

ISSUE BRIEF

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Conservatives and the Fight to Defund Obamacare

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Some in Washington claim that defunding Obamacare would not prevent the implementation or enforcement of the law’s statutory requirements and new regulations. They seem to be unaware of the federal Antideficiency Act (ADA), which makes it illegal to spend money in excess of appropriations.

If a fight over such a defunding provision led to a shutdown of the government, not all elements of the law could be implemented. Moreover, supporters of Obamacare would be put in the unenviable position of trying to explain why they are willing to interrupt the normal functioning of the federal government in order to fund an unworkable law that Americans do not like and do not want to see implemented.

Movement to Defund. Senators Ted Cruz (R-TX) and Mike Lee (R-UT) have been in the news with their Defund Obamacare Act (S. 1292), which Representative Tom Graves (R-GA) has also introduced in the House as H.R. 2682. One of their proposals is to attach it to a must-pass continuing resolution (CR) before the federal government runs out of money on October 1. Under this bill, “no Federal funds shall be made available to carry out any provisions” of Obamacare. No “entitlement to benefits under any provision of” Obamacare will remain

in effect, and all “unobligated balances” will be rescinded.

No one disputes that Obamacare would stay on the books and that defunding would not change the existing law. But all federal funds already appropriated for the implementation and enforcement of Obamacare could not be used by any federal agency to take any action—whether it is issuing new regulations or filing an enforcement action against an individual or an employer for not complying with the new health insurance mandates. The termination of all “entitlement to benefits” would stop the automatic appropriation of new entitlement spending for things like the law’s Medicaid expansion. The rescission of “unobligated benefits” would return to the Treasury appropriated funds that have not yet been spent on items such as the payment of outside contractors—navigators—for enrolling participants in Obamacare, although it would probably not relieve the government of the contractual obligation to pay for services already rendered.

There is no question that such a defunding bill can stop entitlement spending. The Hyde Amendment, which bans federal funding of abortions and is part of yearly discretionary appropriations bills, has prevented federal funds in the Medicaid entitlement program from being used for abortion coverage for almost four decades.

Antideficiency Act. This type of appropriations and funding ban is given teeth by the ADA,¹ which prohibits federal employees from:

- Making or authorizing any expenditure or obligation in excess of the amount available in an appropriation or fund *unless authorized by law*; or

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- Involving the government in any obligation to pay money before funds have been appropriated for that purpose *unless otherwise allowed by law*.

Section 1342 of the ADA prohibits federal employees from accepting voluntary services or employing personal services not authorized by law. That is one of the reasons that federal employees have to be furloughed whenever Congress fails to pass a continuing resolution—federal employees cannot volunteer their services even if they want to, and the government cannot accept outside assistance.

The ADA has both administrative and criminal penalties as well as a notice requirement. Section 1349 subjects federal employees to “administrative discipline” including “suspension from duty without pay or removal from office.” They can be fined or go to jail: Section 1350 imposes a fine of up to \$5,000 and two years in jail. Under Section 1351, the head of any federal agency violating the ADA has to “report immediately to the President and Congress all relevant facts and a statement of actions taken” if anyone in the agency has violated the ADA through unauthorized spending. Pursuant to instructions issued by the Office of Management and Budget (OMB), that report has to include the actions taken to *correct* the ADA violation.

Federal bureaucrats are well aware of the ADA, and its penalties deter violations.

If a Shutdown Occurs. The smartest thing the House of Representatives could do is pass a CR as soon as possible that funds the government with the exception of Obamacare. That would force the President and his supporters to explain why they would shut down the government to fund an unfair, unaffordable, and highly unpopular law that is so unworkable that the Administration has itself admitted it cannot manage to implement major portions on time such as the employer mandate to provide insurance.

Senator Richard Burr (R-NC) calls this approach “dumb.” Senator Tom Coburn (R-OK) is circulating a July 2013 research memorandum from the Congressional Research Service (CRS) that concludes that many aspects of Obamacare could continue to be funded despite the ADA if there is a

government shutdown.² But the CRS memo assumes there is no defunding language passed (as is being proposed) and that the government simply shuts down because there is no CR.

There is an exception in Section 1342 of the ADA for “emergencies involving the safety of human life or the protection of property,” which as the CRS correctly notes, has been “broadly” read by OMB and the Justice Department to give executive agencies a certain amount of discretion over how to spend their remaining funds during a government shutdown. But in 1990, Congress amended Section 1342 in response to a 1981 opinion issued by Attorney General Benjamin R. Civiletti to make it clear that “emergencies” do “not include ongoing, regular functions of government, the suspension of which would not imminently threaten the safety of human life or the protection of property.”

The CRS concludes, based solely on press reports, that if the government shuts down, the Administration would likely “rely on alternative sources of funding” to continue “substantial” implementation of Obamacare. But to do that during a shutdown, the Administration could only provide funds that are not dependent on annual discretionary appropriations or fit within the exceptions to the ADA outlined in the CRS memorandum.

The CRS says, for example, that “cost-sharing payments to health plans” from Treasury would likely not be excepted. The CRS also speculates that the Department of Health and Human Services (HHS) might be able to keep its employees involved in Obamacare on payroll, comparing it to the Social Security Administration keeping its employees on payroll during the shutdown fights of 1995–1996 because they were, “by necessary implication,” integral to making entitlement payments.

But this analogy may not work with the Obamacare insurance exchanges, since they are not an entitlement and are not funded by mandatory spending. The entitlement comes through the insurance subsidies, and while IRS employees may be essential to administer the subsidies, HHS employees might not necessarily be essential to administer the exchanges.

1. 31 U.S. Code § 1341.

2. Congressional Research Service, “Potential Effects of a Government Shutdown on Implementation of the Patient Protection and Affordable Care Act,” July 29, 2013, http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File_id=0af8b42a-b2b9-484b-b0d4-d27e2b690ac (accessed August 7, 2013).

The point is that even if a government shutdown occurs without a defunding bill, while the Administration may have some funding available from other sources to continue to implement parts of Obamacare that fall within exceptions to the ADA, it would not be able to legally implement *all* of the many different parts of the law, and it is doubtful it would have the funds to implement all of the law.

Making Collapse More Likely. In the absence of full repeal, Americans will be better off if *any*

parts of Obamacare are stopped from going into effect. And the more parts of the law that are delayed because of a government shutdown, defunding, or the Obama Administration's own incompetence, the more likely it is that this horrendously complicated law, which is built on many different interdependent factors, will fall apart like a house of cards.

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