

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ASSOCIATION OF COMMUNITY
ORGANIZATIONS FOR REFORM
NOW; ACORN INSTITUTE, INC.;
And NEW YORK ACORN HOUSING
COMPANY, INC.

CIVIL ACTION NUMBER

09-CV-4888 (NG)(LB)

Plaintiffs,

versus

UNITED STATES OF AMERICA;
SHAUN DONOVAN, Secretary of the
Department of Housing and Urban
Development; PETER ORSZAG, Director,
Office of Management and Budget; and
TIMOTHY GEITHNER, Secretary of the
Department of Treasury of the United States,

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS MOTION TO MODIFY OR
AMEND THE PRELIMINARY INJUNCTION**

On Friday, December 11, 2009, this Honorable Court issued an opinion and order, enjoining Defendants during the pendency of this action from enforcing Section 163 of the Continuing Appropriations Resolution and the OMB Memorandum implementing that Section. *See* Dkt ## 9, 10. On December 10 and December 13, 2009, the House and Senate respectively enacted H.R. 3288, the FY 2010 Consolidated Appropriations Act. On December 16, 2009, President Obama signed into law that Act, which is Public Law _____. That Act, and specifically Sections 418, 534 and 511, continues for Fiscal Year 2010 the Bill of Attainder

against ACORN that this Court enjoined on December 11.¹ Therefore Plaintiffs now move to modify or amend that injunction to include the prohibitions on funding ACORN contained in the FY 2010 Consolidated Appropriations Act, Pub Law _____, and Section 427 of the Department of the Interior, Environmental and Related Agencies Appropriations Act 2010, Pub Law 111-88. “It is, of course, well established that a district court has the power, in the exercise of its discretion, to modify its past injunctive decrees in order to accommodate changed circumstances.” *Davis v. N.Y. Hous. Auth.*, 278 F. 3d 64,88 (2d Cir. 2002).

POINT I

The Defund ACORN provisions of the Consolidated Appropriations Act Constitute a Bill of Attainder for the Reasons Set Forth in the Court’s December 11 Opinion

Public Law _____ is a consolidation of various appropriation acts and is therefore subdivided into various divisions providing appropriations for different agencies’ appropriations. Public Law ____ includes three Bills of Attainder: Sections 418, 534, and 511. Section 418 of the Act, which is part of Division A providing for the Transportation and Housing and Urban Development appropriations contains identical language to Section 163 of the Continuing Resolution:

SEC. 418. None of the funds made available under this Act or any prior Act may be provided to the Association of Community Organizations for Reform Now (ACORN), or any of its affiliates, subsidiaries, or allied organizations. Pub Law ____ Division A, Section IV.

This section requires that no funds made available from “any prior Act” may be provided to ACORN or any of its subsidiaries, affiliated or allied organizations. Therefore, any

¹ The last appropriations bill for fiscal year 2010 is H.R. 3326, the Department of Defense Appropriations Act 2010, which has passed both the Senate and House and awaits the President’s signature. Section 9012 of that bill also includes a defund ACORN provision. Plaintiffs will notify the Court immediately if and when President Obama signs that bill and requests that Section 9012 of the act be included in the modified injunction.

appropriation act already enacted into law, including the four acts referenced by the government in its memorandum in opposition to the preliminary injunction (three of which contained no ACORN language), would be subject to the prohibition contained in Section 418. So too, any monies still unspent under prior year appropriation acts, or funds allocated under multiyear contracts such as the Ross contracts, would also be barred from ACORN.

Section 418's language also facially suggests that no funds made available by any division of the Consolidated Appropriations Act could be provided to ACORN. However, Section 3 of the overall act, entitled references, provides that, "except as expressly provided, any reference to 'this act,' contained in any division of this Act shall be treated as referring only to the provisions of that division." Therefore, the "this act" language of Section 418 should be limited to Division A of the Act, which pertains solely to Transportation and HUD funding.

Section 418 thus provides that no HUD or Transportation funds may go to ACORN related organizations, nor can any funds appropriated from any prior act go to such organizations. The Ross Contracts will continue to be suspended by HUD, any pending ACORN applications to HUD, Transportation, or the agencies funded by the prior enacted appropriation acts must be preemptively denied, ACORN related organizations are precluded from applying for any such grants, nor can subcontractors funded by HUD, Transportation, nor any of the other agencies whose appropriations are already enacted into law continue their relationships with plaintiffs.

For the reasons already set forth in this Court's opinion of December 11, Section 418 is an unconstitutional Bill of Attainder.

The Consolidated Appropriations Bill also contains two other unconstitutional Bills of Attainder. Section 534 of Division B of the Act, which appropriates funds for Justice/Commerce

and Science provides that, “None of the funds made available under this Act may be distributed to the Association of Community Organizations for Reform Now (ACORN) or its subsidiaries.” Again, “this act” is limited to Division B under the rule of construction set forth above.

