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Commentary: Bailout Package Signed into Law; Economic Stimulus Still Needed

With the enactment of a \$700 billion Wall Street bailout, or "financial rescue" package, prospects for success in stabilizing the nation's financial markets remain uncertain. Certain, however, is that deteriorating economic conditions that continue to put Americans on the unemployment rolls will remain unaffected by the implementation of the Troubled Asset Relief Program (TARP). And despite over \$100 billion in tax cuts included in the package, Congress failed to leverage even modest economic stimulus from the resulting jump in the federal budget deficit. If and when Congress returns to work for a lame-duck session after the elections, it should consider what steps to take next to improve the economy and aid those who have fallen victim to it.

The Emergency Economic Stabilization Act of 2008 ([H.R. 1424](#)) was signed into law on Oct. 3, hours after the House overwhelmingly approved the bill by a [263-171](#) vote. The [act](#) grants the

Treasury Secretary \$700 billion to purchase troubled mortgage-related financial assets, but it also extends dozens of miscellaneous energy, individual, and business tax cuts and a one-year "patch" for the Alternative Minimum Tax. No one can predict [the ultimate cost](#) of rescuing Wall Street from itself, [nor is there consensus](#) among economists that the bailout will even cure what ails the financial system. Yet, for all the five hundred pages of the new law, the plan was not engineered to abate the march of the economy toward recession.

On the day that President Bush signed the bill into law, the Labor Department [reported](#) that the economy lost 159,000 jobs in September, adding to a nine-month streak of payroll contraction resulting in a 6.1 percent unemployment rate, the highest since 2003. However, TARP was not intended to aid an economy that may already be in recession; it was designed to prevent a catastrophic collapse of the financial markets that would deepen and prolong the looming recession. Not a single cent of the \$700 billion program is to be directed toward stimulating the economy or helping families cope with rising unemployment.

Congress did not adequately address the needs of millions of Americans before it adjourned Oct. 3, while the implementation of the tax cuts in the act will actually diminish the possibility for future economic stimulus and assistance. The attendant deficit (and national debt) hike caused by the more than \$107 billion in unpaid-for tax cuts will ultimately increase political pressure on Congress to curb spending. And because of a [\\$600 billion, bipartisan commitment](#) to continue growing defense and national security spending, programs for supporting families, infrastructure investment and repair, education, and health care will be moved to the front of the line for the chopping block. Some of the tax cuts included in the package will help low- and middle-income families, like the expansion of the child tax credit, but without fiscally responsible offsets to these and other revenue losers, record-setting deficits will ultimately undermine their goals.

This is not to say, however, that all deficit spending is not worth the price of borrowing. When the economy begins a down cycle, millions of workers lose their jobs while even more are forced to take part-time work that falls short of meeting demands like rent, groceries, gas, and utilities. Extending unemployment insurance, expanding the Food Stamp and other nutrition programs, boosting home energy assistance, and increasing Medicaid spending not only provide assistance to those who need it most but also carry an added economic benefit: These targeted spending programs boost the economy by stimulating aggregate demand. The kinds of tax cuts passed by Congress, like extending a dollar-per-gallon credit for biodiesel makers, decreasing excise taxes on rum, or cutting \$100 million in taxes for "certain motorsports racing track facilities," do little to aid those affected by the economic downturn while inducing deficit increases that make investments in families more politically difficult to enact.

TARP, continued tax cuts that aren't focused, and unwise spending are a prescription for future failure. The next administration will face a Congress that expects more tax cuts and more favors for districts back home. But the cycle of further untargeted tax cuts simply cannot continue. Focused federal spending, such as rebuilding infrastructure instead of going to war, can help provide the stimulus to help middle-income America and kick start the economy. The problem is not deficit spending; the problem is unwise deficit spending — and continued

untargeted tax cuts are part of the problem.

TARP may or may not prevent the cataclysmic breakdown of the nation's financial markets as it was designed to do. However competent and successful the execution of the bailout (details in the law on implementation of TARP are sparse), the rescue legislation still does not deal with the wild ride of building up national and international debt and continuing to leverage it through so many derivatives that even Wall Street professionals no longer understand. The latest hot-button topic is the estimated \$60 trillion in credit-default swaps built on about \$6 trillion in bonds. (Credit-default swaps are a type of unregulated insurance that has become a market of runaway speculation.)

Perhaps more importantly, addressing Wall Street, no matter how important for stabilizing credit flow, will not improve the lot for the millions of unemployed workers and those on the edge. By widening the budget deficit with the passage of billions of dollars of unnecessary tax cuts, Congress has worked against itself to pass another economic stimulus package. Regardless of a heightened barrier to passage, Congress should begin crafting a set of timely, targeted, and temporary spending measures to cushion the blows of the economy against families and mitigate the duration and depth of the coming recession.

Congress Enacts Flurry of Legislation at Year's End

Congress tentatively adjourned for the year on Oct. 3 after passing a flurry of legislation to address the financial meltdown, extend expiring tax cuts, provide disaster relief funding, and fund the federal government through March 6, 2009.

