how it was handled, the costs would not pose a serious threat to responsible budgeting or to the president's promise to cut the deficit by half in five years. But critics on [Capitol Hill](#) and [elsewhere](#) dispute this rosy belief that private accounts will solve the Social Security crisis and not negatively impact the deficit. Grassley has said, "Anybody who thinks borrowing money for the transition to personal accounts is going to solve the problem of the long-term solvency of Social Security doesn't understand the size of the problem."

After meeting with Treasury Secretary John Snow and other Social Security Trustees Dec. 8, President Bush announced he would [oppose raising payroll taxes](#) to raise additional money for Social Security. It is still unclear if the President would oppose raising the salary ceiling (currently \$87,900) that caps contributions to the program. With or without personal accounts, Grassley is convinced Congress will have to consider either benefit reductions or tax increases — options Bush opposes — to ensure the long-term solvency of Social Security.

There continue to be mixed signals from the administration with regard to deficits and Social Security. On the one hand, the president seems perfectly comfortable borrowing huge sums of money to create private investment accounts in Social Security when many experts believe [minor financing fixes](#) will more than solve the problem without adding to the deficit. On the other hand, Bolten editorialized recently in the *Wall Street Journal* that the completed omnibus appropriations bill for FY05 made progress on the important task of controlling budget deficits by "eliminating wasteful spending." But the amount of money Bolten implied would be saved in the omnibus bill falls far short of the amount financing private accounts would add to the deficit. And the budget cuts Bolton trumpets have left many programs woefully under funded. For example, funding for the Low-Income Home Energy Assistance Program (LIHEAP) is [well below adequate levels](#) heading into winter.

With the economy continuing to struggle through recovery, the dollar continuing its decline, job creation stagnant and incomes falling, and trade and international investment gaps growing, it is difficult to accept the administration's assurances about Social Security and the deficit — particularly considering its priorities.

## Bush Signs Bill Extending Internet Tax Moratorium

On Dec. 3, President Bush signed the Internet Tax Nondiscrimination Act (S. 150), extending a moratorium on all taxation of Internet access and certain aspects of related electronic commerce through 2007. The bill is a result of a multi-year struggle over policy related to taxing Internet access and the development of broadband services across the United States.

Supporters of the ban argue it will ensure the United States stays on the cutting edge of Internet technologies, encourage innovation and expand the reach of broadband networks into poor and rural areas. Opponents say the ban prohibits states already struggling with huge deficits and budget crises from tapping a vital revenue source.

The moratorium was first established in 1998 in the Internet Tax Freedom Act, which banned for three years all taxation (federal, state, or local) related to the Internet, which it dubbed a "tax free zone." This included taxes on monthly service fees paid to Internet service providers, as well as "multiple and discriminatory" taxes paid when conducting business on the Internet.

The new act will extend those bans while continuing to exempt states that were investigating ways to levy fees on those services prior to Oct. 1, 1998 and those that have taxes and fees currently in place.

While this law has ended the debate temporarily, with both sides claiming a partial victory, the future of a tax-free Internet is still very much in doubt. If not for a compromise offered by Sen. John McCain (R-AZ), this bill might have died in conference. Sen. George Allen (R-VA) and House Judiciary Committee Chairman James Sensenbrenner (R-WI) already have announced plans to attempt to make the ban permanent, but that may be hard to pass considering the continuing decline in stability and revenues in state budgets.

## Economy and Jobs Watch: November Numbers Still Lag Behind Need

The Bureau of Labor Statistics [November Job Report](#) shows a continuing disappointing trend in employment as the nation's employers added 112,000 jobs in November, far below analyst projections of least 200,000 jobs. This report is a bit of a surprise after the October report showed a strong month with 303,000 jobs added. The 112,000 jobs, about what was added in September this year, is below the approximately 140,000 jobs per month necessary to keep pace with new workers entering the workforce.

Also disappointing is the decline in average hours worked per week by 0.1 hours. Combined with an essentially stagnant wage growth (up \$0.01), average weekly earnings dropped 0.2 percent to \$533.47. The rise in wages by one cent was the smallest increase since wages dropped by a penny almost a year ago in December 2003. For the twelve months ending in November, average hourly earnings are up 2.4 percent, but they are essentially flat when adjusted for inflation.

Unemployment was essentially unchanged, with approximately 8 million workers unable to find a job (5.4 percent), but first-time claims for benefits jumped 25,000 in the last week of November to 349,000 after relatively quiet activity the rest of the month. In addition, according to the [Economic Policy Institute](#), both the median and average time unemployed workers spend looking for work rose in November, with the average reaching its highest level since June at 19.9 weeks.

While the jobless recovery in some ways appears to be over, economists are still unclear about certain aspects of the economy and future growth. What is clear is that President Bush's policies have not resulted in adding an average of 306,000 jobs a month as predicted by the White House Council of Economic Advisers. With each successive month of weak job growth and stagnant wages, it becomes clearer and clearer those policies have failed.

## New York Joins States Raising Minimum Wage

As the [New York Daily News](#) reported last Wednesday, nearly one million New Yorkers work full-time jobs, year round, for poverty level wages. A new New York law may help change conditions for some of these people as New York joined the growing list of states requiring that their workers be paid a minimum wage higher than the level set by the federal government, which is \$5.15 an hour.

Last week, the New York state senate overrode Republican Governor George Pataki's veto of the increase, with 50 of the 62 senators voting for it, and only 8 against — well above the 2/3 needed to override a veto. The bipartisan support — especially from the Republican majority — was due largely to pre-election campaign promises senate candidates had made. Senate Majority Leader Joseph Bruno, stated, "The increase will help the working families at the lowest income levels make ends meet, without putting an undue burden on small businesses and the economy."

The law will gradually raise the state minimum wage level 38 percent by \$2 an hour. It will increase from the current \$5.15 to \$6.00 on January 1, 2005, and to \$6.75 on January 1, 2006. The final increase, to \$7.15, will be implemented on January 1, 2007. The wages of food service workers who receive tips will also rise gradually from the current \$3.30 to \$4.60 per hour by 2007.

