CONSTITUTIONAL LAW — SEPARATION OF POWERS — SECOND CIRCUIT HOLDS THAT LAW BARRING ACORN FROM RECEIVING FEDERAL FUNDING IS NOT A BILL OF ATTAINDER. — *ACORN v. United States*, 618 F.3d 125 (2d Cir. 2010).

The Bill of Attainder Clause[1] is one of the least successfully litigated provisions of the Constitution. In fact, the Supreme Court has invalidated legislation on this ground only five times since 1789.[2] Recently, in *ACORN v. United States*,[3] the Second Circuit held that an appropriations act barring a nonprofit organization and its affiliates from receiving federal funding was not an unconstitutional bill of attainder.[4] The court concluded that the withholding of federal funds did not meet the historical or functional definition of "punishment," and that the legislative record did not contain sufficient proof of punitive intent.[5] Because Supreme Court jurisprudence on this subject is so limited, *ACORN* is facially consistent with precedent. In reaching its decision, however, the Second Circuit failed to give due consideration to legislative determination of guilt, thus undermining the separation of powers underpinnings of the Bill of Attainder Clause.

The Association of Community Organizations for Reform Now (ACORN) is a nonprofit corporation dedicated to organizing low- and moderate-income individuals.[6] Funded in part by federal grant money,[7] ACORN has helped millions register to vote, advocated for increasing the minimum wage, worked against predatory lending, prevented foreclosures, and aided the poor in various other ways.[8] Recently, however, ACORN's reputation has come under severe attack. In 2009, hidden camera videos were released that showed employees of an ACORN affiliate advising a purported prostitute on how to conceal illegal activities, causing a national firestorm.[9] ACORN has also been accused of tax evasion, voter fraud, and election law violations.[10]

On October 1, 2009, Congress passed a "stop-gap" appropriations measure to provide temporary funding prior to the enactment of the

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[1] U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

[2] *See* Ass'n of Cmty. Orgs. for Reform Now v. United States (*ACORN*), 692 F. Supp. 2d 260, 263 (E.D.N.Y. 2010).

[3] 618 F.3d 125 (2d Cir. 2010).

[4] *Id.* at 129, 142.

[5] *Id.* at 142.

[6] *Id.* at 129.

[7] *See ACORN*, 692 F. Supp. 2d at 264.

[8] *See ACORN*, 618 F.3d at 129.

[9] *See ACORN*, 692 F. Supp. 2d at 264; *see also ACORN Officials Videotaped Telling 'Pimp,' 'Prostitute' How to Lie to IRS*, FOXNEWS.COM (Sept. 10, 2009), http://www.foxnews.com/us/2009/09/10/acorn-officials-videotaped-telling-pimp-prostitute-lie-irs.

[10] *ACORN*, 692 F. Supp. 2d at 264.

fiscal year 2010 appropriations bill.[11] Section 163 of that Continuing Appropriations Resolution provides: "None of the funds made available by this joint resolution 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."[12] Accordingly, the Director of the Office of Management and Budget (OMB) instructed the heads of all executive branch agencies to cut off funding to ACORN, and to suspend existing contracts "where permissible."[13]

On November 12, 2009, ACORN and two of its affiliates, ACORN Institute, Inc. and MHANY Management, Inc. (formerly known as New York ACORN Housing Company), sued to enjoin the United States and various executive agencies from enforcing section 163 on the ground that the provision was an unconstitutional bill of attainder.[14] ACORN alleged that, because of section 163, agencies had refused to review ACORN's grant applications, grants promised to ACORN had been rescinded, previously awarded grants had not been renewed, and agencies had refused to honor contractual obligations for work already performed.[15] On December 11, 2009, District Judge Gershon granted ACORN's request for a preliminary injunction.[16]

On December 16, 2009, Congress enacted the 2010 Consolidated Appropriations Act.[17] Using language similar or identical to that in section 163, Congress excluded ACORN and its affiliates from eligibility for federal funding in several provisions.[18] Congress also instructed the Government Accountability Office (GAO) to conduct an audit to determine if ACORN was misusing funds.[19]

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[11] *ACORN*, 618 F.3d at 131; *see* Continuing Appropriations Resolution, 2010, Pub. L. No. 111-68, div. B, § 163, 123 Stat. 2023, 2053 (2009).

[12] § 163, 123 Stat. at 2053.

[13] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-10-02, GUIDANCE ON SECTION 163 OF THE CONTINUING RESOLUTION REGARDING THE ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW (ACORN) (2009), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-02.pdf.

