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Senate Pushes Through Corporate Tax Bill Over Holiday Weekend

The Senate commemorated the Columbus holiday Oct. 11 by holding a special session to pass the corporate tax bill, also known as the FSC/ETI bill. The previous week the House had passed the bill, which was designed to remove certain corporate tax subsidies on exports which had been ruled illegal by the World Trade Organization two years ago. The new tax breaks hit the nation at a time when corporate tax revenue has dropped to a historic low -- and the federal deficit has climbed to an all-time high. Last week, the Congressional Budget Office reported the FY 2004 federal deficit hit a record \$413 billion.

Despite this deficit (see [deficit article](#) this issue), the Senate passed the 650-page corporate tax bill by a vote of 69-17. It includes \$143 worth of tax breaks for companies over 10 years and is supposedly offset by loophole closures and other revenue measures.

Critics, however, see the bill as nothing more than billions of dollars worth of giveaways, passed right after the President signed into law a \$176 billion unpaid-for extension of several tax cuts for individuals (see previous [Watcher article](#) for more). Ted Kennedy (D-MA), one of 17 senators who [voted against the bill](#), said the bill "puts the interest of the big corporations above the public interests, above the hopes and dreams and everyday needs of the American middle class." It is easy to see why Kennedy and others took this position. And according to a [Washington Post article](#) about the bill, the \$76.5 billion centerpiece tax cut, provides "tax deductions that would lower the corporate income tax rate from 35 percent to 32 percent for U.S. 'producers.'" These producers, though, are defined very broadly, and they include manufacturers, Hollywood studios, architectural and engineering firms, homebuilders, and oil and gas drillers, among others.

And although an official cost estimate shows that the bill is deficit neutral, many critics argue the measures laid out in the bill will actually lead to higher deficits in the future. A [report](#) by the Center on Budget and Policy Priorities contends that the bill includes a number of temporary tax cuts that will routinely be extended (also called "extenders"). As the report states, if the new tax cuts not really intended to be temporary are extended, "the bill's deficit neutrality will evaporate unless the costs of extending these provisions are offset. If these costs are not offset, extending these provisions would reduce revenues by *nearly \$80 billion* through 2014."

One of the more contentious aspects of the bill concerned a provision to grant the Food and Drug Administration authority to regulate tobacco. Senators originally saw the corporate tax bill as their best chance to pass this type of legislation, however it was not included in the final conference report, as enough senators supported a measure that didn't include the [FDA provision](#).

There's speculation President Bush may wait until after the election to sign the bill, although his administration supports it.

One thing is clear -- as columnist David Broder noted in a [recent column](#) in the *Washington Post* -- Congress recessed without having passed an FY 2005 budget resolution, nine of the appropriations bills, and a needed increase on the national debt limit. They were however, able to push through excessive tax relief in a special holiday session. Congress should be as focused -- if not more -- on completing their budget priorities as they have been on making sure they push through tax relief.

Federal Spending Hits Ceiling Forcing Treasury to Act

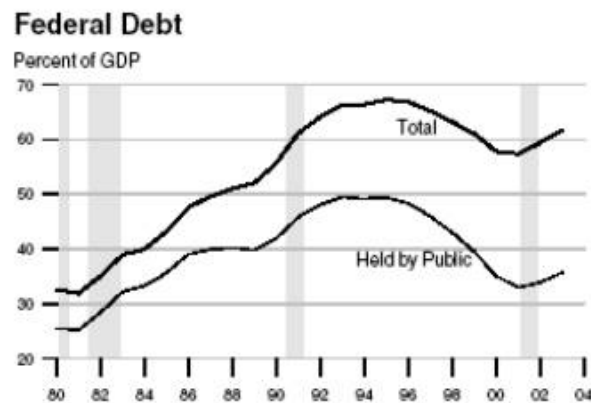
Last week, federal spending again reached the debt limit put in place by Congress -- the legal amount, above which the federal government cannot borrow. If borrowing exceeds this ceiling, currently set at roughly \$7.4 trillion, immediate action is necessary. Treasury Secretary John Snow was recently forced to take action to ensure that normal monetary transactions can continue.

Citing his "commitment to maintaining the full faith and credit of the U.S. Government," Snow sent a [letter to Congress](#) Oct. 14 informing members they must increase the debt limit by mid-November, at which point all temporary steps, accounting gimmicks, and borrowing activities the Treasury is capable of will have been exhausted. Officials predict this will happen by Nov. 24, the week Congress reconvenes for its lame duck session.

Meanwhile, Snow has suspended payments into certain government pension funds, including the Government Securities Fund of the Federal Employees Retirement System. Once Congress raises the debt ceiling, all funds affected by this temporary action will be restored.

Since the establishment of the debt ceiling in 1917, the Treasury has had to act, on five separate occasions, to briefly suspend pension funds in order to delay hitting the borrowing limit. Three of those have occurred under President Bush -- in 2002, 2003, and now 2004 -- according to the [Washington Post](#). At the start of this administration, the debt ceiling was \$5.95 trillion, and had been last raised in 1997. In May 2003 Congress raised the debt ceiling to its current level, and when they raise it again next month as expected, it will mark the second consecutive year the debt limit has needed to be amended.

The frequency with which Congress has been reaching their spending limit is no coincidence. Excessive tax cuts, which have not been offset, as well as increased spending and general fiscal mismanagement, have led to a deficit situation that is rapidly spinning out of control. As the chart below indicates, such actions by Congress and the administration over the past four years have caused the federal debt as a percentage of GDP to rise again, after it had consistently dropped during the period 1996 to 2000. Clearly new, responsible fiscal management policies are urgently needed to regain control of current record federal deficits and debt before further and deeper damage is done to our economy and future.



A Tale of Two Deficits -- Trade and Budget

In the past few days, the government released separately two numbers showing record deficits:

- The final fiscal year 2004 federal budget deficit of \$413 billion -- the highest dollar value on record
- A monthly trade gap in August rising to \$54 billion -- the [second highest on record](#).

Federal Budget Deficit

The final numbers show that the deficit has increased by \$38 billion over the previous year's \$375 billion. A [recent report from the Center for American Progress](#) documents the 2000-2004 period as having the largest deterioration in the deficit situation in the last 50 years, with the size of the swing from surplus to deficit in the amount of 6.1 percent of GDP (including the Social Security surplus).

Meanwhile, the government has reached its own statutory limit on the national debt and Treasury Secretary Snow is undertaking accounting tricks to prevent breaching it until after the elections (see [debt ceiling article](#) this issue).