According to the [Fiscal Policy Institute](#), this wage increases will directly benefit 691,000 workers or roughly 8.8 percent of New York's workforce; another 509,000 workers who make between \$7.15 and \$8.15 will indirectly benefit from the law. (See the [FPI analysis](#).) Pataki stated his opposition to the wage increase stemmed from worries the state would lose jobs to neighboring states who still pay their workers only \$5.15. However, the increases will most likely boost New York's economy while helping hundreds of thousands of people make ends meet and providing neighboring states some incentive to follow its example.

New York was far overdue for a wage increase. The 1968 state minimum wage of \$1.50 would have increased to \$8.72 per hour by 2003, had it been adjusted for inflation. New York's move is only a step in the right direction. Now the Bush administration should act to raise the minimum wage for all American workers to boost the economy, and to help millions of working families achieve a greater standard of living.

## Wealthy Congressmen Support Estate Tax

The estate tax, one of the most progressive tax policies in America, only currently affects the wealthiest 2 percent of Americans. Yet contrary to personal self interest, many members of Congress are not basing their position on the issue on their own pocketbooks. In his recent article in *Tax Notes*, Martin Sullivan made the ironic observation that on average, the more wealthy members of Congress, many of whom would be substantially taxed under the estate tax, are fighting the Bush administration's attempts at repeal.

Sullivan made the point that, "when it comes to fighting class warfare in Congress, the rich are for the poor and the poor are for the rich." Under the current law, which was set forth in the 2001 Economic Growth and Tax Relief Reconciliation Act (EGTRRA), the estate tax is phasing out gradually through 2009. In 2009, the top estate tax rate is 45 percent for all estates. In 2010 the tax will be repealed altogether, but then in 2011, the law reverts back to that which was in place prior to the passage of EGTRRA. That means that after 2010, estates greater than \$1 million will be taxed at a gradual rate from 18 percent to 55 percent, with an additional 5 percent tax on amounts above \$10 million (but not exceeding \$17.184 million). This odd development has inspired some critics to observe, jokingly, that it provides an incentive for heirs to hasten the demise of their benefactors.

The estate tax is not only an important source of federal revenue — repeal would cost the government \$80 billion per year — but it is also important because of its progressive structure, as well as the incentive it creates for [charitable giving](#). Unfortunately, the estate tax has been mischaracterized as a tax that hurts small businesses and family farmers. In reality it affects a very small number of businesses and family farms. Even so, there is a very real risk that this Congress will either vote to accelerate repeal, or to make the [repeal permanent](#) after 2010.

However, the wealthiest members of Congress, those who would get hit the hardest by the estate tax, overwhelmingly support it, and advocate reform of the policy as opposed to repeal. Different reform proposals could involve raising exemption levels, to lowering the rate at which estates are taxed, to exempting family farms and small businesses altogether. Reform, as opposed to repeal, would be much less detrimental to federal revenue levels.

Sullivan's research found the five wealthiest Senators — John Kerry (D-MA), Jon Corzine (D-NJ), Herb Kohl (D-WI), John Rockefeller (D-WV), and Lincoln Chafee (R-RI) — voted against repeal, and eight of the ten wealthiest Senators are also against repeal. Chafee and John McCain (R-AZ), who are the wealthiest Republican Senators, have both broken with their parties in the past to vote against repeal. McCain's assets, which are recorded as equaling roughly \$11.4 million, would be taxed \$3.9 million if he passed away in 2005. John Kerry's, whose wealth is estimated to be around \$1 billion, would be taxed so that \$468.6 million would go towards federal revenue if he passed away in 2005. These wealthy Senators recognize how important the estate tax is, as they continue to support a tax policy taxing their personal assets at a high rate.

Repeal of the estate tax would in fact be extremely detrimental. In an economy plagued by both record high federal budget deficits and spending, coupled with an administration that wants to make existing and costly tax cuts permanent, the loss of this revenue would only further destabilize the economy, and amplify the consequences of a higher deficit, a weaker dollar, and deeper cuts in discretionary spending.

## Congress Strips Offending Tax Provision, Passes Omnibus Bill

Last week Congress reconvened for a second lame duck session. They succeeded in stripping [controversial tax language](#) from the bill and on Dec. 8 the President finally signed it, officially bringing the much delayed FY 2005 appropriations process to a close. The omnibus bill combines nine appropriations bills Congress was unable to finish working on before the end of the fiscal year, along with thousands of provisions and riders.

Congress had to return after the omnibus passed initially to take out a provision giving appropriators unprecedented access to individuals' tax returns. The outcry over this provision exposed the fact that lawmakers themselves did not know the content of what was inside the massive, 3,000-plus paged bill. It is deeply troubling that year after year the appropriations process is reduced to passing a range of bills as part of a huge, complex, and expensive omnibus.

The FY 2005 spending bill significantly affects the funding levels of most federal agencies and programs. The *Washington Post* published a good synopsis of the [highlights of the bill](#). The bill cuts all non-defense discretionary programs across the board, which was done in order to keep the final spending figure within the \$822 billion budget cap Congress and the administration had agreed upon.

As BNA News Services reports, "the \$821.9 billion figure allowed Bush to get the big increases he wanted for the Department of Defense and Homeland Security programs but left little for hikes in other programs." In fact, many programs suffered significant cuts. The Environmental Protection Agency saw their funds cut by \$355 million, or 4.2 percent, the Federal Aviation Administration's budget for safety inspectors and air traffic controllers was cut by \$322 million, and Bush's request for Title I education funding was cut by \$607 million, or 9.5 percent. In contrast, the funding set aside for abstinence education programs increased by 28.5 percent, or roughly \$30 million.

This overall lean omnibus provides some indication of the administration's priorities in drafting its proposed FY 2006 budget, due out in early February. The administration has made clear numerous times they plan to cut the deficit in half by 2009. The question that remains is how. If they plan to do so by continuing to squeeze non-defense discretionary spending, millions of Americans will see a reduction in essential government services while the savings will barely put a dent in reducing the deficit. The money our government will save pinching pennies in the budget is relatively small

compared with the amount of money President Bush gave away to millionaires in the tax cuts of the first term.