The OMB made clear that, so long as the agency had not entered into a binding agreement, ACORN was not to receive federal funding, even if the agency had already determined funding should be awarded. This bar on eligibility applied not only to the 2010 fiscal year, but also to appropriations made in 2009, and to any remaining funds from previous years. *Id.*

[14] *ACORN*, 692 F. Supp. 2d at 264–65.

[15] *Id.* at 265–66.

[16] *See* ACORN v. United States, 662 F. Supp. 2d 285, 300 (E.D.N.Y. 2009).

[17] Pub. L. No. 111-117, 123 Stat. 3034 (2009).

[18] *See ACORN*, 692 F. Supp. 2d at 266; Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, div. A, § 418, 123 Stat. 3034, 3112 (2009); div. B, § 534, 123 Stat. at 3157; div. E, § 511, 123 Stat. at 3311; *see also* Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, div. A, § 8123, 123 Stat 3409, 3458 (2009); Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, div. A, § 427, 123 Stat. 2904, 2962 (2009).

[19] *See ACORN*, 618 F.3d at 131.

On March 10, 2010, the district court granted plaintiffs' request for declaratory and permanent injunctive relief.[20] Specifically, Judge Gershon found that (1) the contested provisions amounted to a bill of attainder, (2) plaintiffs had standing to bring suit against the named defendants, and (3) a permanent injunction was warranted in light of the irreparable harm and absence of adequate remedy at law.[21]

The Second Circuit affirmed the judgment of the district court with regard to standing,[22] but vacated the injunction, concluding that the challenged law was not a bill of attainder.[23] Writing for a unanimous panel, Judge Miner[24] explained that "the Bill of Attainder Clause prohibits any 'law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.'"[25] When determining "the existence *vel non* of punishment," the court weighs three factors: (1) whether the statute meets the historical definition of punishment (the historical test), (2) whether the statute can reasonably be said to further nonpunitive purposes (the functional test), and (3) whether the record "evinces a [legislative] intent to punish" (the motivational test).[26] Analyzing each factor in turn, the court concluded that the laws were not punitive.

First, the court considered the historical test. Although Judge Miner noted that there was "some evidence in the record indicating that ACORN was precluded from receiving federal funds upon the legislature's determination that ACORN was guilty of abusive and fraudulent practices,"[27] the court concluded that the challenged laws were not punitive in the traditional sense.[28] Distinguishing the appropriations laws at issue in *ACORN* from those struck down in *United States v. Lovett*,[29] the court reasoned that some penalties, though punitive when levied against an individual, "may be more an inconvenience than punishment" when aimed at a corporation.[30] The court also rejected ACORN's claim that the laws "attaint ACORN with a note of infa-

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[20] *Id.* at 133.

[21] *ACORN*, 692 F. Supp. 2d at 278, 281.

[22] *ACORN*, 618 F.3d at 135.

[23] *See id.* at 142.

[24] Judge Miner was joined by Judges Cabranes and Wesley.

[25] *ACORN*, 618 F.3d at 135–36 (quoting Selective Serv. Sys. v. Minn. Pub. Interest Research Grp., 468 U.S. 841, 846–47 (1984)).

[26] *Id.* at 136 (quoting *Selective Serv. Sys.*, 468 U.S. at 852 (alteration in original)).

[27] *Id.* at 137.

[28] *Id* at 138. Judge Miner distinguished the withholding of funds from "traditional form[s] of punishment" that are punitive per se, such as "imprisonment, banishment, [or] death," as well as from other penalties, such as the confiscation of property. *Id.* at 136–37.

[29] 328 U.S. 303 (1946) (holding that a law cutting off pay to named government employees was punitive because it operated as a permanent ban on government service).

[30] *ACORN*, 618 F.3d at 137.

my . . . [and] encourage others to shun ACORN,"[31] arguing that Congress must have the "authority to suspend federal funds to an organization that has admitted to significant mismanagement."[32]

Moving on to the functional test of punishment, the court determined that the challenged provisions, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes"[33] — most notably, "protecting the public fisc from ACORN's admitted failures in management."[34] Judge Miner explained that the singling out of ACORN, although relevant to the punishment analysis, did not render the legislation presumptively unconstitutional.[35] Moreover, the fact that the appropriations laws were broad in scope — covering all of ACORN's affiliates and subsidiaries — implied they were not as singular as plaintiffs claimed.[36] Again distinguishing laws barring individuals from particular vocations or criminalizing prior conduct, the court concluded that the withholding of funding here was not punitive because ACORN had admitted mismanagement, which indicated that the laws were not intended to impute guilt.[37] The court also rejected plaintiffs' argument that the denial of funding was punitive because it was not tied to the results of the GAO audit, for "Congress could, of course, modify the appropriations law following the GAO investigation."[38]

