



Atlantic Legal Foundation

BULLETIN

JULY 1994

Foundation Wins CUB Case

On July 14, 1994 the Appellate Division of the Supreme Court of the State of New York, in a unanimous decision, declared unconstitutional, Governor Mario Cuomo's January 1991 executive order which authorized the creation of a private "citizens utility board" (CUB) and which gave the CUB access to mailings by state agencies to recruit members and raise funds. The Appellate Division agreed with the position of Atlantic Legal Foundation (ALF) that Executive Order No. 141 violated the constitutional doctrine of separation of powers. The court held that the power to establish public policy was a prerogative of the legislative branch, and that the legislature had not established a policy of creating a Citizens Utility Board, nor of permitting such a group to use state agency mailings to raise money or seek members.

Atlantic Legal Foundation brought the suit, *Pierre Bourquin v. Mario M. Cuomo*, in June 1991 to have the executive order nullified on several grounds, including separation of powers. The Foundation brought suit on behalf of three taxpayers, including John Faso, an Assemblyman from upstate Kinderhook, New York, and Citizens for a Sound Economy, a Washington-based citizens good government group with over 20,000 members in New York and 200,000 members nation-wide.

ALF argued that the Legislature had never approved creation of a CUB, and that no other private group, charitable or otherwise, is permitted to use state mailings to seek members or support. "The notion that the state would sponsor a private group and its advocacy interests is inimical to the concept of a

'free marketplace of ideas' and the right of all groups to participate on equal footing in attempting to influence public policy" said Martin Kaufman, ALF's Senior Vice President and General Counsel, who argued the case for the plaintiffs.

Mr. Kaufman added: "The decision of the appellate court clearly recognizes the principle that our constitution vests lawmaking power in the elected legislative representatives, not in the Executive

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Branch. Governor Cuomo had tried for many years, unsuccessfully, to get the Legislature to pass bills to create a CUB, and when the Legislature refused to pass such a law, he tried an 'end run' by issuing his executive order. The decision sends a clear signal to Governor Cuomo and to his successors that the Executive Branch cannot circumvent the constitutional principle of separation of powers and the normal legislative process merely because he is frustrated by a Legislature that does not bend to his will."

Douglas Foster, President of ALF, said that "We are very gratified that the appellate court reversed the lower court, which had upheld Governor Cuomo's unconstitutional assumption of legislative prerogatives. This is also a victory for New York taxpayers, because they already are paying for three government agencies—the Consumer Pro-

tection Board, the Attorney General and the staff of the Public Service Commission—which are charged with protecting the interests of utility consumers."

The lower court had ruled in favor of the Governor and the PSC and had dismissed the plaintiffs' case. As a result, CUB had been "certified" by the Public Service Commission and this Spring had used mailings from the New York Department of Taxation and the New York Department of Motor Vehicles which reached thousands of New York residents to solicit members and funds. CUB's message was patently anti-utility and inflammatory. The CUB fliers, some of which bore Ralph Nader's signature, referred to "greedy electric and phone companies" and claimed that utilities could "line their pockets" with consumers' money.

Atlantic Legal Foundation appealed that decision to the Appellate Division of the Supreme Court. The appeal was argued on June 8, 1994.

As a result of ALF's successful appeal, CUB's mailings on the public dole will cease and Governor Cuomo and state officials will be enjoined from allowing CUB to use state agency mailings.

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