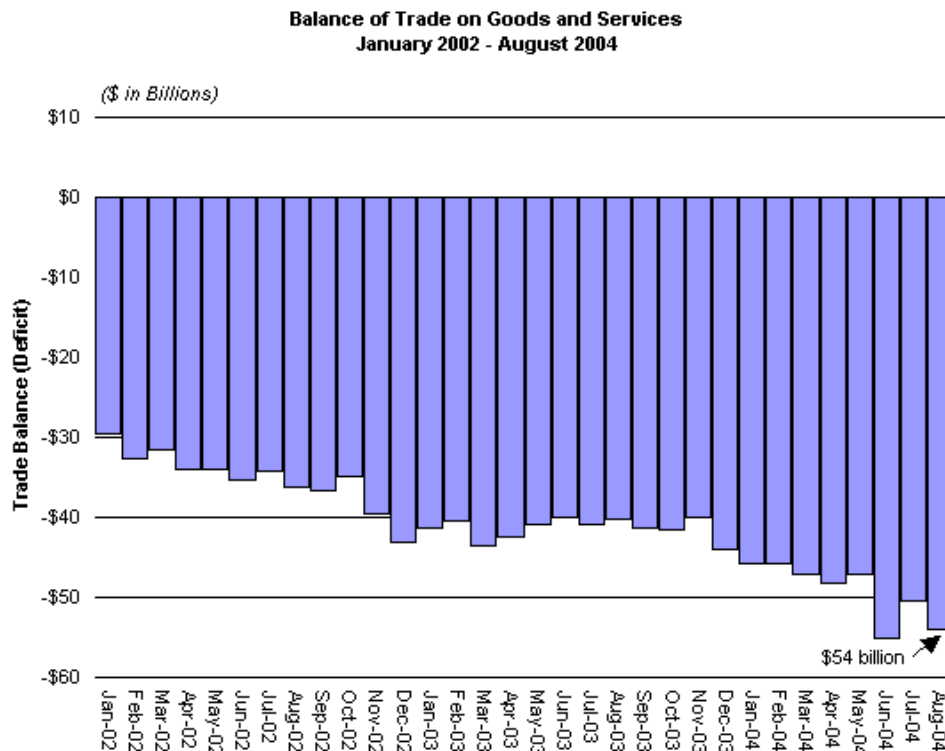
Trade Deficit

The trade deficit has continued to grow. The monthly trade deficit that stood at just \$10 billion in 1998 is more than five times that today. While a trade deficit may not be harmful in the short run, in the long run a large trade deficit carries greater risk of financial turmoil -- and the possibility of economic crisis.

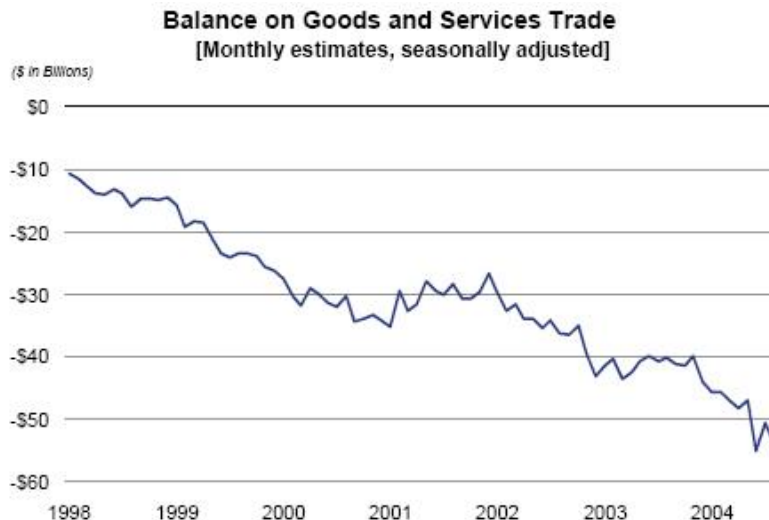
The relation between budget and trade deficits is very complex. For an overview see [Budget and Trade Deficits: Linked, Both Worrisome in the Long Run, but not Twins](#)

This recent speech by the Federal Reserve Governor highlighted this risk:

"In the long run, however, both deficits could become much more worrisome. ... At some point, continued large-scale trade deficits could trigger equilibrating, and possibly dislocating, changes in prices, interest rates, and exchange rates. Continued budget deficits will steadily detract from the growth of the U.S. capital stock and may also trigger dislocating changes."



Source data: [Bureau of Economic Analysis](#)



Senate Recesses, Completes Only 4 of 13 Spending Bills

After passing the Corporate Tax Bill on Columbus Day, the Senate approved with little debate measures to fund both the Military Construction and Homeland Security appropriations bills for FY 2005, which began Oct. 1. Together with the Defense and the District of Columbia appropriations bills Congress recently approved, these bring the total passed to only four of the thirteen bills needed to fund discretionary spending for FY 2005.

Thomas E. Mann of the Brookings Institution summarized this failure for the [Washington Post](#) saying, "This [congressional] session ranks among the least productive and most contentious in modern legislative history."

The \$10 billion Military Construction bill appropriated \$5.5 billion towards military construction, \$4 billion towards family housing, and roughly \$500 million towards other programs, including a Naval Security Investment Program and Chemical Demilitarization Construction. The bill was a \$687 million increase over the FY 2004 appropriation, and a \$450 million increase above President Bush's request.

The Homeland Security appropriations bill provides \$32 billion for the operations and activities of the Department of Homeland Security. This is a \$1.1 billion increase from FY 2004 levels, and almost \$500 million above the President's request. The bill's major expenses include \$9.8 billion appropriated towards border protection, and \$5.5 billion appropriated towards transportation security. The \$32 billion total excludes both the \$2 billion spent for the recovery from hurricanes Charley and Frances, as well as \$6.5 billion in pending supplemental funds that will go towards relief for hurricanes Ivan and Jeanne.

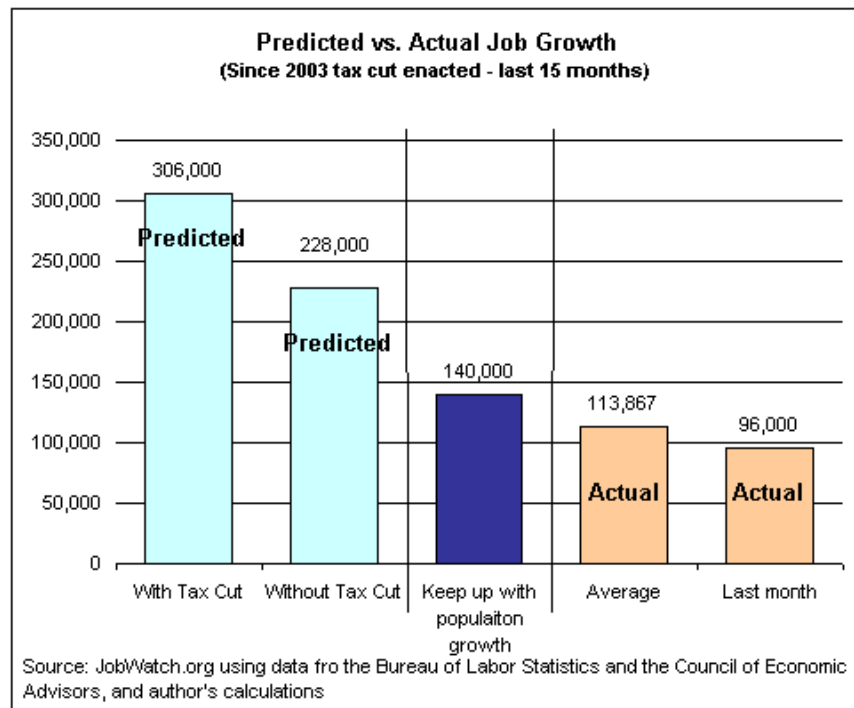
In lieu of completing its fiscal business, Congress passed a CR (continuing resolution) to fund all other programs at FY 2004 levels until the remaining nine bills can be addressed in the post-election lame duck session. Those will almost certainly be inserted into a massive omnibus spending bill, which, because it would contain the vital appropriations bills, will give members the opportunity to attach all sorts of measures to benefit their own constituents. Keep an eye out for excessive pork barrel spending when legislators reconvene.