Finally, the court concluded that the laws failed the motivational test because the record did not "reflect[] overwhelmingly a clear legislative intent to punish."[39] The court noted that, although some members of Congress expressed concern about protecting taxpayer money from ACORN, there was "no congressional *finding* of guilt"[40] and therefore no "unmistakable evidence of punitive intent."[41]

Because the Supreme Court has never considered an appropriations law withholding discretionary funding to be a bill of attainder,[42]

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[31] *Id.*

[32] *Id.* (citing Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 473 (1977)).

[33] *Id.* at 138 (quoting *Nixon*, 433 U.S. at 475) (internal quotation marks omitted).

[34] *Id.* at 140.

[35] *Id.* at 138–39; *see also Nixon*, 433 U.S. at 471–72; Consol. Edison Co. of N.Y. v. Pataki, 292 F.3d 338, 350 (2d Cir. 2002).

[36] *ACORN*, 618 F.3d at 139–40.

[37] *See id.* at 140.

[38] *Id.* at 140–41 (citing BellSouth Corp. v. FCC, 162 F.3d 678, 687 (D.C. Cir. 1998)).

[39] *Id.* at 141 (citing Flemming v. Nestor, 363 U.S. 603, 617 (1960)).

[40] *Id.* at 142.

[41] *Id.* at 141 (quoting Selective Serv. Sys. v. Minn. Pub. Interest Research Grp., 468 U.S. 841, 856 n.15 (1984)) (internal quotation marks omitted).

[42] *See ACORN*, 692 F. Supp. 2d at 269. As the district court noted, it is "not surprising" that the Court had never so held because (as the plaintiffs asserted and the defendants did not dispute) "this is the first time Congress has denied federal funding to a specifically named . . . organization in this way." *Id.*

ACORN seems consistent with precedent at first blush. In reaching its decision, however, the court gave too little weight to the "distinguishing feature of a bill of attainder": the legislative determination of guilt.[43] The deferential stance the court took toward Congress on the question of ACORN's culpability undermined the very purpose of the Bill of Attainder Clause: protecting unpopular individuals from legislative excess through a strict separation of powers.[44]

In holding that the denial of funds was not punitive in this case, the Second Circuit relied on Congress's implicit conclusion that ACORN had committed the acts of fraud and mismanagement of which it was accused, a judgment Congress is not entitled to make.[45] Extrapolating from past acts, the court also assumed that ACORN's allegedly fraudulent conduct would continue, and that the instances of mismanagement could be imputed to ACORN's various affiliates and subsidiaries,[46] many of which carried out tasks wholly unrelated to the charges of fraud. As the Supreme Court has made clear, forward-looking legislation is no less punitive than backward-looking legislation merely because the former is "deterrent" or "preventive" in nature rather than "retributive."[47] On the contrary, punishment is often used to prevent future harm or deter future misconduct,[48] but "legislative intent to encourage compliance with the law does not establish that a statute is merely the legitimate regulation of conduct."[49] In *Lovett*, for example, the Court invalidated an appropriations act cutting off pay to government employees on the basis of purported communist ties because it deprived those individuals of any future opportunity to serve the government.[50] The fact that Congress had enacted the law to prevent future harm did not preclude a finding that the law was punitive.

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[43] De Veau v. Braisted, 363 U.S. 144, 160 (1960).

[44] *See* Akhil Reed Amar, *Attainder and Amendment 2:* Romer*'s Rightness*, 95 MICH. L. REV. 203, 210 (1996) ("Without the nonattainder principle, the legislature could simply single out its enemies — or the politically unpopular — and condemn them for who they are, or for what they have done in the past and can no longer change.").

[45] A report released in late December 2009 stating that ACORN had not broken any laws or violated the terms of its federal funding indicates that congressional action may have been premature. *See* Katrina Vanden Heuvel, *The Nation: ACORN's Vindication: Too Little, Too Late*, NPR.ORG (Jan. 6, 2010), http://www.npr.org/templates/story/story.php?storyId=122275494.

[46] *See ACORN*, 618 F.3d at 139–40.

[47] United States v. Brown, 381 U.S. 437, 458 (1965). Historically, bills of attainder were often "enacted for preventive purposes — that is, the legislature made a judgment, undoubtedly based largely on past acts and associations . . . that a given person or group was likely to cause trouble . . . and therefore inflicted deprivations upon that person or group in order to keep it from bringing about the feared event." *Id.* at 458–59.

