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Defunding ACORN: Necessary and Proper, and Certainly Constitutional

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Barring the Association of Community Organizations for Reform Now (ACORN) from receiving federal funds through the Defund ACORN Act is perfectly constitutional. It certainly is not a bill of attainder, as some recent reports have claimed.[1] The House of Representatives voted on September 17, 2009, to specifically prohibit ACORN from receiving federal grants, funds, or contracts, along with any other organizations that have been:

> indicted for a violation under any Federal or State law governing the financing of a campaign for election for public office or any law governing the administration of an election for public office, including a law relating to voter registration…that had its State corporate charter terminated due to its failure to comply with Federal or State lobbying disclosure requirements…that has filed a fraudulent form with any Federal or State regulatory agency.[2]

Any organization that employs, contracts with, or retains any individuals that have "been indicted for a violation under Federal or State law relating to an election for Federal or State office" or have such an individual acting on the organization's behalf or with its express or apparent authority is also affected by this ban on receipt of federal funds.[3] This is clearly a prohibition on receiving appropriated funds from Congress or any other federal agency.

The CRS's Flawed Legal Analysis. The Congressional Research Service (CRS) has issued a report mistakenly concluding that a "court may have a sufficient basis to overcome the presumption of constitutionality, and find that [the Defund ACORN Act] violates the prohibition against bills of attainder."[4] This conclusion is clearly wrong for a number of reasons; indeed, it should be noted that even the CRS seems to concede its argument is weak at best.

Definition of a Bill of Attainder. Article I, § 9, cl. 3 of the Constitution states that "No bill of attainder or ex post facto Law shall be passed" by Congress. This prohibition also applies to state governments.[5] The Framers considered this prohibition so important that these "are the only two individual liberties that the original Constitution protects from both federal and state intrusion."[6] James Madison said that bills of attainder "are contrary to the first principles of the social compact, and to every principle of sound legislation."[7] But accordingly, what constitutes a bill of attainder is rather narrow.

The bill of attainder clause has never been read to prevent Congress from defunding an organization or a corporation whose employees engage in criminal conduct, and it has rarely been invoked by the modern Supreme Court. Indeed, the Court has "not invalidated legislation on bill-of-attainder grounds since 1965."[8] The CRS report correctly cites to the

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holding in *U.S. v. Brown* in which the Supreme Court defined a bill of attainder as a "law that legislatively determines guilt and inflicts punishment upon an identifiable *individual* without provision of the protections of a judicial trial."[9]

Even with regard to laws that single out individuals, the Supreme Court has distinguished criminal penalties from other congressional regulations. For example, in overturning a law that provided criminal penalties for any individual who was a Communist who held union office, the court made it clear that Congress did have the authority to ban Communists from holding union office, which is a much more severe sanction than simply being ineligible for federal grants.[10] This is particularly true given that the Defund ACORN Act in no way prevents affected organizations from continuing to raise as much money as possible in private donations.

The Two-Prong Test. The CRS report also correctly points out that the courts look to two major criteria to determine if "legislation is a bill of attainder:

1. Whether specific *individuals* are affected by the statute (specificity prong), and
2. Whether the legislation inflicts a punishment on those *individuals* (punishment prong)."[11]

However, the CRS report incorrectly applies these criteria, even if the same analysis applies to organizations Congress no longer wants to fund.

In assessing the first point, the CRS report places a great deal of emphasis on the fact that Section 602(c) of the Act applies the funds prohibition to all of ACORN's affiliates, characterizing this as "joint and several liability," and questions applying such a prohibition based on the "hypothetical" possible behavior of just one employee.[12] However, there is nothing unusual about corporate entities suffering legal consequences because of the behavior of individual employees, whether they work for the parent company or an affiliate. This is a common occurrence, particularly in the civil context: State and federal law enforcement agencies routinely sue corporations on the theory of vicarious liability, and state governments routinely pull the operating license of a corporation if an individual employee neglects to properly comply with state requirements to maintain such a license. In some cases, such vicarious liability may seem unfair, [13] but it is per-