According to the [Brookings Institution and the Center on Budget and Policy Priorities](#), the middle 20 percent of Americans received an average of \$647 in 2004 from tax cuts enacted by the government in 2001 and 2003, while people who make above \$1 million in annual income received an average of \$123,592. Instead of chipping away at small pieces of the deficit by cutting social safety net programs millions of Americans depend on like LIHEAP and Medicaid, President Bush and Congress could make vastly greater strides in deficit reduction by not extending or repealing the first term tax cuts on only those who make above \$1 million per year.

## DHS Pushes Secrecy on the Hill

The [Department of Homeland Security \(DHS\)](#), which has been strongly criticized for its overuse of secrecy and lack of transparency, is now pushing to lock down information among congressional offices. DHS officials have asked congressional aides to sign nondisclosure agreements that would prohibit them from publicly disclosing information from DHS even though the information is unclassified.

DHS has reported that agency policy requires all DHS employees, now over 180,000, to comply with the [three-page nondisclosure agreement](#) even if they have not signed it. While other federal agencies use nondisclosure agreements to protect sensitive but unclassified information, DHS's agreement is stricter and farther-reaching.

The DHS form allows any employee or contractor to restrict information as "official use only." The form also defines "sensitive" as any information that could "adversely affect the national interest or the conduct of federal programs," which could be so broadly interpreted to include information important to oversight and accountability. Violation of the agreements could result in administrative, disciplinary, criminal and/or civil penalties.

Now DHS is asking congressional staffers to sign a nondisclosure agreement. It is not clear what the terms of the agreement are or which staffers are being asked to sign it. However, several staffers acknowledge being approached to sign the agreement.

Congressional offices from both parties have refused to sign the forms. They, along with good government groups, consider the agreements to be part of an unprecedented effort to expand government secrecy that is unmanageable and likely unconstitutional. "This is unclassified material, and we have a right to it without signing over our lives," said Ken Johnson spokesperson of Rep. Christopher Cox (R- CA), chair of the House Select Homeland Security Committee. "We are the overseers, not the overseen."

DHS officials claim that the forms merely educate employees about the importance of protecting sensitive but unclassified information and that it does not restrict the information from appropriate use or disclosure under the Freedom of Information Act. The agreements follow up on a [DHS directive](#) protecting sensitive but unclassified information and only sharing the material with those who have been determined to have a "need to know" it.

The two largest federal unions, the [National Treasury Employees Union](#) and the [American Federation of Government Employees](#), have urged DHS to retract the policy. "The directive violates public policy and our national interest by providing a ready device for officials to suppress and cover up evidence of their own misconduct or malfeasance," attorneys for the unions wrote in a letter to Homeland Security General Counsel Joe Whitley.

## Center Sues FERC Over Restricted Energy Information

The [Center for Public Integrity \(CPI\)](#) has filed a lawsuit against the [Federal Energy Regulatory Commission \(FERC\)](#), claiming the agency illegally blocked access to documents relating to liquefied natural gas (LNG) facilities throughout the country.

CPI, an investigative journalism organization, filed its lawsuit in U.S. District Court for the District of Columbia. The organization requested access to and copies of all FERC's correspondence, including meeting records, transcripts, schedules, minutes, and/or agendas between the agency and companies considering construction of LNG facilities. CPI originally requested the information from FERC under the Freedom of Information Act in February. However, the agency only released "a fraction" of the documents responsive to the organization's request.

Specifically, the organization wants reports on the safety and security of a proposed LNG facility that Hess LNG plans to build in Fall River, Massachusetts. However, Hess's law firm, Baker & Botts labeled its correspondence with FERC about the reports as Critical Energy Infrastructure Information (CEII), thus sealing it away from the public. Under FERC regulations, access to CEII is restricted to those the agency deems have a need to know the information, and only after they sign an agreement of nondisclosure prohibiting them from making the information public.

"It's completely absurd that the folks in Fall River don't have the reports already," exclaimed Bob Williams, CPI project director, "It all comes back to the fact that we think the public's business should be done in public."

CPI just released a report on LNG entitled, "[Appealing to a Higher Authority](#)," which asserts that FERC "is aggressively undermining the authority of state and local governments to reject dozens of proposed liquefied natural gas facilities all across the country." The report claims that over the past three years FERC commissioners have met inordinately more often with LNG industry representatives than with opponents of specific LNG projects.

## Sage Grouse Recommendation Follows Data Quality Challenge

A [data quality challenge](#) recently filed by an industry group may have influenced government officials' recommendation that the greater sage grouse not be listed as an endangered species. The Partnership for the West is a coalition of organizations, which support a largely anti-environment agenda and receive support from corporations like Dow Chemical.

The request for correction under the Data Quality Act (DQA), filed Sept. 23, challenged the quality of U.S. Fish and Wildlife Service's (FWS) [90-day Finding for Petitions to List the Greater Sage-grouse as Threatened or Endangered](#) and a conservation assessment. The group asserts that the documents "overstate threats to the species and understate the exhaustive conservation efforts currently underway by federal agencies, eleven Western States, local working groups, private landowners and environmental groups." The petition also states that listing the greater sage grouse as endangered would actually put the species at greater risk because it would undermine current conservation efforts.

The data quality petition is just one of many tools the Partnership for the West has employed to derail the listing of the grouse as an endangered species. The group also [wrote letters to western governors](#) asking them to oppose any listing of the species. The western governors group later recommended the species not be listed.

The DQA has primarily been used as a tool for industry to dilute, derail, and delay regulation by challenging the reliability and accuracy of information. The protection of endangered species has recently emerged as a major target for such data quality challenges. The U.S. Air Force may have joined the industry in misuse of the DQA when it [submitted a petition](#) that triggered the cancellation of listing slickspot peppergrass as an endangered species.

In a similar sequence of events, after the Partnership for the West's DQA challenge of government documents on the greater sage grouse, FWS biologists recommended the species not be listed as endangered, pointing to a number of assessments that say the species is not facing extinction. For more information about the recommendation, see a [related article](#) in this issue.

## Reclamation Officials Withhold Dam Safety Information

The [Bureau of Reclamation](#) refuses to disclose safety details about the Jackson Lake Dam to a county official trying to verify his county is out of harm's way. The Teton County Commissioner, Bill Paddleford, wants the information as part of the area's emergency planning, which includes the city of Jackson.