On the final day of the fiscal year (Sept. 30), President Bush [signed](#) the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009, a massive spending bill ensuring continued funding for the federal government through the spring of 2009.

The president's signature follows last-minute congressional action to finish the FY 2009 appropriations process. On Sept. 24, the House put together a \$600.6 billion package of three appropriations bills (Defense, Homeland Security, and Military Construction-VA), along with a continuing resolution (CR) that will cover all the other sections of the government until March 6, 2009. The House passed the package by a vote of [370-58](#). The Senate passed the House proposal on Sept. 27 by a vote of [78-12](#).

The year-end appropriations package was assembled and passed in less than a week, with little transparency or time to review specific provisions, earmarks, and funding levels. The bill level-funds most government programs outside of the three individual security bills that were included and a few select programs and priorities in need of more immediate funding. These include the Low Income Home Energy Assistance Program (LIHEAP), which received a \$5.1 billion increase. This is more than double the \$2.5 billion appropriated for LIHEAP in FY 2008 and finally brings the program up to its authorized funding level. There is also \$22.9 billion in emergency funding for disaster relief from recent hurricanes on the Gulf Coast and flooding in

the Midwest, and \$7.5 billion to support a \$25 billion loan to the U.S. auto industry.

After finishing with appropriations legislation for the year, Congress turned immediately to attempts to pass a rescue package for the troubled financial sector. On Sept. 29, the House shockingly voted down — by a [205-228](#) margin — a [modified version](#) of the widely criticized administration bailout plan. This was an unexpected setback for leaders of both parties in the House, who were confident the rescue proposal would pass.

The Senate stepped in two days later and passed ([74-25](#)) a large legislative package that included the rescue legislation originally rejected by the House, a Senate-approved bill containing over \$100 billion in tax cuts, and a temporary increase in the Federal Deposit Insurance Corporation's (FDIC) deposit limit (from \$100,000 to \$250,000). This increase will last through the end of 2009, and premium increases will be funded by the government. The additional proposals were added to the House legislation to help entice more House Republicans to vote for the rescue bill. This strategy was successful, as the House passed the Senate's proposal on Oct. 3 by a vote of [263-171](#).

The tax language in the Senate bill was the same as a tax package ([H.R. 6049](#)) passed earlier this year by the Senate that contains a patch to the Alternative Minimum Tax (AMT) and an extension of dozens of expiring tax cuts. These tax cuts would provide incentives for renewable energy production, including solar and wind power, extend the deduction for state and local taxes, qualified tuition expenses, and teaching supplies. The \$17 billion in energy production tax cuts would be fully offset by ending tax cuts for oil and gas production. The legislation would also lower the income threshold to qualify for the child tax credit from \$12,050 to \$8,500 for the 2008 tax year, which would [benefit 13 million children](#).

The passage of this bill ends a [bitter stand-off](#) between the House and Senate over how to pay for the cost of these tax cuts. Adherence to pay-as-you-go (PAYGO) rules by moderate House Democrats had thrown into doubt whether any of the tax cuts would be enacted this year. In the end, the Senate proposal was approved after being attached to higher-priority legislation House members felt they could not oppose.

While the [cost of the tax provisions](#) of this bill is straightforward, the total cost of the rescue/tax cuts legislation is difficult to determine. [According to the Congressional Budget Office \(CBO\)](#), the ten-year cost of the tax cuts would total \$107.1 billion. The CBO, however, indicates that it is "impossible at this point to provide a meaningful estimate of the ultimate impact on the federal budget from enacting this [rescue] legislation," but would be "substantially smaller than \$700 billion." Nor can CBO estimate the cost of increasing FDIC limits on insured deposits.

Budgetary Impact of Senate Financial Rescue Bill, HR 1424, Approved Oct. 1, 2008 <i>(billions of dollars)</i>	
Provision	Cost
<i>Division A</i>	
FDIC limit increase	"difficult to predict"
\$700 Wall Street Bailout	"not currently possible to quantify," more than 0, but "substantially smaller than \$700 billion"
<i>Division B</i>	
Renewable energy tax cuts	16.9
Offsets	-17.0
<i>Division C</i>	
AMT patch	64.1
Extension of miscellaneous tax cuts	59.3
Disaster relief	8.8
Offsets	-25.2
Total package cost	At least \$107.1 billion, possibly more than \$800 billion
<i>Source: Letter to Honorable Christopher J. Dodd, Congressional Budget Office; Joint Committee on Taxation: Estimated Budget Effects of the Tax Provisions Contained in an Amendment in the Nature of a Substitute to H.R. 1424</i>	

The recent legislative blitz in Congress has resulted in major tax and spending decisions in a very short amount of time. In less than a two-week period, Congress approved legislation that could potentially cost taxpayers approximately \$1.85 trillion. While some of that spending has received significant review and oversight, much of it has not.