Economy and Jobs Watch: Employment Report Again Shows Weakness

The U.S. employment situation remains weak as the [Bureau of Labor Statistics September report](#) showed an increase of just 96,000 jobs. That figure is far below the level needed to keep pace with overall population growth.

So is the monthly average of 114,000 new jobs created since the administration's 2003 tax cuts were enacted. This average also falls well short of the 306,000 new jobs the White House Council of Economic Advisors predicted would be created each month if those tax cuts took effect. (See graph below.)

The evidence clearly shows the administration's economic policies have not worked as advertised. We now have a long way to go to make-up for lost time and must replace current ineffective policies with ones that would create the strong labor market this nation needs and deserves.



Delaware Professor Sues Pentagon for Coffin Photos

A University of Delaware professor of communications is suing the Pentagon to make public the photos of returning soldiers' coffins to American soil.

The lawsuit challenges a 1991 ban on media coverage of fallen soldiers' coffins flown to Dover Air Force Base in Delaware before being returned to their hometowns around the country. Former network television correspondent Ralph Begleiter, together with the [National Security Archive](#), had filed requests under the Freedom of Information Act to obtain photos and moving recordings of all coffins passing through Dover since October 2001.

Earlier this year, Russ Kick, an Arizona resident, started a firestorm of controversy after he posted on his website [The Memory Hole](#) hundreds of such photos obtained from the Pentagon through a FOIA request. The photos ran on the front pages of major newspapers the next day and prompted a national discussion about what the public should know about the human cost of war.

The Pentagon claims the ban protects the privacy rights of the fallen soldiers and their families, although they have made exceptions to the ban in several instances. None of the photos released to Mr. Kick, which the Pentagon called a mistake, gave away the identities of the soldiers. Instead, they were pictures of coffins draped in the American flag, some inside the shimmering stark holds of military aircraft. The photographs demonstrate the care with which the military handles the remains of the fallen soldiers. For some, the pictures honor the price paid by those individuals. For others, they show the true cost of war and should be public. And for a few, the photos document a side of war they would rather keep hidden from the public.

Senate Chairman Refuses to Release Richard Clarke's Testimony

For almost four months Sen. Pat Roberts (R-KS), Chairman of the Senate Intelligence Committee, has refused to release declassified testimony related to the 9/11 investigation from former White House Counterterrorism Chief Richard Clarke. Given the critical nature of Clarke's public statements and the proximity of elections, political motivations for the repression are strongly suspected.

Clarke testified behind closed doors in June 2002 to the joint House-Senate inquiry into 9/11. Then last March Clarke testified publicly before the 9/11 Commission strongly criticizing the actions of President Bush and officials in his administration for not taking adequate steps to address terrorist risks.

Many Republican leaders claimed that Clarke's public testimony was inconsistent with the earlier classified statements. However, since the earlier testimony could not be released, the general public could neither confirm nor deny these charges. Clarke strongly denied the accusations of inconsistency, asserting that the earlier hearing simply never covered the certain material.

Ironically, Roberts was among several congressional leaders who had called for declassifying Clarke's testimony so it could be made public. However, since June 25 this year, when the National Security Council did declassify Clarke's testimony, Roberts has repeatedly refused to make it publicly available -- despite numerous requests by Sen. Jay Rockefeller (D-WV), the vice chairman of the Intelligence Committee.

Critical Habitat Proposed for Endangered Species Challenged Under Data Quality Act

The [Fish and Wildlife Service \(FWS\)](#) proposed designating 376,095 acres essential to the survival of the southwestern willow flycatcher. The southwestern willow flycatcher is an endangered bird whose habitat covers the southwestern portion of the United States. Information related to this endangered species was challenged under the Data Quality Act in 2003 and may have helped shape the habitat designation.

In March 2003, an Arizona rancher challenged guidance criteria that calculate the effect grazing has on the species. The Forest Service had used that criteria to produce an environmental assessment alternative to prohibiting the rancher's livestock from grazing in potential flycatcher habitats. For more information on the challenge see [OMB Watch's analysis](#).

Based on the [Federal Register](#) notice, the FWS puts little stock in the critical habitat designation. FWS stated, "In 30 years of implementing the ESA, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species." Apparently, only 36 percent of species listed as endangered have designated critical habitat. The majority of designations, including the willow flycatcher's, result from litigation.

The FWS has had to respond to several lawsuits about the willow flycatcher's habitat designation. While this most recent adjustment to the designations is in response to an environmental group's complaint, concerns emerge about the other influences the proposal might reflect.

Even though the designation plan proposes almost 400,000 acres of critical habitat there are significant portions excluded from the mandatory protections of the Endangered Species Act. FWS makes it clear only lands currently occupied by the southwestern willow flycatcher are being proposed as critical habitat. Considering the rancher's complaint focused on restrictions placed on potential habitat, the proposed rule's emphasis on inhabited areas could ease requirements enough to allow grazing.

Apparently FWS is more interested in clarifying the exemptions than the protections. For instance the proposed rule would exempt several military bases from critical habitat designation because of the benefits of unimpeded national security training outweighed the benefits of protecting this species of bird. Other proposed exemptions include 19,000 acres in Arizona and 10,000 acres in California.

Congress Passes Limited FOIA Exemption for Satellite Imagery

The House and Senate adopted a new Freedom of Information Act (FOIA) exemption without the overly broad language originally proposed by the Senate, which would have provided a blanket prohibition on disseminating any commercial satellite imagery or derived products. The exemption was part of the 2005 Defense Authorization Act passed Oct. 9.

Clarifications were made in the language during the House-Senate conference on the bill after public interest and access organizations pointed out concerns with the new exemption. The original Senate language properly stated that commercial data is prohibited from sale under the Land Remote Sensing Policy Act of 1992. However, it would have prohibited the release of "any imagery and other product that is derived from such data." That broad statement could have cover information usually provided to the public regarding disasters, international incidents, wars, and other news items. Not only would the information have been exempt from disclosure, it would have been prohibited from release even if government officials believed it should be released.