1. This claim was made by Rep. Jerry Nadler (D-NY). *Nadler: ACORN ban unconstitutional*, POLITICO, September 17, 2009, *available at* http://www.politico.com/blogs/glennthrush/0909/Nadler_ACORN_ban_unconstitutional.html.
2. Defund ACORN Act, Sec. 602(b) (amendment to Student Aid and Fiscal Responsibility Act of 2009, H.R. 3221).
3. *Id.* at Sec. 602(c).
4. CONGRESSIONAL RESEARCH SERVICE, No. 7-5700, THE PROPOSED 'DEFUND ACORN ACT:' IS IT A 'BILL OF ATTAINDER?' (Sept. 22, 2009) [hereinafter CRS REPORT].
5. U.S. CONST. art. I, § 10, cl. 1.
6. THE HERITAGE GUIDE TO THE CONSTITUTION 154 (David F. Forte & Matthew Spalding eds., 2005). *See also* "Can Congress Punish People? Why the Constitution Prohibits Bills of Attainder," Heritage Foundation *WebMemo* No. 2356, March 23, 2009, *available at* http://www.heritage.org/Research/LegalIssues/wm2356.cfm.
7. THE FEDERALIST No. 44.
8. *Supra*, note 6 at 155. *See also*, United States v. Brown, 381 U.S. 437 (1965).
9. CRS REPORT at 1–2 (citing *Brown* at 468) (emphasis added).
10. 381 U.S. at 449–450.
11. CRS REPORT at 2 (emphasis added). It should be noted that although the Act specifically defines ACORN as a "covered organization," ACORN would meet the general definition even if were not specifically named. ACORN has had dozens of employees indicted for voter registration fraud in numerous states, meeting the general criteria in Sec. 602(c)(3) of the Act.
12. CRS REPORT at 5, 10.
13. Despite many scholars' increasing reservations about vicarious criminal liability for a corporation based on the acts of one employee, the courts have upheld its constitutionality. *See generally,* New York Central & Hudson River R.R. v. United States, 212 U.S. 481 (1909); John Hasnas, "Rethinking Vicarious Criminal Liability: Corporate Culpability for White-Collar Crime," *WebMemo* No. 1195, Aug. 15, 2006, *available at* http://www.heritage.org/Research/LegalIssues/wm1195.cfm.

fectly constitutional to debar an entire company from receiving government contracts or grants because of one or more employee wrongdoers.

The CRS report also wrongly second-guesses the rationale for Congress acting to approve this Act, saying that "it would be difficult to establish why ACORN and its affiliates are deserving of differential treatment." First, the courts have never required even rough consistency or proportionality in congressional funding or defunding decisions. How many appropriations acts would survive such an activist test with the courts stating, "We think the designated university is not especially deserving of the petunia study center"? Even if some rough proportionality were required of congressional funding cutoffs, CRS ignores the recent news reports on undercover videos documenting the acts of ACORN employees in encouraging and engaging in possible conspiracies in numerous offices to suborn mortgage fraud, bank fraud, tax fraud, and human trafficking in underage girls for prostitution. It is completely rational—and not legally punitive—for the government to decide that it does not want to do business with an organization so fraught with potential malfeasance.

The CRS also ignores the comprehensive report issued by Representative Darrell Issa (R–CA), Ranking Member of the Committee on Oversight and Government Reform. This report found that "structurally and operationally, ACORN hides behind a paper wall of nonprofit corporate protections to conceal a criminal conspiracy on the part of its directors, to launder federal money." It intentionally blurs "the legal distinctions between 361 tax-exempt and non-exempt entities [in order to divert] taxpayer and tax-exempt monies into partisan political activities."[14]

Senator Charles E. Grassley (R–IA) also issued a report on ACORN concluding that "[d]ollars raised for charitable [purposes] appear to be used for impermissible lobbying and political activity."[15] ACORN has received more than $53 million in federal funds since 1994 and is eligible for $8.5 billion in available stimulus funds.[16] Congressional concern over an entity and its subsidiaries that receive taxpayer funds engaging in numerous possible violations of state and federal law is more than enough justification to meet any test applied by a court trying to determine the reasonableness and rational basis for such legislation. Indeed, one former ACORN board member, Marcel Reid, recently called upon the U.S. Department of Justice to conduct a nation-wide RICO investigation based on these and similar facts.[17]

The CRS report then analyzes the Act to determine whether it meets the "punishment" prong of a bill of attainder. As it says, the Supreme Court has identified three types of punishment that meet the criteria:

1. where the burden is such as has traditionally been found to be punitive;
2. where the type and severity of burdens imposed cannot reasonably be said to further non-punitive legislative purposes; and
3. where the legislative record evince a congressional intent to punish.[18]

Misapplying Lovett. The CRS report begins by conceding that there is no evidence evincing congressional intent to punish.[19] The CRS report properly concludes that there are no court decisions *whatsoever* holding that the denial of federal funds to an organization like ACORN "is the "type of 'punishment' traditionally engaged in by legislatures as a

14. STAFF OF H. COMM. ON OVERSIGHT AND GOVERNMENT REFORM, IS ACORN INTENTIONALLY STRUCTURED AS A CRIMINAL ENTERPRISE? (July 23, 2009), at 3.
15. Carol D. Leonnig, *ACORN Funded Political, For-Profit Efforts, Data Show,* WASH. POST, Sept. 25, 2009; Memorandum from Tax Staff to Senator Grassley, Review of ACORN Tax-exempt Status (Sept. 22, 2009), *available at* http://finance.senate.gov/press/Gpress/2009/prg092409d.pdf.
16. *Id.*
17. Kathleen Parker, *ACORN's Overdue Unraveling*, WASH. POST, Sept. 23, 2009.
18. CRS REPORT at 6.
19. CRS REPORT, Summary.

means of punishing individuals for wrongdoing."[20] It then speculates on whether such a denial would "functionally" serve as a punishment, an analysis that depends on the type and severity of the legislatively imposed burden. However, the CRS report tries to compare prohibiting an organization from receiving federal funds to the personal employment and contract rights upheld by the Supreme Court in *United States v. Lovett*.[21] This is a completely inappropriate and invalid comparison.

In *Lovett*, three federal government employees who were suspected of being subversives by the House Committee on Un-American Activities were prohibited by Congress from receiving a federal salary unless they were reappointed to their jobs by the President with the advice and consent of the Senate. The Supreme Court found this to be a bill of attainder since it denied these individuals their contractual rights to federal employment. While it makes sense to consider the abrogation of such a vested property right to employment based on a claim of subversive activity to be legislative "punishment" within the criteria for a bill of attainder, the CRS report's conclusion that this is "similar" to preventing an organization from receiving appropriated funds from Congress defies common sense, particularly when applied to Sec. 602(a), which prohibits prospective contracts and grants from being awarded to a covered organizations. Nonprofits like ACORN have no vested property or contractual right to receive federal contracts or grants. Such a view also defies case law—and federal statutory and regulatory provisions.

Congressional Authority to Cut Off Funding. The Antideficiency Act prohibits the federal government from making or authorizing "an expenditure or obligation exceeding an amount available in an appropriation" or involving the government "in a contract or obligation for the payment of money before an appropriation is made."[22] The Federal Acquisition Rules require government contracts to insert provisions making it clear that all payments are "conditioned upon availability of funds," i.e., conditioned on Congress appropriating the funds to make such a payment or grant.[23] Thus, Congress has the authority to cut off funding to an organization like ACORN even in contracts or grant agreements entered into prior to the effective date of the Act because all funding under such agreements would be subject to appropriations by Congress. This also would defeat ACORN's possible attempt to sue for breach of contract if Congress does cut off funding for hoped-for, long-term contracts and grants.[24]

The facts of the *Flemming* case are also directly applicable to the Defund ACORN Act. The Supreme Court held that a provision of the Social Security Act that terminated the benefits of aliens who were deported based on certain criteria was not a bill of attainder. The mere denial of government benefits is "certainly nothing approaching the 'infamous punishment' of imprisonment."[25] As the Court states,

> only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground. Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed. Moreover, the presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it.[26]

20. CRS REPORT at 6.
21. United States v. Lovett, 328 U.S. 303 (1946).
22. 31 U.S.C. § 1341. *See also* U.S. GOV'T ACCOUNTABILITY OFFICE, ANTIDEFICIENCY ACT BACKGROUND, *available at* http://www.gao.gov/ada/antideficiency.htm.
23. *See* FAR 2005-32.700 *et seq.*, *available at* http://www.acquisition.gov/far/current/html/Subpart%2032_7.html.
24. If this were not so, there would be a long list of disappointed defense contractors who would be in line to collect for future earnings from their canceled, decades-long defense contracts.
25. Flemming v. Nestor, 363 U.S. 603, 617 (1959).
26. 363 U.S. at 617. *See also* Houston v. Williams, 547 F.3d 1357, 1364 (11th Cir. 2008) (county government's denial of funds authorized by federal program to a felon and convicted sex offender was not an unlawful bill of attainder since it neither determined guilt nor inflicted punishment; rather, it furthered the goal of allocating resources).