[48] *See id.* at 458.

[49] Selective Serv. Sys. v. Minn. Pub. Interest Research Grp., 468 U.S. 841, 851 (1984).

[50] *See* United States v. Lovett, 328 U.S. 303, 316 (1946); *cf.* ACORN v. United States, 692 F. Supp. 2d 260, 270 (E.D.N.Y. 2010) (noting that *Lovett* was not based on the plaintiffs' property interest in their jobs).

The Second Circuit's reasons for holding that the provisions at issue were not intended to impute guilt — that the laws themselves did not mention ACORN's guilt directly and that there was no conclusive determination of guilt following a legislative trial[51] — are unconvincing.[52] The standard for demonstrating punitive intent cannot logically be that high; even a legislator bent on punishing ACORN would have to know that explicitly imputing guilt in the text of a bill would not pass constitutional muster. Indeed, many legislators expressed concern that the appropriations law was a bill of attainder.[53] The statements in the legislative record and the political context surrounding the enactment of the bill make abundantly clear that Congress inserted the challenged provisions in response to the public outcry against ACORN.[54] Had Congress not determined that ACORN was guilty of fraud and misconduct, there would have been no reason to bar the organization from receiving federal funding.[55] This species of legislative action is exactly the evil that the Bill of Attainder Clause aims to prevent: congressional pandering to popular whims and the subversion of separation of powers for the sake of political expediency.

The Supreme Court has emphasized that the Bill of Attainder Clause is not merely a technical prohibition, but rather an explicit expression of separation of powers.[56] The Founders viewed Article I, Section 9 not necessarily as a means of promoting government efficiency, but as a "bulwark against tyranny"[57] — a provision designed to prevent the kind of arbitrary rule the colonists had experienced under Parliament and the all-powerful state legislatures that dominated in

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[51] *ACORN*, 618 F.3d at 138.

[52] *See* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 480 (1977) (noting that a bill need not contain a "formal legislative announcement of moral blameworthiness or punishment" to be considered punitive, although the absence of such a statement may be probative of legislative intent).

[53] Senator Dick Durbin, for example, spoke out against the legislation: "I went to one of these old-fashioned law schools. We believed that first you have the trial, then you have the hanging. But, unfortunately, when it comes to this organization, there has been a summary execution order issued before the trial." *ACORN*, 692 F. Supp. 2d at 274 n.14 (quoting 155 CONG. REC. S10,211 (daily ed. Oct. 7, 2009)).

[54] *See ACORN*, 618 F.3d at 141–42. For a fuller account of the legislative history, see *ACORN*, 692 F. Supp. 2d at 275–77.

[55] *See ACORN*, 692 F. Supp. 2d at 272. This conclusion is bolstered by Congress's failure to tie the denial of federal funding to the outcome of the GAO investigation. Contrary to the Second Circuit's assertion, the fact that Congress *could* change the law ex post should the GAO report vindicate ACORN does not change the legislative determination of guilt in the first instance. As the district court pointed out, moreover, even if Congress had tied the deprivation to the outcome of the GAO report, the appropriations law would still suffer from a fatal flaw — reliance on the findings of a congressional investigation or executive report as a conclusive determination of wrongdoing, and thus grounds for punitive action. *See id.* at 273.

[56] *See* United States v. Brown, 381 U.S. 437, 443–44 (1965).

[57] *ACORN*, 692 F. Supp. 2d at 268 (quoting *Brown*, 381 U.S. at 443).

the Confederation period.[58] The Bill of Attainder Clause, therefore, acts as a "general safeguard against legislative exercise of the judicial function, or more simply — trial by legislature."[59]

As the Supreme Court has made clear, the scope of the Bill of Attainder Clause must be assessed in light of the evils it was designed to prevent — namely, the submission of the supposedly impartial judicial function to the whims of a popularly elected legislature.[60] The reasons are twofold: first, the judiciary is better suited than the legislature to find facts and impute blame in particular cases;[61] and second, the Framers wanted to protect unpopular individuals from politically motivated legislators.[62]

The nation's history bears out the Founders' concerns. Each time the Supreme Court has invalidated legislation as a bill of attainder, Congress had targeted unpopular individuals who were widely considered worthy of condemnation.[63] The political subtext of these legislative acts demonstrates that a thoroughgoing separation of powers is an integral source of protection for easy targets of congressional attack. This concern with legislative determination of guilt is what motivated

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[58] *See* INS v. Chadha, 462 U.S. 919, 961–62 (1983) (Powell, J., concurring) ("One abuse that was prevalent during the Confederation was the exercise of judicial power by the state legislatures. The Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the tyranny of shifting majorities. . . . Their concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person was expressed . . . [in] the Bill of Attainder Clause." (internal quotation marks and citations omitted)).