The [new adopted language](#) clarifies that only information that is protected "for reasons of national security" and is under license pursuant to the Land Remote Sensing Policy Act qualifies for exemption. This properly limits the exemption to data and products that are currently protected under law. The new language also clarifies that any of the exempted information cannot be withheld from Congress.

Related OMB Watch article: ["Senate Approves FOIA Exemption for Satellite Images"](#)

Justice Asks to Submit Secret Evidence on Transportation Rule

The Justice Department has requested permission to submit evidence to the court under seal in a case about a secret security rule. The case involves a secret transportation security rule that requires airline passengers to show identification in order to fly.

A private citizen, John Gilmore, challenged the requirement and sued the government claiming the rule infringes on citizens' right to travel freely. While airline security claimed that the requirement for ID existed they could not cite a specific rule. Initially, government officials claimed that they could not even confirm the existence of the security rule. Then after realizing that an obscure maritime security rule published in May 2004 mentioned the rule, the government acknowledged the rule's existence but has still refused to disclose its contents.

The Justice Department claims that the rule cannot be publicly discussed because it qualifies as Security Sensitive Information (SSI), which is a new category of information that allows the Transportation Security Administration (TSA) to withhold unclassified information from the public except on a need to know basis.

The rule apparently derives from a temporary secret security directive issued during the mid 1990s that instructed airlines to request photo identification from passengers. Soon after the 9/11 attacks the TSA issued a new order upgrading the

request to a requirement.

The 9th Circuit Court of Appeals ruled against the government's motion to file documents under seal. Officials have appealed the decision and the court is expected to make a decision soon.

OpenTheGovernment.org Targets Secrecy in Post Ad

[OpenThegovernment.org](#), a broad-based coalition of more than 30 groups dedicated to fighting government secrecy and strengthening open government, placed a quarter-page [ad in the Washington Post](#) Oct. 13. The primary message states, "Our Safety Depends on the Free Flow of Information ... Let's Turn the Tide on Secrecy." The coalition placed the ad as part of its campaign to raise awareness about the problems of unnecessary government secrecy, which undermines public health and security. [Learn more](#).

New Corporate Tax Bill Limits Charitable Deductions

While conferees rejected last minute efforts to attach provisions of both the [CARE Act](#) and the [Houses of Worship bill](#) to the [corporate tax bill](#), the legislation sent to the president does contain three provisions of particular interest to the nonprofit sector.

The [final bill](#):

- Limits charitable deductions for vehicle donations to the sale price obtained by the charity
- Limits the value that taxpayers can claim on the donation of a patent or intellectual property to a charity
- Requires increased reporting for non-cash charitable contributions such as property.

Vehicle Donations

Beginning Jan. 1, 2005, when a person donates a vehicle and claims the value is \$500 or more, the exact deduction will depend on how the charity plans to use the vehicle. If the nonprofit sells the vehicle, the donor will only be able to deduct the amount that the organization got from the sale, if the charity notifies the donor of the final amount. If the nonprofit uses the car for "significant" tax-approved charitable work, the donor can claim the fair market value of the donated vehicle. Nonprofits will be penalized for providing fraudulent acknowledgments to donors.

Sen. Charles Grassley (R-IA) calls the changes "commonsense reforms [that] will go a long way toward ending the abuses in car donations" documented by the [Government Accountability Office](#). The GAO found wide discrepancies between the values that some auto donors claim on their tax returns and the actual worth of the cars they give. A November 2003 GAO report notes that excessive tax valuations of donated vehicles cost the U.S. Treasury \$654 million in tax revenue in 2000.

In a [letter](#) sent to Treasury Secretary John Snow during consideration of the changes, representatives of two dozen charitable groups argued, "Under such a proposal, a taxpayer's actual deduction amount would be uncertain at the time of a contribution, and potential donors would not be able to compare the relative benefits obtained by donating their vehicles, trading them in to a car dealer, or selling the vehicles themselves. ... We believe this approach would greatly discourage and reduce future vehicle donations to charities and increase the cost of administering such programs, and we would respectfully ask that the Treasury join us in opposing any such proposal."

Lawmakers, however, believe that the current problems with vehicle donations necessitate the changes and that the new law will not be overly burdensome. The U.S. Treasury will develop rules implementing the new law in the coming months, and lawmakers and charities will be watching closely.

Contributions of Patents or Intellectual Property

In December 2003, the Internal Revenue Service (IRS) issued a [notice](#) that states the IRS "is aware some taxpayers, who transfer patents or other intellectual property to charitable organizations, are claiming charitable contribution deductions in excess of the amounts to which they are entitled under §170 of the Internal Revenue Code." Congress decided to act to remedy this problem.

HR 4520 provides that if a donor contributes a patent or other intellectual property to a charitable organization, the donor's initial charitable deduction is limited to the lesser of the donor's basis in the contributed property or the fair market value of the property. The donor is allowed to deduct additional amounts in subsequent years based on a percentage of the income received by the charity with respect to the contributed property. The charity must report income received or accrued with respect to the contributed property to the IRS. The donor must obtain written confirmation from the charity regarding any income from the donated property. It will be effective for contributions made after June 3, 2004.

Non-Cash Donations

Current law requires individual donors to obtain a qualified appraisal of the property being donated for deductions over \$5000. HR 4520 will extend this requirement to C corporations. It will be effective for contributions made after June 3, 2004. It also requires donors to attach the appraisal to their tax return if the contribution exceeds \$500,000.

Charities acknowledge that there are problems with the current system of monetary and in-kind donations, but many feel that the burden of policing tax breaks should not be on recipient organizations. There is also concern that the new rules will chill these types of contributions.

The charitable deduction provisions in the bill could be just the beginning of a series of tax changes affecting charities. The Finance Committee is currently considering proposals to curb what they call "a wide range of abuses" in the charitable arena, including "charities used as tax shelters for corporations and charitable board members steering business to their private firms."

Independent Sector Names Accountability Panel

Congress recessed without taking action on Senate Finance Committee staff proposals outlined in a [July discussion draft](#). However, the Finance Committee is pursuing the nonprofit accountability issues. It has asked Independent Sector (IS) to form a panel to recommend measures that would increase accountability and good governance in the sector. Independent Sector [recently announced its panel](#), comprised of 25 nonprofit and philanthropic leaders from both public charities and private foundations. Independent Sector's president, Diana Aviv, will serve as executive director, and Patricia Read, IS's senior vice president for public policy and government affairs, is the project's director.

The panel will establish two advisory groups, one of prominent community leaders, including those from other sectors. The second advisory group will include a range of academic and legal advisors. The Panel will also create five working groups to study and provide recommendations on issues involved in governance, transparency and financial accountability.

Specifically, the five working groups are:

- Governance
- Legal analysis
- Oversight (IRS, state issues, self-governance issues)
- Transparency
- Small organizations.

Independent Sector is currently raising money from community and private foundations, as well as public charities, to fund this endeavor. The funds, exclusively managed by IS, will be devoted entirely to the project.