Foreign Foods Evade FDA's Watch

The ability of the U.S. Food and Drug Administration (FDA) to monitor and police imported foods is once again under scrutiny. A public health crisis originally thought to be limited to China crept into the U.S. when FDA announced recalls of products tainted by melamine, a dangerous chemical.

The FDA has announced [recalls](#) for beverage products imported from China and contaminated with melamine. On Sept. 26, FDA announced the recall of Mr. Brown instant coffee and milk tea products. On Oct. 6, FDA recalled Blue Cat Flavor Drink. California has recalled Chinese-made candies as well. No illnesses have been reported, according to FDA.

FDA [announced Oct. 3](#) a new standard for melamine. Rather than banning the nonfood item completely, FDA released an interim assessment that determines melamine to be safe in food at levels of 2.5 parts per million or lower.

The current melamine contamination controversy began in September when contaminated infant formula was linked to thousands of illnesses and at least four infant deaths in China. The Chinese dairies producing the contaminated formula cut their milk with melamine to create the appearance of increased nutrient content. Unlike water, melamine can fool devices that test milk for purity. However, melamine is toxic and more commonly used in industrial manufacturing to produce glue and concrete, among other items.

FDA's new interim assessment also says that no amount of melamine in baby formula is safe. According to FDA, the agency is "currently unable to establish any level of melamine and melamine-related compounds in infant formula that does not raise public health concerns." FDA adds, "There is too much uncertainty to set a level in infant formula..." In September, FDA advised consumers not to purchase infant formula manufactured in China from Internet sites or other sources.

The recalls have reignited concern over FDA's ability to adequately police the rising tide of imported food reaching American consumers. From 2002 to 2007, food imports increased 84 percent, according to the Government Accountability Office (GAO).

[GAO released a report](#) Sept. 26 analyzing FDA's practices for ensuring the safety of the nation's fresh produce supply. The report comes on the heels of this summer's [Salmonella Saintpaul outbreak](#), which sickened 1,442 people in 43 states, Washington D.C., and Canada. After a three-month investigation focusing mainly on tomatoes, FDA traced the contamination to serrano and jalapeño peppers imported from Mexico.

GAO found that FDA is unable to examine the vast majority of fresh produce imports. FDA samples less than one quarter of one percent of imported produce shipments, according to GAO. "[W]hile FDA has allocated additional resources to import oversight, it has not been able to inspect a larger percentage of imported fresh produce items," the report says.

FDA conducts fewer than 20,000 inspections of all imported foods, GAO found. Batches of imported foods, which FDA calls "entry lines," numbered 9.6 million in 2007. Based on those figures, FDA inspects less than 0.21 percent of all import entry lines.

Controversy has surrounded FDA for the past few years. In addition to numerous imported food recalls, the agency's drug safety program has been under scrutiny. FDA's approval of Vioxx, which killed thousands of people suffering heart disease, piqued public awareness of the flaws in FDA's drug approval process. Later controversies over pharmaceuticals, such as the diabetes drug Avandia, fanned the flames.

FDA officials decided to begin a public relations campaign to improve the agency's image. However, even that was not immune from controversy. [A Washington Post investigation](#),

published Oct. 2, found the agency sidestepped contracting requirements when it awarded a \$300,000 contract to a public relations firm.

FDA awarded the business to Alaska Newspapers Inc., which does not have to compete for federal contracts because the company is considered an Alaska Native corporation. The government exempts Alaska Native corporations from competition requirements in order to promote native-owned business.

However, the *Post* investigation shows that FDA's intent all along was to subcontract the public relations work to Qorvis Communications, a major Washington-based consulting firm. Internal e-mails uncovered by the *Post* show FDA knowingly circumvented contracting rules in order to award the contract to Qorvis without opening up the work to competition. Although the FDA suspended the contract, Congress has started an investigation.

Bill Improving Inspectors General Independence Passes Congress

Congress recently passed legislation that reforms the functions of federal agencies' inspectors general to increase their independence and insulate them from political interference. The passage comes after more than a year of negotiations in Congress and between the legislative and executive branches. President Bush is expected sign the bill.

The Inspector General Act of 1978 created independent units, called inspectors general (IGs), within most federal agencies to conduct audits and investigations of agency activities to ensure that agencies are as effective, efficient, and accountable as possible. The law requires the IGs to report to their respective agency heads, who are to transmit the reports to the appropriate congressional oversight committees. Amendments to the act over the years have expanded the number of inspectors general, placing them in 65 federal agencies and departments.

The Inspector General Reform Act of 2008, [H.R. 928](#), passed the Senate Sept. 24; it passed the House Sept. 27 by a 414-0 vote. Passage of the legislation is in response to controversies about the roles and operations of IGs and claims of political interference in their activities. IGs have become at times a political football, having been injected into controversies about the effectiveness of the response to Hurricane Katrina, the firings of several U.S Attorneys, and political interference in the work of scientists at the Department of the Interior and at the National Aeronautics and Space Administration (NASA).