The Jackson Lake Dam is located on the Snake River and holds an estimated 275 billion gallons of water. If the dam were significantly damaged and released this water, it could wash away towns along the lower portion of the river. The dam is also only seven miles east of the Teton Fault, which geologists believe is overdue for an earthquake that could surpass a 7.0 magnitude. For these reasons, Paddleford believes it is important to verify the soundness of the dam and prepare for all contingencies during the emergency planning.

The Bureau of Reclamation officials claim the dam is perfectly safe, and released a "nonsensitive" version of an engineering report to respond to concerns. However, the information does not satisfy Paddleford, who wants specific answers to safety questions.

This is just one of many examples of public information being shielded under the guise of security concerns since 9/11. In many cases, the government restricts information directly related to public health and safety. In a similar example, the [Federal Energy Regulatory Commission \(FERC\)](#) removed information from its website about problems in a Montana dam. Owners of the Milltown Dam near Missoula found gaps near the foundation. The agency never notified County commissioners about the problem, and were instead notified by a county employee who found the report on FERC's website. FERC removed the document a few days after the commissioners sent a complaint to the agency. In this case, the public can access the document at [memoryhole.org](#). However, much of the information stripped from websites after 9/11 is no longer available in the public domain.

## AU Sues to Block Funding for California Missions

On Dec. 2, [Americans United for Separation of Church and State](#) (AU) filed a lawsuit in federal court to block taxpayer funding for restoration of mission churches in California. The suit charges that the recently passed "[California Missions Preservation Act](#)" is tantamount to taxpayer-supported religion.

The bill, signed by President Bush on Nov. 30, requires the Secretary of the Interior, currently [Gale Norton](#), to make grants of up to \$10 million to the [California Missions Foundation](#) to repair the missions and their artifacts. Many of these artifacts are religious symbols and artwork.

Americans United for Separation of Church and State (AU) allege that the bill advances religion in violation of the [Establishment Clause](#) of the First Amendment. The Roman Catholic Church owns 19 of the 21 missions the bill funds, in which it also celebrates mass. AU is concerned that this bill could be the forerunner of taxpayer-supported maintenance of "historic" houses of worship.

However, California's missions are the state's most visited historical landmarks, drawing 5.3 million people each year, including hundreds of thousands of California fourth-graders who study mission history. All are state historic landmarks and six have been deemed national historic treasures. Additionally, federal money has been routinely spent before on historic structures where church services are held, including Atlanta's Ebenezer Baptist Church, San Antonio's Mission Concepcion, and Boston's Old North Church.



Opponents of the lawsuit state that the money will go to the California Missions Foundation, a private, nonprofit group which is undertaking a fund raising campaign to refurbish the structures. The missions require at least \$39 million in repairs, and an additional \$11 million for visitor improvements and conservation. The legislation allows for the disbursement of matching funds up to \$10 million.

The legislation was amended before it was passed to require the disbursement of funds be made contingent on a finding by the Justice Department that the statute does not violate the First Amendment.

## **ACLU Files Info Request on Government Spying on Nonprofits**

The Dec. 1 issue of [USA Today](#) reports the American Civil Liberties Union (ACLU) has filed Freedom of Information Act requests to learn the extent of "surveillance, questioning and interrogation" of people associated with activist groups and individuals traveling to and from the Middle East. The request focuses on the activities of anti-terrorist task forces in ten states, including Arizona, California, Colorado and Texas.

The anti-terrorist task forces are made up of combined local, state and federal law enforcement personnel. The program has expanded from 34 task forces in 2001 to 100 in 2004. The ACLU has also questioned the ongoing participation of Central Intelligence Agency (CIA) personnel in illegal investigations of U.S. citizens. The CIA claims its officers are acting as advisors, not investigators.

## **Law Symposium Exposes Weaknesses of Anti-Terrorist Guidelines for Nonprofits**

A recent Pace Law Review Symposium, "Anti-Terrorist Financing Guidelines: The Impact on International Philanthropy," highlighted the need for changes in the government guidelines and increased transparency of the reasons behind government decisions to shut down several Muslim charities accused of financing terrorists. The U.S. Treasury Department published the guidelines, which have been widely criticized, in November 2002. Speakers at the symposium said the current situation has led to a decrease in international philanthropy, inappropriate application of the guidelines, a perception of ethnic discrimination against Muslim organizations and shut down of several charities with no terrorist-related convictions. A Treasury official acknowledged problems and said the department is working with the sector to revise the guidelines. See [summary](#).

## **Nonprofit Accountability Update**

Reports of financial scandals and the emergence of many new nonprofits have increased scrutiny of the nonprofit sector. The [Senate Finance](#) and House Ways and Means Committees both held hearings in June that put nonprofits under the spotlight, and more congressional oversight activity is planned. Moreover, calls for greater nonprofit accountability are coming not only from the federal government, but also from state legislatures.

The [Panel on the Nonprofit Sector](#), managed by [Independent Sector](#), recently announced both the participants for its five work groups and the creation of a nine-member [Citizens Advisory Group](#). The five work groups will assist the Panel as it prepares recommendations to the Senate Finance Committee on improving oversight and accountability of nonprofits.

The work groups will review: § Governance and Fiduciary Responsibilities; § Legal Framework; § Oversight and Self-Regulation; § Small Organizations; and, § Transparency and Financial Accountability. The work groups will discuss possible changes to existing laws, advocate increased self-regulation in areas, and identify issues where more research is needed.

Additionally, the Citizens Advisory Group, comprised of leaders of America's business, educational, media, political, and religious institutions, will advise the Panel as it develops recommendations to Congress to improve the oversight and governance of nonprofit organizations by providing broad perspectives on how to strengthen governance, transparency, and accountability within the sector.

Members of the panel are: Norman R. Augustine, chairman, Executive Committee, Lockheed Martin Corporation, Bethesda, MD; Johnnetta B. Cole, president, Bennett College for Women, Greensboro, NC; John M. Engler, president and CEO, National Association of Manufacturers, Washington, DC; Rev. James A. Forbes, senior minister, Riverside Church, New York, NY; Alex S. Jones, director, Joan Shorenstein Center on the Press, Politics and Public Policy, John F. Kennedy School of Government, Harvard University, Cambridge, MA; Bob Kerrey, president, New School University, New York, NY; Leon E. Panetta, founder, The Panetta Institute, Seaside, CA; John E. Porter, partner, Hogan & Hartson, Washington, DC; Sharon Percy Rockefeller, president and CEO, WETA, Arlington, VA.