FEC To File Response to BCRA Court Ruling

The Federal Election Commission (FEC) has told an appeals court it will file a statement noting which rules it will defend from a [lower court ruling](#) overturning regulations implementing the Bipartisan Campaign Reform Act of 2002 (BCRA) by Nov. 8. Rules that are not appealed will have to be reconsidered by the agency. In a recent meeting FEC Vice-Chair Ellen Weintraub indicated that its exemption for Internet communications may need to be reconsidered. The FEC must also decide whether to defend its exemptions to the electioneering communications rule for 501(c)(3) organizations and unpaid broadcasts.

Update on Church Electioneering

The corporate tax bill has been sent out of conference without provisions from the "Free Speech Restoration Act," which would have allowed churches to endorse candidates and fund partisan electioneering activities. However, that has not stopped a rash of churches from directly or indirectly endorsing candidates this election season.

Under the Internal Revenue Code, all organizations exempt under section 501(c)(3), including religious organizations, are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of, or in opposition to, any candidate for elective public office. Clergy, members of congregations, and others can endorse candidates on their own behalf, volunteer for campaigns, or even run for public office, so long as they do not use the resources of a 501(c)(3) organization.

However, there are no regulations that clearly define what activities are allowable and what are not. Consequently, some religious organizations have pushed the boundaries of the law, even directly endorsing candidates from the pulpit. Campaigns and candidates have also sought support from religious organizations, and this year has seen a [new push](#) in that direction.

Nonprofits are calling upon the Internal Revenue Service (IRS) to investigate violations. Americans United for Separation of Church and State filed [complaints](#) regarding churches such as the First Baptist Church of Springdale, AR, and Friendship Missionary Baptist Church of Miami, FL.

The current fight over the right to endorse candidates from the pulpit is not new. This year has seen complaints ranging from [charges against Jerry Falwell](#) for using his ministry to support Republicans to African-American churches endorsing Democrats.

Current laws allow unlimited 501(c)(3) time and money to address issues, including comment on public issues from the pulpit, in newsletters, etc.; engage in public education campaigns; publish pamphlets, research, newsletters and analysis; litigate; comment on proposed regulations; participate in agency and commission proceedings and nonpartisan voter education, registration and get out the vote activities.

Comments Needed on Alternative Guidelines to Prevent Terrorist Financing

A group of charitable and philanthropic organizations has released a draft "[Principles of International Charity](#)" that can be used to prevent diversion of charitable funds to terrorists. Both domestic and international nonprofits are being asked to comment on the draft, which is an alternative to the Dept. of Treasury's November 2002 guidelines. OMB Watch and other groups have called on Treasury to [withdraw their guidelines](#).

In April 2004 the Treasury Department [invited a group](#) of charitable sector organizations which had been critical of its "Voluntary Best Practice Guidelines" to engage in a dialog about revising them. In response, representatives of more than 25 organizations, including OMB Watch, and umbrella groups like the Council on Foundations and Grantmakers Without Borders, set up a working group independent of Treasury. Over the past several months, the working group drafted the "Principles of International Charity" as an alternative to the Treasury Guidelines.

The "Principles" briefly describes the history of U.S. nongovernmental organizations supporting responsible international charitable activities and lists eight fundamental principles of accountability that guide international work. A commentary section fleshes out the principles with specific issues and examples.

The working group will meet with representatives of the Treasury Dept. in the next few months to discuss using the "Principles" as the basis for revisions to Treasury's guidelines.

Comments on the "Principles" can be sent to Kay Guinane at OMB Watch [online](#) or by faxing to 202/234-5150. Please submit comments by Oct. 29, 2004. See the [full text](#) of the draft Principles.

Gaps in Homeland Security Benefit Bush Campaign Funders

The Bush administration has weakened, opposed, or failed to initiate proposals to address security gaps that leave chemical and nuclear plants, hazardous material carriers, shipping ports, and drinking water facilities vulnerable to terrorist attacks, according to a new report that links these failures to Bush campaign funding from the very industries that oppose needed regulation.

According to the new Public Citizen report [Homeland Unsecured: The Bush Administration's Hostility to Regulation and Ties to Industry Leave America Vulnerable](#), the Bush administration "has abdicated its responsibility to protect the American homeland from the risk of potentially catastrophic terrorist attacks upon chemical plants, nuclear reactors, hazardous materials transport, seaports and water systems."

"In many cases, the administration and its Republican allies in Congress have either opposed security reforms or obstinately refused to act even though ready solutions are obvious," the report maintains.

Five Critical Infrastructure Vulnerabilities

Chemical Plants

Terrorist attacks on any of the nation's 15,000 chemical plants could kill millions. The Army concluded in a 2001 study that an attack on a single plant could kill or injure 2.4 million people, and the Environmental Protection Agency has identified 123 plants that could, in the event of accident or attack, endanger one million people or more.

In fact, terrorists have already entertained these deadly possibilities, according to the report. Evidence from the trial of the 1993 World Trade Center bombers revealed that the terrorists had stolen cyanide from a chemical plant and planned to release it in the WTC ventilation system. The FBI learned that Mohammed Atta, ringleader of the 9/11 attacks, landed a plane in Tennessee in March 2001 and asked a local man what chemicals were contained in the storage tanks he had flown over. Those tanks, it turns out, held more than 250 tons of sulfur dioxide.

Despite the obvious threat, the Bush administration has not begun to secure chemical plant facilities and has in fact opposed measures to require security improvements:

- The administration joined forces with the chemical industry to pressure Congress to reject the Chemical Security Act (S.157), which would have phased out unsafe technologies and required chemical plants to use safer chemicals and technologies when available and feasible.
- The administration scrapped an EPA effort to use its Clean Air Act authority to increase security at chemical plants. The administration "totally overruled EPA's fledgling initiative by allocating responsibility for chemical security to the new Department of Homeland Security (DHS), even though DHS has no authority to enforce the Clean Air Act or to establish and enforce new plant security standards," the report added.
- DHS has subsequently failed to issue mandatory security

From the Report

[Homeland Unsecured: The Bush Administration's Hostility to Regulation and Ties to Industry Leave America Vulnerable:](#)

Eight-five percent of the nation's critical infrastructure is controlled by the private sector. "Homeland security and national preparedness therefore often begins with the private sector," the 9/11 Commission's report says. Security expert Stephen Flynn, director of the Hart-Rudman commission that concluded prior to 9/11 that America's greatest security challenge was the threat of a catastrophic terrorist attack, states flatly that "without standards, or even the threat of standards, the private sector will not secure itself."

Yet the administration has failed to use its executive powers or support legislation to mandate regulatory steps that can and should be taken without large taxpayer expenditures. In some cases, it has played a leading role in blocking critical measures.

This reflects the administration's hostility toward the reasonable regulation of industry, even where the safety and security of

regulations. Instead, it has promoted voluntary industry standards, despite its earlier admission in October 2002 that voluntary guidelines are insufficient.