The bill was introduced in the House by Rep. Jim Cooper☼ (D-TN) in February 2007 and approved by the House Committee on Oversight and Government Reform in September of that year. A companion bill was introduced in the Senate by Sen. Claire McCaskill☼ (D-MO) in June 2007.

In October 2007, President Bush issued a [statement of administration policy](#) threatening to veto the bill over provisions that would have infringed upon the president's ability to supervise

and remove IGs. The president also objected to provisions that would have required IGs to submit budget requests directly to Congress, bypassing the normal budget process, which requires presidential review and approval. Bush also objected to codifying an independent council of IGs, even though such a council exists by executive order. Several provisions addressing the president's objections were removed and altered in the final bill to gain White House support.

Among the changes included in H.R. 928 are:

- A requirement that the president or agency heads inform both houses of Congress of the reasons for removing or transferring IGs at least 30 days prior to the removal or transfer. Under current law, the president is required to communicate the reasons to Congress but is not required to do so prior to an IG's removal or transfer.
- Salary increases for IGs to pay them as senior level executive employees, but with a prohibition on receiving bonuses or cash awards
- The creation within the executive branch of a Council of the Inspectors General on Integrity and Efficiency to "(A) address integrity, economy, and effectiveness issues that transcend individual Government agencies; and (B) increase the professionalism and effectiveness of personnel by developing policies, standards, and approaches to aid in the establishment of a well-trained and highly skilled workforce in the offices of the Inspectors General."
- Provisions to allow IGs to obtain their own legal counsel. The bill allows IGs to seek counsel from other IG offices, have their own counsel reporting directly to them, or obtain counsel from the Council of the Inspectors General
- The establishment of separate budget lines in the requests of the IGs, agency heads, and the president for the operations, training, and support of the IGs so that Congress can clearly track the resources a president intends to provide IGs
- A provision requiring agencies to have a direct link on their homepages to the office of their IG so that IG reports and materials are easily accessible and so that the public can directly report instances of waste, fraud, and abuse

The bill was sent to President Bush Oct. 3, and he is expected to sign the legislation.

EPA Doesn't Want to Know about Factory Farm Waste

In a Sept. 24 congressional hearing, the U.S. Environmental Protection Agency (EPA) defended its proposal to exempt factory farms from reporting on airborne and chemical emissions from animal waste, even though the agency has no reliable information on public health impacts of the pollution. Without the reports, communities would not know when potentially dangerous animal waste releases occur. Emergency responders would also have less information when responding to citizens' reports of noxious odors.

In December 2007, EPA proposed a [rule](#) that would exempt factory farms known as concentrated animal feeding operations (CAFOs) from reporting on emissions of hazardous

chemicals from animal waste. The number of CAFOs more than tripled from 1982 to 2002, according to a Government Accountability Office (GAO) [report](#), from 3,600 to almost 12,000. These operations generate enormous amounts of waste in a relatively small area; in some cases, a single farm can produce more than one-and-a-half times the sanitary waste produced by the 1.5 million residents of Philadelphia, according to the report.

The GAO report identified several problems with EPA's approach to CAFO animal waste emissions, most notably the lack of reliable information on the facilities. Currently, no federal agency collects data on the number, size, and location of CAFOs. The GAO report had to extrapolate other U.S. Department of Agriculture data to identify the growth trend. EPA also has very little information about the pollution emitted from CAFOs and the resultant public and environmental health implications. Despite the dearth of information, EPA proposed exempting CAFOs from reporting animal waste emissions.

EPA began a study of CAFO air pollution in 2007 with the intention of using the results to help develop protocols for determining compliance with applicable federal laws. However, this voluntary study is designed and funded by the agribusiness industry, and GAO researchers and other scientists have identified numerous flaws in the study that would threaten the accuracy and reliability of the data it produced. Without good data, it is unlikely that EPA could develop appropriate air emission protocols for CAFOs. With the two-year industry study only half completed, EPA decided to proceed with its exemption proposal without the resulting data — information that could be flawed and unusable, in any event.

EPA's main justification for the proposed rule is that it is unlikely that federal emergency responders would respond to a report of a release of hazardous chemicals if they knew it was originating from a farm. The nature of such releases provides little opportunity for responders to do anything about the emissions, thus discouraging any response if there are no remedial or protective actions they can take.

Despite EPA's assertions, many emergency responders still oppose the proposed rule. In [public comments submitted in March](#), a national association of state, local, and federal emergency responders labeled the proposed exemption "offensive" because it denies valuable information needed when responders deal with emergency calls from the public. The association also questions the legality of the proposed rule on several grounds.

During a [hearing](#) of the House Committee on Energy and Commerce's Subcommittee on Environment and Hazardous Materials, several members of Congress criticized the logic of EPA's decision, referring to it as "a backwards way of looking at [emergency responses to CAFO emissions]" and "Alice in Wonderland thinking."