With Congress' passage of the [Sarbanes-Oxley Act](#), many state legislators and attorneys general have passed or been considering various proposals to increase nonprofit accountability at the state level. The National Council on Nonprofit Associations has compiled a [chart](#) detailing these pending bills and proposals to change nonprofit governance in the states.

## Civic Engagement Conference Summary-Return the Charity to the Citizen!

The National Conference on Citizenship, held Dec. 3 in Washington, DC, examined the role of citizenship in the post-9/11 world. The conference provided a forum to discuss the important role nonprofits play in encouraging citizenship. Read more for a summary of points made at the conference.

The conference theme was highlighted by John DiIulio, Jr., former director of the White House Office of Faith-Based Initiatives, who moderated a panel discussion on nonprofits and citizenship in front of 500 educators and nonprofit leaders.

"After working at Princeton as a professor for many years, I decided to take a sabbatical and work at a middle school in inner-city Philadelphia teaching government and ethics. For our class trip, we went to Washington, DC. We walked around all day, packed as much into the day as we could, and the last thing we visited was the Lincoln Memorial. 40 kids spilled out of the bus and ran up the step of the Memorial. When they reached the top, almost in unison, they started reading aloud the Gettysburg Address." He paused. "With a one-in-three-lifetime chance of ending up in prison, from a place where 60 percent of the kids their age in their community are illiterate, what does citizenship mean to these lower income, impoverished children?"

Nonprofits struggle with the concept of civic renewal and the rights of citizenship — how to get individuals involved in their local, state or federal government or community organizations.

Most people are civically engaged in some way, but their forms of participation and interaction differ significantly. A small percentage are involved in many ways, but most people are more specialized or selective in their forms of engagement. Some focus almost exclusively on their church, while others thrive on political activity.

Nonprofits make a difference when they are engaged. However, people still encounter significant barriers to participation. The challenge is how do nonprofits encourage individuals to make a difference in their communities.

All forms of citizen interaction and participation contribute to a community's strength — from joining an organization to donating to a charity to socializing informally. Nonprofits fill a role in civic engagement by bringing people together. Many nonprofits create social capital by creating places of common interest. Unfortunately, many nonprofits have become too specialized and removed from ordinary citizens, and tend to intimidate volunteers.

One way nonprofits can attract participants is by providing service opportunities. Alan Khazei, founder of City Year, discovered that by challenging young people to serve their country, his organization has inspired them to take part in their own collective enterprises. The values these young people learn through City Year take hold, and as a result, they vote in higher numbers than any other voter group.

Nonprofits also need to return charity to the citizens. Historically, charities have been viewed as voluntary and disorganized. The first foundations — Ford, Rockefeller, Sage — took public affairs out of the hands of the volunteers and put it in the hands of specialists.

Recently, nonprofits' common cause has been voter mobilization as a way to re-involve the citizen in politics. While this greatly encouraged record voter turnout last month, voting without other civic involvement allows the voter to select between two specialists without getting their hands dirty. The day after the election, they can simply return to their lives and let the experts rule.

Nonprofits need to provide more ways for citizens to get involved at all levels in which they operate — local, state and federal. By providing service opportunities, individuals can come together and create a sense of civic engagement and collective enterprise and truly return the charity to the citizen.

## Superfund Lacks Funds to Cleanup Toxic Waste Sites

Facing an increasing backlog of sites with the same meager budget, the Superfund program administrator thinks he's found a new way to tackle the country's most severe hazardous waste problems: Stop addressing them.

## Superfund Program Looking for New Solutions

On Dec. 2, Thomas P. Dunne, acting administrator for the Environmental Protection Agency's (EPA) office of solid waste and emergency response, announced at an academic Superfund conference that the agency might temporarily discontinue listing new Superfund sites. Facing a fiscal crunch, the agency is considering ceasing to list new sites and holding off new cleanup projects until work on current projects is completed as a way of focusing the program's resources on existing problems.

The comments sparked outrage from Sen. Jim Jeffords (I-VT), who said, "We have already dried up the funds needed to clean up the toxic sites we currently know about; now the Bush administration suggests sticking our head in the sand and not even [taking inventory of] other polluted sites. The millions of Americans who live within a short distance of a contaminated site want real solutions, starting with fully funding the program and reauthorizing the expired polluter pays fees. We should be working to protect our environment and public health by cleaning up more sites, faster, rather than shirking our responsibility."

Dunne also suggested two other approaches that may help stretch Superfund's dismal \$450 million budget: creating economic incentives for businesses to clean up sites and creating a management system that would allow communities to have more of a realistic view of cleanup costs and priorities. Dunne insisted that the agency is not married to any of the



ideas, but that they highlight the need for serious dialogue on how best to tackle cleanup of the hundreds of severe toxic waste sites around the country.

## A Price We All Pay

### The Price Tag of Hazardous Waste: \$253 Billion

A recent [EPA report](#) projects that at the current pace, it will take between 30 and 35 years and \$253 billion dollars to cleanup most of the nation's known and yet-to-be-discovered toxic waste sites. This figure is significantly higher than EPA's last estimate, released in 1996, that cleanup would cost \$187 billion over 30 years. EPA projects that it will have to remediate at least 294,000 hazardous waste sites — and that number could go as high as 355,000. That estimate includes the 77,000 hazardous waste sites that have already been discovered plus 217,000 yet-to-be-discovered sites. According to the report, the \$253 billion price tag will be borne predominately by the polluters.

Less than 1 percent of all hazardous waste sites are part of the Superfund program, which includes only the worst toxic waste messes, but Superfund cleanups account for 15 percent of the total projected cost. Currently there are 456 Superfund sites remaining to be remediated, and EPA expects to find approximately 280 more.