Section 511 of Subdivision E of the Act, which appropriates funds for military and VA functions, states that “None of the funds made available in this division or any other division of this Act may be distributed to the Association of Community Organizations for Reform Now (ACORN) or its subsidiaries.” This language explicitly applies not only to subdivision E, but “to any other division” of the Consolidated Appropriations Act, and therefore prohibits any federal funding from the FY 2010 appropriations bill from being provided to ACORN and non-defined subsidiaries.

In sum, each of these three provisions, as well as Section 427 of the Interior Bill already enacted,² constitutes a Bill of Attainder. Certainly, in combination they constitute a Bill of Attainder and continue the ban of federal funding contained in Section 163 of the Continuing Resolution. In combination they prohibit any funds from being distributed to ACORN and related organizations from any Fiscal Year 2010 Appropriation Act and any prior act that provides any federal funds. Nor can the government suggest, as it did with respect to Section 163 of the CR, that these measures are simply emergency, few month stop gap provisions. Rather, these new provisions bar federal funding for ACORN indefinitely, and at minimum until the end of Fiscal Year 2010.³ The provisions have the same infirmities that this Court has

² Section 427 of Public Law 111-88 states that “None of the funds made available under this Act may be distributed to the Association of Community Organizations for Reform Now (ACORN) or its subsidiaries.”

³ Section 535 of Subdivision B of the Consolidated Appropriation Act provides for an investigation of ACORN by the Comptroller General:

already found rendered Section 163 unconstitutional. They each explicitly name ACORN and related organizations, contain no method for ACORN to remove itself from the disbarment, bypass and evade the extensive governmental regulations providing for suspension and

SEC. 535. (a) The Comptroller General of the United States shall conduct a review and audit of Federal funds received by the Association of Community Organizations for Reform Now (referred to in this section as “ACORN”) or any subsidiary or affiliate of ACORN to determine—

(1) whether any Federal funds were misused and, if so, the total amount of Federal funds involved and how such funds were misused;

(2) what steps, if any, have been taken to recover any Federal funds that were misused;

(3) what steps should be taken to prevent the misuse of any Federal funds; and

(4) whether all necessary steps have been taken to prevent the misuse of any Federal funds.

(b) Not later than 180 days after the date of enactment of this Act, the Comptroller General shall submit to Congress a report on the results of the audit required under subsection (a), along with recommendations for Federal agency reforms.

On its face, and viewed independently of the other Bill of Attainder provisions of the Act, Section 535 does not constitute an unlawful bill of attainder, and plaintiffs do not challenge it here nor seek to enjoin its operation in this action. Nonetheless, Section 535 is clearly illustrative of Congress’s punitive purpose in enacting Section 534, Section 418 and Section 511 of the Bill. For the Act as a whole cuts off ACORN funding for the entire fiscal year irrespective of the results of the Comptroller General’s investigation. The three challenged provisions cut plaintiffs’ access to federal funds and federal contracts for at least a year, even if the Comptroller General concludes within the 180 days allotted for his/her investigation that ACORN has not committed any misuse of federal funds. While the Bill of Attainder Clause would prohibit Congress from cutting off a named organization’s funds for misconduct for a year pending an investigation, that Congress here did not key its defunding of ACORN to the results of the Comptroller General’s investigation simply further underscores Congress’ already obvious punitive intent in enacting the defund ACORN provisions of these appropriation bills.

Moreover, Congress did not even require the Comptroller General to make any recommendations about what to do with respect to future funding of ACORN after it concludes its investigation. Instead, it requires “recommendations for federal agency reforms,” a requirement that only makes sense if the Comptroller General concludes that federal funds were misused. Subpart b of Section 535 thus assumes that the Comptroller General will conclude that funds were misused.

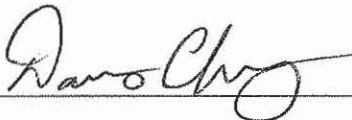
disbarment of contractors with due process, and “no reasonable observer could suppose that this severe action [more lengthy than the CR] could have been taken in the absence of a Congressional conclusion that misconduct had occurred.” December 11 Opinion at p. 13. If not enjoined, these provisions would continue the irreparable harm that this Court already found plaintiffs were suffering from the enactment and enforcement of Section 163 of the Continuing Resolution.

CONCLUSION

For the reasons already stated in this Court’s December 11, 2009 Opinion and Order (Dkt # 9), the Court should modify or amend the injunction it has already issued to prohibit the government from enforcing Sections 418, 534 and 511 of the Consolidated Appropriations Act which prohibit the distribution of funds to ACORN and related organizations, and Section 427 of the prior enacted Appropriations Bill for Interior Environmental and Related Agencies.

Dated: New York, New York
December 17, 2009

Respectfully submitted,
Center for Constitutional Rights

By: _____

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