In [testimony](#) to the House panel, Susan Bodine, the assistant administrator for EPA's Office of Solid Waste and Emergency Response, defended the agency's action. EPA has no record of initiating an emergency response to reports of animal emissions from CAFOs. This lack of previous emergency response convinced EPA to seek to exempt CAFOs from reporting the releases. However, the EPA does not receive reports of emissions from animal waste that are

submitted to state and local authorities or to other federal agencies, so EPA would not have complete information on the extent of emergency responses to this type of pollution. Bodine acknowledged the agency had received comments from emergency responders both for and against the proposed exemption.

EPA is still reviewing feedback submitted during the public comment period that ended March 27 and will draft a response to the comments. The final rule has not yet been submitted to the Office of Management and Budget (OMB).

The proposed rule affects reporting requirements under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Emergency Planning and Community Right-to-Know Act (EPCRA). These laws require polluters to report when releases of hazardous chemicals pass a certain amount over a 24-hour period. Proper authorities — local, state, or federal, depending on the situation — decide whether emergency responders should take action.

The manure from large feed lots has been shown to pose serious threats to environmental and public health. Of 68 scientific studies reviewed by GAO, 27 found a direct or indirect link between emissions from manure to specific health or environmental impacts. Thirty-four studies focused on measuring the amount of air and water pollution from animal feeding operations. Only seven of the 68 studies found no linkage between pollution from animal wastes and human or environmental health. Threats from improperly handled manure include water pollution from excess nutrients resulting in fish kills, contaminated drinking water, and emissions of hydrogen sulfide, ammonia, and particulate matter.

EPA Reopens Libraries

After two years, numerous protests by the public, a formal grievance from a government employee union, a critical governmental [report](#), and congressional intervention, the U.S. Environmental Protection Agency (EPA) has reopened agency libraries it closed as a purported cost-saving [measure](#). The libraries generally are smaller and open fewer hours than before, are now controlled by a political appointee, and may have lost materials in the interim, but they are open to the [public](#).

Beginning in 2004, the agency dismantled a significant portion of its library network in response to anticipated budget cuts. Ultimately, six libraries were closed, and four others had their hours reduced. Parts of the collections from the closed libraries were scattered across the network or converted into digital formats, though many records were simply thrown away. Outcry among public interest groups, public employees, librarians, scientists, and others prompted Congress to halt the closings and force EPA to reconsider its network plan.

In December 2007, Congress ordered the libraries reopened and appropriated \$1 million for that purpose. The reopened libraries are in Chicago, Dallas, Kansas City, and the EPA Headquarters Repository and the Chemical Library in Washington, DC. The libraries, staffed

by professional librarians, will provide services to the public and EPA staff via phone and e-mail, and they will be open for a minimum of 24 hours over four days per week on a walk-in basis or by appointment.

In addition to the library reopenings, EPA [pledged in a Memorandum of Agreement](#) (MOA) with the American Federation of Government Employees (AFGE) to digitize more library holdings to improve online access. The agency's [initial digitization report](#) noted that the process is on hold, with almost half of the estimated publications yet to be digitized. EPA claims to be evaluating the digitization process in order to reconcile "some difference of opinion on some of the technical aspects of the project."

As part of EPA's effort to resolve the difference of opinion on digitization, the agency plans to convene a panel of [National Library Network](#) stakeholders for their input on the process. The stakeholders will include advisors from the Federal Library and Information Center Committee (FLICC) of the Library of Congress, professional library associations, the scientific community, academia, and the public. No time frame for this process or for restarting the digitization process was mentioned in the agency's report. The MOA negotiated with the employees' union requires EPA to report on the digitization process every three months but sets no specific performance benchmarks.

The EPA status report noted enhancements made to the database that will eventually hold the digitized publications, located in the [National Environmental Publications Internet Site](#) (NEPIS). However, these [improvements](#) were completed in May, before the union and the agency had signed the MOA.

In a [July 21 letter](#) to members of Congress, AFGE called on members to address specific questions about the EPA's plan. The union expressed concern about the amount of resources dedicated to the libraries, including the amount of physical space and shelving; the absence of public involvement regarding the libraries; and an accounting of the funds appropriated for the reopening of the libraries. Additional concerns about the libraries remain, including their control by a political appointee in the EPA's Office of Environmental Information.

Department of Justice Finalizes Enhancements of FBI Powers

Attorney General Michael Mukasey recently finalized changes to Federal Bureau of Investigation (FBI) rules that increase the agency's ability to gather information on citizens without having prior suspicion of wrongdoing. The [new rules](#) cover the FBI's powers over criminal, national security, and foreign intelligence surveillance and have been criticized by civil liberties advocates and privacy groups.

