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NCLA Responds to OMB with Ideas to Curb Unconstitutional Agency Enforcement and Adjudication Practices

Improving and Reforming Regulatory Enforcement and Adjudication, OMB-2019-0006

Washington, DC (March 16, 2020) – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group submitted [comments](#) in response to the Office of Management and Budget’s (OMB) *Improving and Reforming Regulatory Enforcement and Adjudication Notice* today. NCLA’s examples document that recommendations that examine whether the current modes of rulemaking, enforcement and adjudication do not always comply with the Administrative Procedure Act (APA) and the U.S. Constitution. These examples are drawn from real cases—mostly cases in which NCLA represents the party involved. NCLA knows firsthand the many ways in which agencies need to curb their unlawful exercise of power and their abuses of the administrative lawmaking, enforcement and adjudication functions and took this opportunity to share that knowledge with OMB.

NCLA focused on six out of the eleven topics in OMB’s request for information including: investigatory reform; joint agency enforcement agreements; use of the Federal Rules of Evidence in agency adjudications; exculpatory evidence; unfair coercive resolution practices; and procedural rights in adjudication.

In its comments, NCLA addresses **investigatory reform** as critically important given the failure of government agencies to undertake investigations in a reasonable manner *before* subjecting companies and individuals to a burdensome process. It also violates the due process of law for an agency to take years to pursue an investigation of someone (with or without their knowledge) and then demand a response within days of receiving a notice of violation. As such, agencies tasked with adjudicating a person’s past and present rights and liabilities under the law must provide adequate notice and full **procedural protections** except when informal proceedings are allowed by law.

NCLA also believes that these prolonged investigations and adjudications lead to **unfair and coercive resolutions**. The costs of defending oneself or one’s company for years on end can be crippling. Targets of agency enforcement are often on the receiving end of an agency publicity machine that gets to pursue its narrative in the court of public opinion while people wait for their rights to be vindicated by a neutral arbiter in court. Not every defendant can afford the monetary and emotional toll attached, and are, therefore, unfairly coerced to settle before ever getting to defend their actions before a neutral judge.

NCLA also recommends that agencies that conduct civil enforcement actions should be required to promulgate a final rule adopting the **Federal Rules of Evidence** in all formal agency adjudications. When it comes to disclosure of **exculpatory evidence** in civil enforcement actions, NCLA calls for agencies to adopt the “*Brady Rule*” and to require mandatory education and training for agency enforcement staff and Administrative Law Judges.

NCLA released the following statements:

“When defending against federal agency adjudicatory overreach, it is easy to come to the conclusion that the process is the punishment. The current practices are often used not to shed light on or solve a problem, but to ensure that regardless of the ultimate outcome, the agency always wins and the American citizen or company always loses. It is high time that agencies take accountability and course-correct.”

—**Kara Rollins, NCLA Litigation Counsel**

“NCLA appreciates OMB’s efforts to identify areas for improvement in administrative enforcement activity. For too long agencies have used enforcement actions to expand their authority, jurisdiction, and budgets. When the courts defer to agency interpretations of statutes and regulations, or to administrative “factual” records in appeals from agency adjudications, it compounds the unfairness of the administrative process. NCLA represents clients who are suffering through regulatory enforcement practices that violate their civil rights, so we know firsthand that agency practices are ripe for reform.”

—**Mark Chenoweth, NCLA General Counsel**

ABOUT NCLA

NCLA is a nonpartisan, nonprofit civil rights organization founded by prominent legal scholar Philip Hamburger to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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