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Congressional Discretion. Under the mistaken legal analysis of the CRS report, Congress would have no legal authority to exercise its discretion on appropriations. Once federal funds were appropriated in an earmark or for any other purpose and dispensed to a particular organization, Congress would have no right to terminate that earmark or end the appropriation of those particular funds. Such a result is clearly untenable, and there is no statutory or constitutional basis for it. Such a rule would prevent Congress from deciding that organizations that have received federal TARP funds and have committed bad acts—be it waste, fraud, or abuse of contracts—could have their specific appropriations terminated absent a formal judicial proceeding. Unlike most contracting parties, the government would effectively be prohibited from choosing not to engage in business with an organization that had shown itself unworthy of trust.

The CRS report outlines in detail the procedural rules required for federal agencies to debar a contractor or suspend a grant recipient, and then criticizes the Defund ACORN Act for not following the same rules. However, Congress is not bound by such regulations, and there is no requirement that the Act follow the procedural rules and limitation set out in the regulations. Again, what Congress is doing here is choosing with whom to do business, not making a judicial or quasi-judicial determination of guilt or any kind of concomitant punishment.

"Minor" Legal Violations. The CRS report also substitutes its judgment for that of Congress, criticizing the legislation for focusing on "relatively minor legal violations such as campaign financing, election laws or disclosure requirements."[27] This shows a fundamental lack of knowledge and understanding of the federal laws governing campaigns and elections. Many violations of the Federal Election Campaign Act are felonies punishable by large fines and criminal indictment and imprisonment.[28] Voter registration fraud is also a felony under the National Voter Registration Act that can result in imprisonment for up to five years.[29] The claim that violations of these federal laws are "relatively minor legal violations" does not reflect the judgment of Congress, and the Congressional Research Service does a disservice to Members of Congress when it makes an assertion that is clearly contradicted by Congress in passing these statutes.

"Permanent Exclusion." Finally, the CRS report makes a fundamental error when it places emphasis on the supposedly "permanent exclusion" that would be imposed in the Act when compared to current CFR regulations that limit debarment to generally no more than three years. This ignores the fact that no legislation passed by Congress is permanently enshrined in the United States Code. Congress can, at any time, amend the Defund ACORN Act—if it becomes law—to change the length of the prohibition. This comparison also improperly seems to limit the authority of Congress to decide the circumstances under which an organization should qualify to receive federal funds.

It also confuses criminal punishment with the civil implications of not receiving government funds. When an *individual* is sentenced to imprisonment—which is the core focus of the bill of attainder clause—such incarceration is a permanent scar and blemish on the life, livelihood, and reputation of an individual. Even if the individual is pardoned, those years behind bars cannot be restored. Yet unlike criminal punishments that restrict constitutionally protected, individual rights, organizations such as ACORN have no constitutional right to receive federal appropriations. Moreover, an equivalent amount of funding can be restored to ACORN if Congress changes its mind.

A Constitutional Act. In sum, the Defund ACORN Act does not meet the legal definition of a bill of attainder. There is no valid reason why the courts would not defer to the legislative judgment of Congress as to the regulatory purposes of this statute, particularly since its general provisions provide no proof of punitive intent and further the interests of not providing taxpayer funds to organizations

27. CRS REPORT at 12.
28. *See* 2 U.S.C. § 437g(d).
29. 42 U.S.C. § 1973gg-10.

that violate campaign finance and election laws—laws that implicate the very essence of our democratic form of government and our voting process.

The CRS report at one point concedes the tenuousness of such a claim, as it should, when it admits that a "court would most likely be able to discern a rational, non-punitive purpose for [the Act]: a desire to prevent federal funds being used for activities that violate federal or state law."[30] There is no basis for a court to overcome the presumption of constitutionality of the Act and rule otherwise.

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30. CRS REPORT at 4.