The FBI withheld drafts of the new rules, which will go into effect Dec.1, from congressional inquiry. As reported in the previous *Watcher*, several senators, including Sen. Patrick Leahy (D-VT), said that the Department of Justice (DOJ) refused to provide copies of the draft guidelines to the Senate Judiciary Committee, and the agency continued such evasive behavior

at a hearing on [Sept. 17](#). The stated reason for the new rules was to consolidate several older rules that the FBI argued were outmoded for a post-9/11 environment.

Mukasey and FBI Director Robert Mueller released a joint public [announcement](#) Oct. 3 describing the new guidelines. They stated, "Previously, several existing sets of guidelines applied to the FBI's activities, with one set applying to ordinary criminal law enforcement activities; one set applying to national security efforts; another applying to foreign intelligence collection; and additional sets applying to other activities." Mukasey noted that some text of the new rule will remain unavailable to the public, but he took the position that transparency of the FBI's guidelines had improved. "The vast majority of the new rules will be available to the public, in contrast to the classification of substantial portions of the previous guidelines."

Leahy responded in a [statement](#) that "the attorney general is once again giving the FBI broad new powers to conduct surveillance and use other intrusive investigative techniques on Americans without requiring any indication of wrongdoing or any approval even from FBI supervisors."

In his Sept. 29 [memorandum](#) to agency heads, Mukasey wrote that the new rules would replace six existing guidelines, including one governing how the FBI monitors civil demonstrations, which has been in place since 1976.

The new rules govern the FBI activities in the following areas:

- General authorities to conduct investigations inside the U.S.
- The scope and methods allowed for investigations and intelligence gathering
- Providing assistance to other agencies, including other intelligence agencies, state, local and tribal offices, as well as foreign agencies
- Analyzing intelligence to identify and understand trends, causes, and potential indicators of criminal activity and other threats
- Retaining and sharing of information

The most controversial aspect of the new guidelines is the redefinition of the FBI activity called "assessment" as a method of investigation. Assessments allow agents to proactively initiate investigations without a court order and without factual evidence that a crime has been committed or planned. The guidelines explain that assessment investigations can include collecting information from online services, both nonprofit and commercial, such as social networking websites. However, assessments may also involve "observation or surveillance not requiring a court order" and use of "human sources" or informants.

The guidelines also permit otherwise illegal activity by agents and resources as part of intelligence gathering so long as the activity is approved by the Attorney General or Special Agent in Charge. The guidelines note that some illegal activities cannot be authorized, including the use of violence when not defending oneself, as well as unlawful investigative techniques such as illegal electronic surveillance. It is notable that the guidelines describe the

activity as "illegal electronic surveillance" and not "warrantless electronic surveillance."

Finally, as Mukasey noted in his statement, there are aspects of the new rules that are not made public. One section authorizes the use of classified investigative techniques without disclosing the type of activities that could be included or any detail on restrictions on the use of such methods. In fact, the concern of disclosure is so great that the guidelines caution on use of the methods because "inappropriate use of classified investigative technologies may risk the compromise of such technologies." The new rules also make several references to classified directives that provide additional information on searches, determining a person's U.S. status, and certain predicated investigations.

Critics argue that these new rules allow for looser foreign intelligence gathering standards to now apply to the way the FBI collects domestic information. Anthony Romero, Executive Director of the American Civil Liberties Union, [said](#), "The guidelines will all but obliterate accountability, because agents will have the power to begin pre-investigations with near complete autonomy.... What is needed is more oversight, not less." Mukasey's memorandum categorized the differences in standards applicable to national security activities versus criminal law enforcement activities as "arbitrary."

Telecom Surveillance to Receive Get-Out-of-Jail-Free Card

The Department of Justice (DOJ) is seeking retroactive immunity for the telecommunications companies that cooperated with the National Security Agency's (NSA) warrantless surveillance program, utilizing power granted in the FISA Amendments Act of 2008.

On Sept. 19, the DOJ filed a [motion](#) to dismiss *Hepting v. AT&T* and more than 40 other [lawsuits](#) against telecommunications companies that provided data to the NSA. This motion was enabled by the FISA Amendments Act of 2008 ([H.R. 6304](#)). These cases were initially pursued by the Electronic Frontier Foundation (EFF), which has [called](#) the NSA program "dragnet surveillance."

The FISA Amendments Act states that cases can not be maintained if the Attorney General certifies that the defendant's actions were authorized by the president. Mukasey issued a [blanket certification](#) the same day he filed the motion to dismiss. The letter does not specify which telecommunications companies assisted the government because, according to Mukasey, releasing such information "would cause exceptional harm to the national security of the United States." Nor does the public certification specify which one of five provisions of the amended FISA renders the companies exempt from litigation.

Mukasey asserted that eavesdropping was narrowly targeted solely to al Qaeda affiliates and not a wider dragnet. Mark Klein, a former AT&T engineer turned whistleblower, disputed this in a [2006 statement](#) about equipment he helped the NSA install that intercepted all of AT&T's Internet and phone traffic, conducting what he called "vacuum-cleaner surveillance." Klein

served as a plaintiff's witness for the telecommunications lawsuits.