Nuclear Power Plants

Although the phrases "dirty bomb" and "radiological device" began to achieve wide circulation after 9/11, the administration has not addressed the over 100 potential dirty bombs already in the United States: the 103 nuclear reactors in 65 power plants across the country. In fact, according to the 9/11 Commission staff, nuclear power plants were among the ten targets originally planned by al Qaeda for the terrorist attacks of Sept. 11, 2001.

The safety gaps in nuclear power facilities are frightening, as are the administration failures cited by the report:

- Security guards failed to protect nuclear power plants nearly half the time in mock terrorist attacks conducted from 1991 to 2001. The Nuclear Regulatory Commission has subsequently allowed the nuclear power plants' own lobby to control terrorism preparedness tests, and the lobby has in turn contracted the tests to the same company that provides, in most nuclear facilities, the very security forces that must be tested.
- The NRC proposed in March of this year to weaken, not strengthen, fire safety regulations for nuclear power plants.
- The Government Accountability Office identified three major security flaws that remained unaddressed one year later. Among the flaws: the NRC assesses power plant security plans in an inadequate paper review without on-site visits, and it has no plan to conduct follow-up reviews of plants which the commission has cited for violating security requirements.

Hazardous Materials

The report also concentrates on the dangers that crisscross the country every day on the highways and the rails: toxic chemicals and other hazardous materials (hazmats) that are routinely transported without post-9/11 security improvements, *even through major metropolitan areas*.

The numbers are staggering, as are their implications. Over a million carloads of hazardous material traverse the rails annually, and over 75,000 trucks transport hazardous materials every day on the nation's roadways. These dangerous materials regularly pass through major population centers, including the nation's capital. "Ninety-ton rail cars that regularly pass within four blocks of the U.S. Capitol building in Washington, DC, contain enough chlorine to kill 100,000 people within 30 minutes and could endanger 2.4 million people," the report adds.

The administration has squandered several opportunities for addressing the security gaps in these areas, according to the report, especially in the area of hazmat truck transportation. The administration has failed to conduct a comprehensive assessment of the dangers in this area and has instead weakened or delayed regulations to improve hazmat truck security. The administration issued a final rule that exempted hazmat carriers from providing drivers with written routes and conducting pre-trip inspections to ensure the integrity of the truck itself. Further, the administration has not mandated immediate background checks of hazmat drivers but, instead, delayed a proposal for fingerprint-based background checks until 2005.

Moreover, although Washington, DC obviously remains a prime target for terrorist attack, the administration recently informed Congress that it intends to allow the 8,500 hazmat rail cars that pass through Washington every year to continue to do so. The report notes that a Transportation Security Agency official told Congress that "efforts to reroute trains away from major cities would be 'quite limited.'"

Ports

Long before ABC News exposed post-9/11 weaknesses in port security by shipping a load of depleted uranium into the United States undetected, the lack of security in the country's 361 sea and river ports has been well known. The administration can verify the contents of only four to six percent of all containers, even three years after 9/11. Moreover, as revealed in a recent [letter](#) from Rep. Jim Turner (D-TX) to Homeland Security Secretary Tom Ridge, the administration has not satisfactorily implemented "key recommendations for correcting the identified deficiencies in inspections. In light of the fact that [a report by the DHS Inspector General] deals with the grave threat of a nuclear attack, and the Department has cited the interest of al-Qaeda in such an attack, the report requires immediate action by the Department."

The Public Citizen report identifies other administration failures that keep ports unsecured. Among other things, the administration has failed to push for the funding needed to secure ports, and its 2005 budget proposal actually would zero out a pilot program for testing the security of containers entering the country.

Americans is at grave risk. Within days of taking office, the Bush administration began setting up hurdles in the regulatory process and installing industry executives and their allies in the government. A particularly telling appointment was that of John Graham, a well-known industry-backed academic hostile to regulation, who was given the job of regulatory czar within the White House Office of Management and Budget. The administration has hired more than 100 industry lobbyists, lawyers or company executives to fill high-level government jobs during Bush's tenure in office.

While business lobbyists work within the administration to block regulatory initiatives and dismantle existing ones, industries that would be affected by new security measures have lobbied hard against such proposals -- and found much success. And, as this report shows, these same industries have provided strong financial support for the Bush presidential campaigns and the Republican Party.

The chemical, nuclear, hazardous materials transport, ports and shipping, and water utility industries have contributed \$19.9 million to Bush and the Republican National Committee since the 2000 election cycle. Thirty of Bush's top fundraisers — 10 so-called "Rangers" and 20 "Pioneers," who each raise at least \$200,000 and \$100,000, respectively — hail from those industries. In addition, these industries have spent more than \$201 million to lobby the administration and Congress since 2002. . . .

The Bush administration and many experts believe that terrorists will attempt to strike again at the United States. Success in thwarting such an attack may well depend on whether the government *requires and helps* the private sector to adopt strong defenses. Thus far, however, the administration has shunned mandatory protective regulation, legislation and supportive federal funding, professing instead its faith in "voluntary" efforts by industry. Blinded by its anti-regulation ideology and its allegiance to political contributors, the administration has been unwilling to use its executive powers or clout when a Congress led by [its] own party has refused to enact necessary legislation or provide essential funding. This is a tragic mistake that must be confronted if the United States is going to secure our highly vulnerable vital infrastructure against terrorism.

Water Systems

Water systems are important, obviously for drinking water and use in agriculture and the food industry, but water systems across the country also hold chemicals such as chlorine that are used to remove contaminants. Not only could water systems be threatened by contamination of the water itself, but there is also the deadly possibility that an attack on the stored chemicals would release toxic clouds into populated areas.

The administration is not adequately addressing the security of water systems, according to the report. The president himself has opposed increased federal funding for water infrastructure, and the administration has tried to cut funding for the revolving loan funds that states need to upgrade water systems. The administration appears to have concentrated its efforts instead on measures to force local governments to sell off public water systems to private companies.

Follow the Money

Aside from compiling and documenting the administration's failures to secure these five areas of critical infrastructure, the new report also makes the link between these failures and industry money flowing into Bush and Republican campaigns. The industries seeking to avoid security regulation -- chemical, nuclear, hazmat transport, ports and shipping, and water utility industries -- are major contributors to Bush and GOP campaign funds, number among the "Ranger" and "Pioneer" elite bundlers of campaign contributions, and have spent millions during the last two years on vigorous and successful lobbying.

Recent Studies Show Lack of Enforcement of Environmental Laws

Enforcement of federal environmental law has declined significantly during the Bush years, according to several recent studies, even as the 30-year trend of environmental improvement has begun to reverse course.

Declining Enforcement

A recent [report](#) by the Environmental Integrity Project (EIP) indicates that the Bush Department of Justice has filed 75 percent fewer lawsuits against polluters than the previous administration. Whereas Clinton launched 152 lawsuits against polluters in the first three years of his administration, Bush has filed only 36. The decline is even starker when the focus shifts to power plants: the Bush administration has pursued only three lawsuits against energy companies, in a 90 percent drop from the 28 filed by the Clinton administration.