### Administration Allows Taxpayers to Foot the Bill

The Superfund program was started during the Reagan administration to locate, investigate and clean up the nation's worst toxic waste sites. As originally conceived, the Superfund would pay for cleanups using money primarily from an industry-financed trust fund. This fund was created through a tax imposed mainly on chemical and petroleum companies, who are accountable for most of the industrial waste in toxic sites. In 1995 Congress failed to reauthorize the Superfund tax, and the resources used to clean up toxic waste dumps have since dwindled. Bush opposed reauthorization, allowing the fund to go bankrupt in October 2003 and forcing taxpayers rather than polluters to bear the brunt of cleanup costs.

### 'All Appropriate Inquiries' Rule Lets Developers Off the Hook

Even without the fund, EPA is only supposed to tap into taxpayer money after obtaining funding from all liable parties, yet recent policy changes have limited the liability of those involved.

In one recent move, EPA issued a new regulation that weakens the environmental standard for appropriate inquiry into the history and environmental condition of brownfields, shielding potential developers from future liability. The standards are required by the 2002 brownfields law, which provides incentives for redeveloping former toxic sites without sacrificing public health and safety.

The weakened environmental standard prompted five Democratic lawmakers to submit [comments](#) to EPA Administrator Mike Leavitt (whom President Bush has nominated to be his new secretary of Health and Human Services), charging that the new regulation is inconsistent with the intention of Congress and the brownfields law and that the weakened standard "will result in more contaminated sites going undiscovered, allowing contamination to go unaddressed and allowing a continuing threat to public health and the environment."

Along with their complaints, Reps. John Dingell (D-MI), Hilda Solis (D-CA), and Frank Pallone (D-NJ) joined Sens. Barbara Boxer (D-CA) and Jeffords in attacking the new regulation for failing to require that an environmental professional conduct the inquiry, thus increasing the possibility that environmental problems will be missed. The lawmakers noted that "the probability of missing an environmental problem becomes unacceptably high when the person conducting the inquiry on the ground does not have the experience or judgment of an environmental professional. The consequences are serious."

The new rule also allows for exemptions to the brownfields law requirement that visual inspections of the facilities and adjoining properties be conducted as part of the inquiry. Such exemptions include weather, the location of the property, and refusal of the seller to allow access despite good faith efforts by the purchaser. The lawmakers note that the "opportunity for mischief is great" if such exemptions are allowed. "Actual visual inspection of a facility is central to every environmental inquiry," the lawmakers contend.

The letter further asserts that the standard would:

- Allow sellers of contaminated property to "take excess profits from the sale of the property and put those profits out of reach before the need for cleanup is known";
- Increase the likelihood that taxpayers will bear the cost of cleanup when contamination is found; and
- Allow purchasers to claim liability exemption despite the weakness of the inquiry standard and to take no further action to investigate or cleanup environmental problems.

## Lawmakers, IG Call for Reinstatement of Polluters Fees

At a time when one in four Americans live within four miles from a Superfund site, 34 out of the 61 total ongoing Superfund projects did not receive funding in 2004, according to an EPA [letter](#) to Jeffords. In October, Jeffords and Boxer sent a [letter](#) to Leavitt demanding that the polluter fees be reinstated to pay for future cleanups and that the Superfund program be fully funded. Even the [Inspector General](#) has called for hundreds of millions more in the agency's \$450 million budget in order to meet the increasing backlog of site cleanups. However, increased funding has yet to arrive and taxpayers, not polluters, continue to pay the cost of cleanup.

## Panel Nixes Endangered Species Status After Politico Bashes Science

A panel of Fish and Wildlife Service officials has recommended against granting Endangered Species Act protections to the greater sage grouse, based on source materials that included scientific assessments from federal biologists and a critique of that science from a political appointee with no background at all in biology.

The recommendation, which is likely to be followed, means that the sage grouse's habitat will not receive special protections. That habitat overlaps with areas of likely oil and gas deposits in Colorado, Montana, Utah, and Wyoming — areas the Bush administration has been pushing to open up for energy developers, who would face significant regulation under the Endangered Species Act if the sage grouse were listed as an endangered species.

The *New York Times* [discovered](#), however, that the FWS panel made its recommendation after reviewing two versions of the same scientific assessments. The first, an overview of the extensive science available on the sage grouse and its dependence on sagebrush, was prepared by agency wildlife biologists. The second, offering revisions to the biologists' draft report and commentary criticizing the science, was prepared by Julie MacDonald, a politically appointed senior policymaker with no background in wildlife biology.

"The consistent thrust of Ms. MacDonald's critique was to dismiss the methodology behind studies that indicated significant declines in grouse population or habitat, to denigrate many studies as mere 'opinion' and to seek inclusion of industry comments that she found compelling," according to the *Times*.

That assessment would place MacDonald's interference with science squarely within this administration's pattern of distorting science to meet political ends. The right-hand box of this article (not available to those reading this article in the PDF version of the *Watcher*) lists other *Watcher* articles chronicling the politicization of science during this administration, which include [White House changes to a report](#) from scientific experts on the hazards of mercury and the administration's efforts to [hide information about climate change](#).

The following are some examples of MacDonald's changes and criticisms:

From the scientists: "Prior to the settlement of the Western United States by European immigrants in the 19th century, sage grouse lived in 13 states and 3 Canadian provinces. Sagebrush habitats that potentially supported sage grouse occupied approximately 463,509 square miles."	MacDonald's rejoinder: "This entire discussion of estimated habitat, estimated range, estimated population should be eliminated as it is 1) not supported by contemporary accounts, 2) not supported by data and 3) simply a fairy tale, constructed out of whole cloth, based on a series of arbitrary assumptions."
From the scientists: "Sage grouse depend entirely on sagebrush throughout the winter for both food and cover."	MacDonald's rejoinder: "I believe that is an overstatement, as they will eat other stuff if it's available."
According to the scientists: the sage grouse numbered in the millions before settlers arrived in the 19th century	MacDonald's rejoinder: these estimates are "simply a fairy tale, constructed out of whole cloth"
According to the scientists: one study revealed that a population of 4,000 birds in one Utah valley dwindled to less than 200 after their habitat was fragmented	MacDonald's rejoinder: "Citing examples like this, which are extreme, do not elucidate the issues we are faced with .... This example should be deleted."
In the scientists' assessment: a study from the Western Association of Fish and Wildlife Agencies, in which experts compiled the vast body of science available on sage grouse populations, territory, historical trends and adaptability	MacDonald's rejoinder: "We should treat it as we would treat an industry publication."