NSA has not been alone in eavesdropping. The FBI has been criticized for improperly gathering telephone records in terrorism cases. In April, EFF obtained documents through the Freedom of Information Act (FOIA) that indicated the FBI was collecting Americans' phone and Internet usage data. Moreover, the *Washington Post* [reported](#) that an FBI request for expanded authority on what types of information the agency could collect is currently under review by the Federal Communications Commission.

Pastors Challenge Church Electioneering Ban

On Sept. 28, 33 pastors around the nation participated in Pulpit Freedom Sunday, an initiative designed to challenge a 1954 amendment to the Internal Revenue Code (IRC) that prohibits religious organizations and charities from supporting or opposing candidates for political office. The Alliance Defense Fund (ADF) released a [list](#) of the pastors who participated in hopes that the Internal Revenue Service (IRS) will investigate the churches. The action generated controversy, with Americans United for Separation of Church and State (AU) filing complaints against seven of the participating congregations.

In May 2008, ADF, a conservative legal alliance, announced Pulpit Freedom Sunday to encourage pastors to intentionally violate federal tax law by endorsing a political candidate from the pulpit. Organizations that are tax-exempt under section 501(c)(3) of the IRC, which include religious organizations, can lose their tax-exempt status if they engage in prohibited partisan electioneering. ADF is hoping to challenge the ban on pulpit electioneering in federal court and is providing legal assistance to participating congregations.

Three former high-level IRS officials, including Marcus Owens, an attorney with Caplin & Drysdale, and a former IRS Exempt Organizations director, filed an ethics complaint against ADF with the IRS, asserting that ADF's actions surrounding Pulpit Freedom Sunday violate Circular 230, which governs attorney practice before the IRS. The complaint also asks the IRS to investigate ADF's tax-exempt status due to the group's role in organizing Pulpit Freedom Sunday.

BNP (subscription) [reported](#) that on Sept. 17, Michael Chessman, director of the IRS Office of Professional Responsibility, sent a letter acknowledging the complaint and saying the IRS has agreed to "review this information carefully and give it all due consideration." Sen. Charles Grassley (R-IA), the ranking member of the Senate Finance Committee, told Iowa reporters prior to Pulpit Freedom Sunday, "A minister ought to be able to speak politically just like anybody else can. The only thing that I would say, he can't use the resources of a church or a nonprofit organization for political purposes."

ADF believes that the initiative protects religious organizations' speech rights. According to an ADF [press release](#), the organization will fight any attempt the IRS makes "to remove a church's tax-exempt status because a pastor exercised his constitutional right to engage in religious

speech from the pulpit. The goal is to have the Johnson Amendment [the 1954 amendment to the IRC that prohibits religious organizations from engaging in partisan electioneering] declared unconstitutional."

But there is no consensus in the religious community on this issue. Rabbi Jack Moline, chairman of the Interfaith Alliance board, told the [Washington Post](#) that "a sanctuary should not be a place of political agitation on behalf of a candidate. On behalf of issues, yes. Of candidates, no." Also, two Ohio pastors, the Rev. Eric Williams and the Rev. Robert Molsberry, asked clergy to preach about the benefit of the separation of church and state on Sept. 21. The Ohio pastors led a group of 55 religious leaders who filed a complaint with the IRS asking the agency to force ADF to stop encouraging pastors to violate federal tax law on Pulpit Freedom Sunday.

AU filed IRS [complaints](#) against six congregations the day after their pastors endorsed candidates from the pulpit. Five of the six pastors in question openly endorsed Sen. John McCain☀ (R-AZ). The sixth pastor did not mention McCain, but he did criticize Sen. Barack Obama☀ (D-IL), stating, "According to my Bible and in my opinion, there is no way in the world a Christian can vote for Barack Hussein Obama. Mr. Obama is not standing up for anything that is tradition in America." AU later filed a [complaint](#) against a seventh church in which the pastor told congregants that Christians should vote for McCain.

Many organizations believe that it is especially important to investigate Pulpit Freedom Sunday to ensure that the IRS does not create the perception that the agency only initiates investigations against activities and speech that it strongly disagrees with. An [Alliance for Justice statement](#) on the matter noted that "while the necessity of this tax law prohibition is often up for debate, the equal enforcement of the law is not." In addition, a new [OMB Watch commentary](#) notes that the IRS investigated All Saints Episcopal Church of Pasadena, CA, although there was no endorsement or opposition to a candidate in that case. The agency concluded, "The IRS found that a 2004 All Saints' anti-war sermon violated the prohibition on intervention in elections...Inaction by the IRS would also encourage others to willfully violate the IRS' prohibition."

Recent surveys also indicate that the American public supports the ban against partisan electioneering. According to an [article](#) by the Pew Forum on Religion and Public Life, "While a strong majority of Americans support religion's role in public life, a solid majority also expresses opposition to churches coming out in favor of particular political candidates."