Though EPA did issue large penalties to petroleum refineries this year, settlements would have been larger and reached more quickly if the Justice Department had pursued litigation, according to the EIP report. Even in high profile cases, such as the [recently reported](#) evidence that industry attempted to cover up data showing high levels of lead in the nation's drinking water, the Justice Department has turned a blind eye. A study by the [Transactional Records Access Clearinghouse](#) (TRAC), which has compiled all manner of government data, including environmental enforcement data, also found that criminal prosecution of environmental violations has declined across the board during the Bush administration.

The [study](#) examined alleged criminal violations of more than 1,400 federal environmental statutes and found that "federal prosecutors have filed environmental charges against substantially fewer defendants during the administration of President Bush than during either of President Clinton's two terms." During the last four years, environmental prosecutions have dropped 23 percent from the second Clinton term.

Another TRAC [analysis](#) found that criminal prosecution of environmental violations varied wildly across the nation. According to the report, "[T]he U.S. Attorneys and their assistants throughout the country declined to prosecute well over half (922) of [the 1,600 polluting companies and individuals referred, from the beginning of FY 2001 to the first quarter of FY 2004] -- or 58 percent. On each of these, however, investigative agencies had referred the matter to federal prosecutors believing the evidence indicated they were criminal violators." U.S. Attorneys often cited "weak evidence, lack of criminal intent, and agency request or office policy" in deciding not to prosecute.

TRAC also [found](#) that the lack of enforcement varied by statute. For instance, the most frequently cited law in pollution cases during both the Clinton and Bush years was 33 U.S.C. § 1319, a water pollution statute. While charges citing this law increased by 54 percent from Clinton's first to second term, filings dropped by 28 percent during the Bush years. Filings under the hazardous waste management law likewise dropped 39 percent under Bush, and filings under the Air Pollution Prevention and Control Act dropped by 41 percent.

"A few environmental areas showed different trends. Prosecutions under Atomic Energy statutes were down across all three presidential administrations. In contrast, prosecutions for Title 49 offenses on the transport of hazardous wastes rose. Numbers of cases in these categories were, however, modest," the report added.

A fourth TRAC [report](#) released Monday tracks enforcement of wildlife protection laws under the Bush administration. As it turns out, "enforcement of the federal laws designed to protect migratory birds, endangered species, marine mammals and other kinds of wild life has slumped during the Bush Administration, according to authoritative Justice Department data." Filings of felony charges for violations of wildlife protection laws fell by 20 percent during the Bush years and filings of misdemeanors fell by 40 percent. The trend in legal filings varied depending on the statute. The wildlife protection law that is most often used in criminal prosecutions, a law protecting wildlife against the taking, killing, or possessing of migratory birds, has witnessed the greatest decline in filings; filings under that law dropped by 47 percent under the Bush administration.

Though criminal prosecution is certainly not the only way to decrease pollution and environmental hazards, the results of

these studies contradict public statements by EPA Mark Leavitt citing the vigor with which EPA pursues those who disobey the law. In January of this year, during his inaugural speech, Mike Leavitt told EPA employees, "[A]nyone who evades the law should feel the full weight of the law until compliance is met."

Declining Environmental Improvement

Though the air and water quality have improved over the last 30 years, the lack of enforcement of environmental laws coincides with a slackening and reversal of the rate of improvement during the Bush administration. A recent [Knight-Ridder study](#) looked at 14 indicators of pollution and found that nine had worsened while three zigzagged and only two improved:

- Superfund cleanups of toxic waste fell 52 percent.
- Fish-consumption warnings for rivers doubled.
- Fish-consumption advisories for lakes increased 39 percent.
- The number of beach closings rose 26 percent.
- Civil citations issued to polluters fell 57 percent.
- Criminal pollution prosecutions dropped 17 percent.
- Asthma attacks increased 6 percent.
- Global temperatures and unhealthy air days increased slightly.

Knight-Ridder also found "record-low additions to national parks, wilderness, wildlife refuges and the endangered species list. The Bush administration also approved 74 percent more permits to drill for oil and gas on public lands in its first three years than were granted in the previous three years."

At the same time, more Americans are living in cities with unhealthy air. "The number of times that air in U.S. cities was declared unhealthy increased from 1,535 in 2000 to 1,656 in 2001 and 2,035 in 2002. And the EPA's inspector general issued a report last month saying that national air-emission reductions don't accurately reflect the stagnating pollution levels in metropolitan areas," according to the report.

Partisan Patterns Detected in Civil Rights, Environment Decisions

Federal judges appointed by Republican administrations -- and the Bush administration in particular -- are expressing, through decisions and dissents, a marked bias against civil rights, environmental, and other public interest litigation, according to two new reports.

A recent report and new update by the People for the American Way Foundation contrasts the rhetoric and reality of President Bush's claim he would appoint to the federal bench only judges who would interpret the law rather than "make it." According to the PFAWF analysis of split decisions by the federal appeals courts, Bush appointees regularly express hostility to civil rights and other public interest litigation as well as to Congress's power to legislate broadly in the public interest.

Through their votes and opinions, primarily dissenting opinions, Bush appointees have advocated changing the law in ways that make it more difficult for aggrieved parties to vindicate their rights and for Congress to legislate in areas such as environmental protection. Bush appointees to the circuit courts have sought to do the following:

- Question the constitutionality of the Endangered Species Act;
- Overturn National Labor Relations Board rulings against anti-union discrimination and unfair labor practices;
- Allow the Bush administration to refuse to disclose its secret contacts with industry in Vice President Cheney's energy task force;
- Make it more difficult to prevent possibly irreparable harm to the environment pending the resolution of legal issues in environmental litigation;
- Toss the legal claims of a woman downstream from a sewage treatment plant that frequently overflowed and discharged raw sewage into a nearby creek, thus contaminating the downstream property owner's private well drinking water; and
- Reject challenges to a panel under the Federal Advisory Committee Act and the Federal Land Policy and Management Act.

The Environmental Law Institute focused in its new report on the National Environmental Policy Act, which is the backbone of environmental law. According to the ELI report, the percentage success rate for environmental petitioners in NEPA cases before the federal appeals courts declines significantly when moving from three-judge panels with Democratic-appointed judges to panels with Republican-appointed judges:

	3 Dem. Appointees	2 Dem. + 1 Rep.	2 Rep. + 1 Dem.	3 Rep. Appointees
Success Rate Percentage	75%	51.5%	9.7%	11.1%

The ELI concludes, "Simply put, the fact that an environmental plaintiff's chances of winning a NEPA case before the circuit courts varies by a factor of nearly six-to-one depending on the party of the judges' nominating president runs counter to our notion of impartial justice."