[59] *Brown*, 381 U.S. at 442; *see also* Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 308–09 (1989) (explaining that "the prohibition against legislative punishment . . . insure[s] that no one is denied a fair trial" by "prevent[ing] the legislature from serving in two capacities — law creator and law enforcer").

[60] *See Brown*, 381 U.S. at 442; *see also id.* at 447 (explaining that the Bill of Attainder Clause should "not . . . be given a narrow historical reading," but should instead "be read in light of the evil the Framers had sought to bar: legislative punishment, of any form or severity, of specifically designated persons or groups").

[61] *See id.* at 445 (explaining that the Clause "reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons").

[62] *See* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 480 (1977) (explaining that the Bill of Attainder Clause was motivated in part by a fear that "the legislature, in seeking to pander to an inflamed popular constituency, w[ould] find it expedient openly to assume the mantle of judge or — worse still, lynch mob"); THE FEDERALIST NO. 44, at 278–79 (James Madison) (Clinton Rossiter ed., 2003) ("Bills of attainder . . . are contrary to the first principles of the social compact and to every principle of sound legislation. . . . The sober people of America are weary of the fluctuating policy which has directed the public councils.").

[63] The laws at issue barred individuals with ties to the Confederacy from certain vocations after the Civil War, *see* Pierce v. Carskadon, 83 U.S. (16 Wall.) 234 (1873); *Ex Parte* Garland, 71 U.S. (4 Wall.) 333 (1867); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867), and similarly barred purported Communists during the Cold War, *see Brown*, 381 U.S. 437; United States v. Lovett, 328 U.S. 303 (1946). For a history of the Supreme Court's attainder jurisprudence, see Comment, *The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification*, 54 CALIF. L. REV. 212, 218–32 (1966).

the Court in *Brown*, the leading case on attainder.[64] The law at issue, which precluded members of the Communist Party from holding union posts, was deemed a bill of attainder because the statute did "not set forth a generally applicable rule . . . and leave to courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics."[65] The *Brown* Court made clear that Congress "cannot specify the people upon whom the sanction it prescribes is to be levied,"[66] even if there are good policy reasons for the legislation in question. While the "[a]ct's specificity . . . does not automatically offend the Bill of Attainder Clause,"[67] Congress cannot create a class of one for the purpose of imposing punishment.[68] In *Nixon*, the Court held that an act specifically naming President Nixon and barring him from destroying his presidential papers was not a bill of attainder because, in light of the timing and circumstances, "Congress had reason for concern solely with the preservation of appellant's materials."[69] Unlike the appropriations act at issue in *ACORN*, the law confronting the *Nixon* Court was more regulatory than punitive, as evidenced by the fact that Congress ordered "the further consideration of generalized standards to govern [Nixon's] successors."[70]

In *ACORN*, the Second Circuit made much of Congress's responsibility for preventing waste, fraud, and abuse, arguing that the funding ban was constitutional because it was necessary to protect the public fisc.[71] While Congress is certainly authorized, and is indeed required, to take steps to ensure that federal funds are not misused, it cannot do so by summarily singling out individuals based on nonjudicial findings of wrongdoing.[72] Separation of powers requires that Congress achieve these ends by enacting "rules of general applicability," leaving "the task of adjudication . . . to other tribunals."[73]

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64 *See Brown*, 381 U.S. at 447.

65 *Id.* at 450.

66 *Id.* at 461.

67 *Nixon*, 433 U.S. at 471–72.

68 Consol. Edison Co. of N.Y. v. Pataki, 292 F.3d 338, 350 (2d Cir. 2002).

69 *Nixon,* 433 U.S. at 472. Nixon's records needed immediate attention because he had fallen ill and was the only President who had arranged for materials to be destroyed upon his death. *Id.*

70 *Id.*

71 *See ACORN*, 618 F.3d at 137, 141.

72 *Cf.* United States v. Brown, 381 U.S. 437, 461 (1965) ("We do not hold today that Congress cannot weed dangerous persons out of the labor movement, any more than the Court held in *Lovett* that subversives must be permitted to hold sensitive government positions. Rather, we make again the point made in *Lovett*: that Congress must accomplish such results by rules of general applicability."); Verkuil, *supra* note 59, at 304 ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." (internal quotation marks and citations omitted)).

73 *Brown*, 381 U.S. at 461.