Efforts to rescind the electioneering ban have also been criticized because they would allow religious organizations to engage in partisan politics at taxpayers' expense. Critics believe allowing churches to engage in partisan political activity would also create a disparity between religious and non-religious nonprofit organizations by giving religious groups greater speech rights. Groups in support of the efforts believe that the ban inhibits religious organizations' ability to speak about the moral and social issues of the day, even though the prohibition only applies to partisan support or opposition of a candidate, not genuine issue advocacy.

Treasury Promotes Private Philanthropy through USAID

Should U.S. charities and foundations be required to turn over funds to the United States Agency for International Development (USAID) in order to support humanitarian aid and development in areas where designated terrorist groups are operating? The Department of the Treasury (Treasury) is promoting a partnership between USAID and American Charities for Palestine (ACP) as a model for providing assistance and complying with counterterrorism laws. Treasury recently indicated such coordination may become a requirement. This approach has the potential to undermine the independence of grantmakers and nonprofits and to fundamentally alter their relationships with grantees and local communities. It is based on an expansive interpretation of counterterrorism laws that seeks to prohibit vaguely defined "abuse and exploitation" of charities by terrorists.

In a Sept. 25 [speech](#) at Treasury's annual Iftar dinner (an evening meal for breaking the daily fast during the Islamic month of Ramadan), Deputy Treasury Secretary Robert M. Kimmit told attendees the new project between USAID and ACP is an example of "alternative distribution mechanisms" that can get aid into areas where designated terrorist groups are operating. Kimmit said ACP "raises funds from the American charitable sector and donor communities and *transfers these funds to USAID* in order to finance specific projects...." (emphasis added) He characterized the project as "protecting the integrity of giving."

The USAID-ACP project was also promoted by Treasury Assistant Secretary for Terrorist Financing Patrick O'Brien at a meeting with Muslim charities on Aug. 15. In his introductory [remarks](#), O'Brien said:

"[T]his type of partnership allows individual U.S. donors to tap into the government resources and distribution networks, thereby leveraging counterterrorism mechanisms only available to the government. It is our hope that this type of collaboration will take root and serve as a model for other areas of concern as well as encompass other funding streams including that of the international community."

Few details of the project have been made public. On Aug. 1, USAID and ACP [signed a Memorandum of Understanding \(MOU\)](#) establishing the partnership to channel charitable donations from U.S. individuals and entities to the West Bank and Gaza Strip. The [USAID press release](#) on the project is consistent with Kimmit's indication that the funds will be controlled by USAID, saying it "seeks to offer a secure and efficient means of transferring charitable donations from individuals and entities in the U.S. *to USAID-managed programs* for the Palestinians." (emphasis added) According to founder Dr. Ziad Asali, ACP is a 501(c)(3) organization formed specifically for the joint project with USAID by the [American Task Force on Palestine \(ATFP\)](#). Although a link to the MOU was originally posted on the ATFP website, OMB Watch staff were not able to view it, and it has since been taken down.

O'Brien called the project a "safe and effective way for individuals to contribute" without violating U.S. laws that bar any interaction with designated terrorist organizations, even if they control areas where aid is needed and all funds are used for charitable purposes. O'Brien makes the false assumption that independent aid distribution mechanisms operated through foundations and U.S. charities are not as "safe" or "effective" as those provided by the government. The government method for screening out interaction with terrorist organizations is likely to be based on USAID's pilot Partner Vetting System (PVS), which would require grantees to provide U.S. intelligence services with personal information on their leaders and employees as well as those of their grantees and partners. PVS has been [strongly criticized by the U.S. nonprofit sector](#). The "alternative delivery mechanism" could have the practical effect of extending this requirement to private philanthropy and programs with no federal funding.

In a Sept. 22 conference call between the Treasury Guidelines Working Group (TGWG) — a group of foundations and charities concerned about the Treasury counterterrorism guidelines covering philanthropy — and officials from Treasury's Office of Terrorism and Financial Intelligence, Treasury's Chip Poncy indicated that the USAID-ACP partnership may be expanded. Call participants expressed concern that the USAID-ACP pilot may lead to a requirement that donors and grantmakers go through such an entity in global hot spots. Poncy responded that it is not clear where this project is going, and this is a potentially necessary way of getting aid into certain areas because of the threat of "terrorist abuse."

Treasury's references to preventing terrorist "exploitation and abuse" of charities have been increasing since nonprofits have challenged the agency to show evidence of earlier claims that charities are a significant source of terrorist financing. That evidence has not been forthcoming. However, Poncy told the TGWG that Executive Order 13224 extends Treasury's regulatory authority through language referring to those "associated with or otherwise working on behalf of" terrorist organizations, and the issue is "more complicated than direct support." This is a shift from the first few years after 9/11 when Treasury's statements were focused on diversion of funds to terrorism. This changed when Treasury published the Annex to the latest version of the [Anti-Terrorist Financing Guidelines](#) in September 2006, but the agency has never defined "exploitation" or "abuse."

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