The differences become even starker when shifting to the success rates of environmental plaintiffs pursuing NEPA claims before district court judges. The success rates decline sharply when moving from Democratic-appointed district court judges to judges appointed by any Republican president to, finally, district court judges appointed by this administration:

	Dem. Appointees	Rep. Appointees.	Bush II Appointees
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Success Rate Percentage	59%	28%	17%
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The ELI report concludes that NEPA itself is under attack:

Although it is difficult to predict how the trends revealed in this report will play out, the current direction is troubling. More environmental plaintiffs today feel it necessary to bring legal action under NEPA than at any time over the last 25 years, and recent judicial appointees may be more likely to reject environmentalists' claims in their NEPA decision-making. Judicial polarization over NEPA is acute, and may be growing. The fact that party affiliations of judges appear to influence NEPA cases is cause for concern about the objectivity of adjudications under the Act. The issue merits further research and discussion in both the judiciary and other branches to protect the integrity and effectiveness of our nation's bedrock environmental statute.

Ultimately, neither the PFAWF nor ELI analysis yields particularly surprising conclusions; the partisan affiliation of an administration always is reflected broadly in the actual decisions of the judges appointed by a given White House, even if there are often individual appointees who are exceptions to the rule. Given the lifetime tenure of judicial appointments, however, these analyses do underscore the long-term effects of any administration on civil rights, environmental, labor, consumer, and other public interest policies beyond the term of the administration itself. For those who follow regulatory policy in particular, these reports serve as ugly reminders that all three branches of government are equally relevant to protections of the public health, safety, civil rights, and environment.

Administration Continues to Suppress, Weaken Science

In three separate cases in the past month, agency scientists have claimed that government agency officials have suppressed or softened their scientific findings, allowing policies harmful to public health and the environment to be carried out despite scientific evidence of their potential harm.

Antidepressants and Vioxx

As reported in the last issue of the [Watcher](#), Food and Drug Administration scientist Andrew Mosholder told a congressional committee that FDA higher-ups asked him to rewrite conclusions to a study he conducted suggesting that antidepressants led to an increased risk of suicidality in children. Now another agency scientist has come forward and claimed that FDA officials also asked him to soften his conclusions on the harmful effects of Vioxx, a COX-2 inhibitor that was recently pulled by maker Merck after studies revealed an increased risk of cardiovascular disorder associated with the drug. According to the [Washington Post](#),

[Sen. Charles] Grassley [(R-IA)] said in a news release that David Graham, associate science director of the Office of Drug Safety, told him that agency officials "ostracized" him and subjected him to "veiled threats" as he tried to have his study cleared for publication. When a top FDA official suggested "watering down" the report, Graham responded in an e-mail: "I've gone about as far as I can without compromising my deeply-held conclusions about this safety question."

Though studies dating as far back as 2000 pointed to increased risk of cardiovascular disease and stroke for users of Vioxx, FDA has stood quietly on the sidelines while more than 27,000 users of the drug experienced serious side effects.

Endangered Salmon

Federal biologists at the National Oceanic and Atmospheric Administration told the [Sacramento Bee](#) that NOAA officials forced them to rewrite conclusions that a new California water plan to shift millions of gallons of water to Southern California from rivers in the north would harm the endangered salmon population. Senate Democrats have called for an investigation.

RegWatch Roundup

If you haven't been reading [RegWatch](#), our new regulatory policy weblog, here's a look at what you've been missing.

Regulatory Policy Failures

So what's the federal government doing to protect us from **bio-terrorism**?

- [Weakening needed rules](#), after meeting with the food industry!
- Promoting a Bioshield program that is [inadequate to the task](#)!

But surely our **nuclear facilities** are being secured against terrorism threats. Right?

- Well, the Nuclear Regulatory Commission [maintains](#) that it is not necessary to safeguard nuclear facilities from attacks by planes, even though a leaked study reveals that nuclear facilities may be more vulnerable to such attacks than the NRC or the nuclear industry would like the public to believe.
- And the NRC [allowed the nuclear power industry's own lobby](#) to conduct terrorism preparedness tests!

Well, then, what's the government doing to protect the **environment**?

- [Reducing the amount of habitat](#) needed to protect a threatened species, the bull trout -- first by deleting all benefits from the cost-benefit analysis, then by concluding that the benefits don't outweigh the costs of protecting all the proposed habitat!
- [Letting industry write its own rules](#) in the regulations that are supposed to protect us from mercury, a powerful neurotoxin that is particularly harmful to children and pregnant women!
- [Moving to weaken rules intended to prevent overfishing](#) even though a new report reveals that overfishing is imperiling the oceans!
- [Remaining idle](#) as species after species of amphibians becomes extinct and *male* fish in the Potomac River have begun to produce *eggs*!
- [Reversing](#) a 30-year trend of environmental improvements!

And it doesn't stop there. There have been several high-profile retrospective reviews of the **Bush administration regulatory record**:

- Documenting how the administration leans in favor of [oil and gas interests](#) when making land use decisions,
- Revealing that agencies are "[slow-rolling](#)" [needed regulatory protections](#) in order to avoid alienating business interests during the election season, and
- [Comparing](#) this administration's track record of putting foxes in the henhouse against the Clinton record of hiring academics and public interest experts in regulatory agencies, in particular [the Environmental Protection Agency](#).

What's the missing link between the power industry and the Bush administration's "**energy policy**" -- that is, its habit of distorting environmental and other regulatory policies to favor polluting power companies? [Campaign contributions](#)!

The Heritage Foundation, of all places, has actually [quantified the Bush administration's rollback](#) of regulatory protections.

Unsound Science

The NIH [finally addressed](#) unseemly conflicts of interest, while the FDA seemed to move heaven and earth to suppress scientific conclusions unfavorable to the pharmaceutical industry in the cases of [Vioxx](#) and [youth using antidepressants](#).

Consumer Issues

Consumer groups have joined together for a [new agenda](#) for consumer rights.

The new agenda is a timely initiative. *Consumer Reports* released [two reports](#) on the failures of federal government agencies to ensure that unsafe products are removed from the market.

Provocative Ideas

Scholars continue to develop interesting ideas with relevance for regulatory policy.

- If current cost-benefit analysis policies had been applied in the 1970s to major environmental decisions -- like removing lead from gasoline -- that we now know have been unequivocally beneficial to us all, cost-benefit [would have led us in the wrong direction](#).
- Some authors of now discredited anti-regulatory screeds have replied to critics of their flawed arguments, but a law professor analyzing those responses reveals that [the replies only raise yet more questions](#) of the dubious basis for the claim that regulation is irrational.
- What is biopharming? Imagine field after field of plants that have been genetically engineered as mini-factories. They should not enter the food chain, but a professor reveals that we are at great risk of contamination of the food supply because the government is [failing to regulate](#).
- Is the current practice of recess appointments [unconstitutional](#)? A legal scholar argues that the Recess Appointments Clause permits appointments only for vacancies that arise *during* a recess -- and only *intersession* recesses, not the shorter *intrasession* breaks.
- The Defense Department's many contracts -- and lax supervision of them -- have been [linked](#) to the Abu Ghraib prison torture scandal.

