



New Civil Liberties Alliance notches wins against ‘unlawful power’ of bureaucracies

July 5, 2021

One winning force in the fight against the Left’s relentless assault on freedom is a group taking aim at the unconstitutional abuses of federal and state bureaucracies.

Several victories have been won in recent weeks against the leftist axis of Team Biden, Big Tech and Big Media. Needless to say, the Social and Corporate Media Big Media were silent.

The New Civil Liberties Alliance states that its mission is to “protect constitutional freedoms from violations by the Administrative State and to restore Americans’ fundamental rights.”

The NCLA announced on July 2 that a federal judge stopped the Department of Treasury from enforcing the “tax mandate” provision of the Covid-19 relief bill known as the American Rescue Plan Act of 2021 (ARPA).

United States District Court Judge Douglas Cole entered a permanent injunction on July 1 preventing Congress “from telling the states that they cannot cut state taxes as a condition of receiving federal funds,” said senior litigation counsel Peggy Little of the NCLA, which filed amicus briefs in support of petitioner states Ohio and West Virginia.

The Covid relief legislation passed by Congress and signed by Joe Biden offers approximately \$195 billion to states, but conditions the receipt of Covid recovery funds “on the surrender of inherent and core sovereign taxing power,” the NCLA noted. “Under ARPA, Congress alone can provide tax relief to Americans for three or more years. State taxes are frozen. Worse, state officials must now serve as Congress’ auditors of state finances, upon potential criminal penalties for those officials.”

In his ruling, Judge Cole concluded that the tax mandate, as written, falls short of the clarity required for Congress’ power to impose spending conditions under the Constitution.

“Judge Cole’s well-reasoned rejection of the Treasury Department’s Interim Final Rule confirms what should have been obvious from the start: unelected bureaucrats cannot exploit Congress’ vague language to dictate tax policy to states under the guise of ‘providing clarity,’ ” said NCLA litigation counsel Sheng Li.

The tax mandate case marked another in a string of recent victories for the NCLA on behalf of the American people.

In fact, the NCLA emerged from the just-ended Supreme Court term with a perfect record.

The NCLA “is celebrating an unblemished 6-0 record for the amicus curiae briefs we filed in defense of civil liberties,” the NCLA noted in a July 2 [press release](#).

“The high court’s administrative power cases produced several unlikely majorities, including two NCLA amicus wins in the form of unanimous opinions written by Justice Sotomayor and Justice Breyer. Justice Gorsuch even quoted from NCLA’s amicus brief in his separate opinion in *U.S. v. Arthrex*. These six rulings in favor of NCLA’s positions show that our strategy of defending civil liberties against administrative power in the federal courts is working.”

In each of the six cases, the Supreme Court “vindicated Americans’ civil liberties after Congress, administrative agencies, or the lower courts neglected them,” the NCLA said. “NCLA will continue to support structural constitutional challenges to the Administrative State in order to safeguard civil liberties.”

The most recent victory was handed down on Thursday in *Americans For Prosperity Foundation v. Bonta*, in which the NCLA filed three separate amicus briefs in support of the petitioners along the way to defend the associational freedom and anonymity principles laid out in *NAACP v. Alabama ex rel. Patterson*.

Chief Justice John Roberts, writing for a 6-3 Court, held that the California Attorney General’s donor-disclosure policy for nonprofits, which began under Kamala Harris, is facially unconstitutional because it burdens donors’ First Amendment rights and is not narrowly tailored to an important government interest.

“Requiring these groups to turn over a list of their major supporters to the California Attorney General for their various charitable endeavors would violate the First Amendment of the United States Constitution,” the NCLA noted. “Further, it would erode the Constitution’s structural provisions and guarantees of rights that safeguard minorities and unpopular minority opinions. The First Amendment does far more than protect dissident organizations from direct government coercion. It also stops the government from enabling the bullying and intimidation wrought by private citizens against others who anonymously join together to express unpopular views through an organization.”

In the second case, the NCLA celebrated a June 21 “amicus win against the Administrative State in the U.S. Supreme Court case *United States v. Arthrex, Inc.* A divided Supreme Court vacated an earlier decision in this case by the U.S. Court of Appeals for the Federal Circuit and held that administrative patent judges (APJs) were not appointed to their positions in the manner Article II of the Constitution requires. Justice Gorsuch quoted NCLA’s amicus brief in his concurring opinion to demonstrate that Congress likely disapproved of the remedy devised by the majority. NCLA argued (with Arthrex) that APJs are principal officers of the United States. Hence,

according to the Constitution’s Appointments Clause, they must be appointed by the President with the advice and consent of the Senate.”

Blogger Don Surber noted: “This means the president appoints them. Bravo. We can always fire a president. Good luck trying to fire a civil service-protected pencil-pusher. Obama had changed it to bureaucratic appointments.”

In a case ruled on in April, the NCLA noted that the Supreme Court “unanimously held that the lower courts erred in imposing an issue-exhaustion requirement on Social Security disability claimants. In *Carr v. Saul*, claimants challenged a judge-made version of the administrative exhaustion rule, a requirement that litigants at an administrative hearing must raise any legal arguments in support of their claim at each step of the administrative process or forfeit those arguments on appeal. The New Civil Liberties Alliance and the Cato Institute filed a joint amicus brief arguing that imposing issue exhaustion requirements is inappropriate when the issue does not depend on an agency’s discretion, expertise, or fact-finding.”]

It was a case of the bureaucracy attempting to make the rules that the bureaucracy plays by. The Supreme Court wasn’t having it.

In other wins against the Administrative State, the NCLA hailed the top court’s rulings in *Collins v. Yellen* and *AMG Capital Management v. FTC* “invalidated ill-conceived congressional designs for regulatory agencies. Justice Alito’s opinion for the Court in *Collins* held that the structure of the Housing and Economic Recovery Act of 2008 violated the separation of powers by restricting the President’s power to remove the Director of the Federal Housing Finance Agency (FHFA). In *AMG Capital Management*, the Federal Trade Commission (FTC) was barred from its unlawful practice of applying the agency’s statutory provisions in an unauthorized way to avoid the due process protections for monetary remedies Congress provided in the FTC Act.”

NCLA’s remaining amicus win focused on the free exercise of religion.

In *Fulton v. City of Philadelphia*, a unanimous Supreme Court ruled in favor of Catholic Social Services (CSS) and three affiliated foster parents in their lawsuit against the City of Philadelphia after being excluded from a foster-care program based on their religious beliefs. Justice Alito cited NCLA President Philip Hamburger’s work eight times in his concurrence.

“Although the Supreme Court in *Fulton* reached the correct outcome, it still needs to confront the underlying problem that administrative governance is slanted against many religious Americans,” Hamburger said. “Unelected bureaucrats are much less responsive than elected lawmakers to the deep-seated religious concerns of many Americans. So even when administrative rules are facially neutral, they often end up burdening religious Americans in ways enacted laws would not. The danger, in short, is that the entire game is tilted. The New Civil Liberties Alliance will continue to press the Court to face up to this inherent bias in administrative rulemaking.”