See [related article](#) this issue.

## FCC Rigs Cost-Benefit Report to Side With Industry on Cable A La Carte

The Federal Communications Commission (FCC) sided with the cable and big media industries against regulation mandating *à la carte* cable service, justifying its position with a cost-benefit analysis rigged against *à la carte* options.

The vision of cable *à la carte* is that cable customers could pick and pay for only the channels they want. Most American consumers can only purchase cable service in large tiered packages, like "basic" and "expanded" service packages, which require them to pay for channels they never watch in order to receive the channels they do want.

Under enormous pressure from large cable companies and media conglomerates, the FCC has signaled its rejection of the possibility of cable *à la carte* by releasing an analysis that it rigged in favor of the cable and media industries and against consumers. Consumers Union [criticized](#) the FCC analysis as "dramatically flawed" because it "focuses primarily on a mandatory *à la carte* system rather than the voluntary system Consumers Union and other public interest groups have proposed. It also inflates the cost by assuming that everyone would have to buy or rent a special cable box, when consumer groups have said that the proposal should target digital cable subscribers, who already pay for the box."

Consumers Union noted that the analysis also inflated the cost of the addressable converter boxes considered necessary for the most feasible implementation of cable *à la carte*. Further, the FCC's analysis mentioned in passing without seriously contemplating the possibility that one company's trap boxes—addressable boxes installed outside of a building—could effectively manage *à la carte* and mixed bundling alternatives, much less that *à la carte* regulation could drive down the implementation costs of necessary technology or spur other innovations.

One of the most startling developments in the debate over *à la carte* cable is the effectiveness with which gigantic media corporations isolated consumer groups by wedging apart other potential public interest allies. The key was the industry's

re-framing of its targeted and niche marketing efforts to program for women and minority groups as public service. The megacorporations involved downplayed their control over such channels as TV-One (in which the giant cable provider Comcast is an investor) and Oxygen (likewise owned in part by Time Warner, a giant in both cable service and cable/broadcast content) and lured identity politics groups into the battle by claiming that *à la carte* would threaten the diversity of programming available on cable.

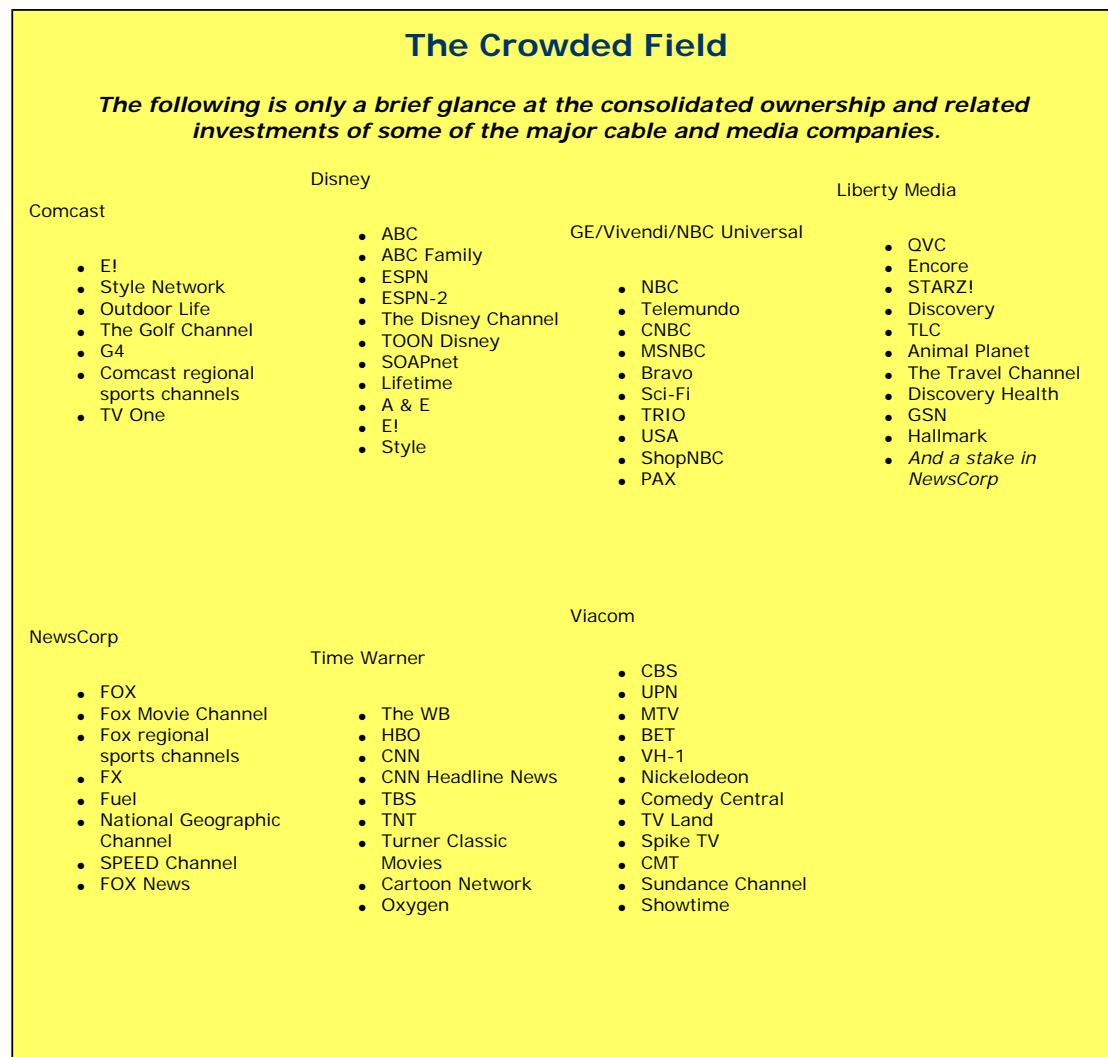
Having successfully enlisted groups such as the Ms. Foundation, the Rainbow/PUSH Coalition, and the NAACP into criticisms of *à la carte* as a threat to diversity, the cable and media giants opposed to *à la carte* successfully downplayed the real threat to diversity in programming: their own monopolistic and monopsonistic market dominance.

Two key factors contribute to the current market climate, which *à la carte* would counteract:

**Media Consolidation:** Most broadcast and cable channels are owned by a small number of gigantic media corporations. Many cable channels, such as ESPN, are in such demand that they are essential components of any successful package in the current non-*à la carte* tiered-and-bundled market. The companies that own these must-carry channels, especially the broadcast networks, are able to exploit that dominant position by forcing cable providers to carry other channels in the media companies' portfolios. This factor is particularly relevant in the retransmission agreements that any cable company must sign in order to carry the over-the-air broadcast networks, which are owned by corporate megaliths.

**Cable Monopsony:** With the exception of a few communities across the country, American cable companies are government-sanctioned monopolies: the only company in town allowed to offer wired cable TV services. As monopoly *sellers* of cable service, the cable companies are, in turn, exclusive or monopsony *buyers* of cable programming. Accordingly, the cable companies are empowered to extract concessions from would-be providers of cable programming. Consumer groups observed that TV-One, a new cable channel created by black media entrepreneurs, is available on Comcast cable systems because the original owners finally sold a stake in the channel to Comcast. Oxygen, a new channel founded by women and directed at women, likewise secured its status when it won carriage on New York City's cable provider—which is owned by Time Warner, an investor in Oxygen.

In the current environment, it would probably be impossible for an independent or black- or women-owned cable channel to secure adequate carriage in enough cable systems to succeed as a viable enterprise, in part because media consolidation consumes most of the available real estate in a cable channel line-up, and in part because cable monopsony means that scarce channel openings will most likely be given to programming in which the cable company giants like Comcast or Liberty Media are investors.



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## Food Supply Called 'Easy' Target for Terrorists

The Food and Drug Administration's response to bioterrorism has done little to protect our food supply, prompting even the outgoing Secretary of Health and Human Services to show concern.

In his resignation remarks last week, Tommy Thompson told press that he believed that it would be "easy" for terrorists to contaminate our food supply. "For the life of me, I cannot understand why the terrorists have not attacked our food supply because it is so easy to do," he said, adding that he "worried every single night" about terrorist threats to the nation's food supply.

Four provisions of the bioterrorism act required FDA to develop new regulations to protect our food supply. FDA's latest bioterrorism regulation on the establishment and maintenance of records represents the fourth regulation promulgated by FDA in response to the act. The regulation requires that food suppliers establish and maintain records of where their food shipments came from and where they go next. In the case of an attack on our food supply, these records will assist government officials in discovering the source of the attack, although they will do little to protect our food supply from an actual bioterrorism threat.

FDA's three previous rules require registration of foreign and domestic food facilities, necessitate prior notice of food shipments imported or offered for import in the US, and authorize the use of administrative detention so that food products that might pose a threat of serious adverse health consequences or death may be detained.

Administrative detention is only effective once the adverse threat has been found, but, as Thompson pointed out, only a very small percentage of food supply is ever inspected. If the food threats are not discovered, administrative detention can do little to protect the food supply. The registration of facilities will, like the new record-keeping regulation, assist FDA in tracking any attacks once they occur, but it will do little to find potential threats.

The prior notice of shipment could have been a real effort to block the entry of contaminated food into our food supply, but the rules were significantly weakened during review with OMB. The original proposal, issued in February 2003, required importers to notify the FDA by noon the day before the shipment was to arrive. The final standards, however, required just eight hours notice for shipments arriving by sea, four hours for those transported by air or rail, and only two hours for shipments coming by land — hardly enough time to investigate a potential bioterrorism threat.

According to a statement by the Center for Science in the Public Interest Food Safety Director Caroline Smith DeWaal, our food supply will remain an easy target for terrorism unless FDA is given the authority necessary "to visit foreign factories and farms that want to ship food to the U.S., and authority to mandate recall and traceability all along the food supply. Ultimately, the food laws should be comprehensively modernized and food-safety functions combined into a unified food-safety agency, rather than the hodgepodge we have today."

With Thompson set to depart, Bush has nominated Mike Leavitt, currently the administrator of EPA, to head HHS. It is unknown how or to what extent Leavitt will work to strengthen food safety safeguards. Generally while at EPA, Leavitt, a former governor of Utah, favored the regulated community, promoting minimal regulation and voluntary standards in lieu of requirements.

## Rocket Fuel Ingredient Ignites Controversy

Perchlorate, a key ingredient in rocket fuel that is associated with developmental delays, can be found in lettuce from Florida, bottled water from California, and organic milk from Maryland, according to initial data from the Food and Drug Administration.

Although it is too soon to determine whether perchlorate contamination of food and water is truly widespread, the FDA's [early results](#) are nonetheless the latest chapter in a dispute pitting environmental and public health against industry influence over science and the prerogatives of the Department of Defense.

Perchlorate is one of a class of endocrine-disrupting chemicals that slow brain development in the fetus and can cause reproductive disorders such as low sperm count, early onset of puberty, genital abnormalities, and cancer. The proof of this connection between perchlorate exposure and these conditions is stronger than ever before imagined, according to a June 2004 press briefing from a group of researchers that conducted a comprehensive literature review.

Meanwhile, federal regulators are waiting on a report on the health effects of perchlorate from a National Academies panel. The panel was [criticized](#) by the Natural Resources Defense Council and the Center for Science in the Public Interest for including four members with significant conflicts of interest. One, the chair of the panel, resigned before the panel's first meeting in Oct. 2003, while another resigned this June—after the panel [had already met four times](#). The remaining two are still on the panel, which is expected to release its report next month.

Perchlorate has also been found in 22 Department of Defense sites across the country, the [drinking water well for a high school in Massachusetts](#), and [ground water in Iowa](#). The stakes are so high that Environmental Protection Agency officials issued a [gag order](#) to regional staff forbidding them from cooperating with congressional investigators and prevented agency scientists from discussing studies showing that lettuce absorbs large amounts of perchlorate.

Moreover, stonewalling from the White House has [forced NRDC into court](#) to demand answers about the White House and industry efforts to block regulatory protections for perchlorate.

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