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**Congress Should Put Universal Service on a Firmer Constitutional Foundation**

by

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The universal service system that gives subsidies to various communications providers and individuals who subscribe to communications services rests on somewhat shaky constitutional ground. The Communications Act delegates to the Federal Communications Commission excessively wide-ranging authority to impose what, in effect, are taxes on subscribers to voice services. The Communications Act also allows the Commission to spend billions of dollars in annual universal service surcharge revenues – that is, the taxes on subscribers – outside of the congressional appropriations process.

Congress should put the provision of universal service subsidies, to the extent they are deemed necessary, on firmer constitutional footing. Indirect taxing and spending by the FCC do not conform to constitutional norms, even if, thus far, the current universal service regime's mode of operation has not been held a constitutional violation in the courts. To address this constitutional problem, Congress should directly appropriate money intended to promote deployment of communications facilities by service providers and to assist low-income consumers as well as other Americans who lack access to voice and high-speed broadband services.

Functionally, federal Universal Service Fund (USF) surcharges are taxes, imposed as line items on the long-distance portion of subscribers' monthly bills. A key reason for steadily rising contribution rates – that is, rising taxes on subscribers – is that the universal service base is steadily shrinking. Voice revenues are in dramatic decline. As a result, surcharge rates have risen to a record 33.4% for the second quarter of 2021. This is a sharp uptick from the 27.1% rate from the fourth quarter of 2020, and far above the fourth quarter surcharge rates of 12.9% in 2010 and 5.6% in 2000. There is no reason to think that the current trajectory of a shrinking tax base and rising rates is reversible unless or until Congress overhauls the universal service subsidy system. But reforming universal service is more than just a matter of fiscal policy – it's also a matter of constitutional policy.

The current arrangement for imposing surcharges on voice subscribers and distributing money to USF program subsidy recipients is in tension with Congress's constitutional responsibility to American taxpayers. The Constitution grants all legislative power to Congress, including the power to tax citizens. Article I, Section 8, Clause 1 of the Constitution provides that "[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." In Federalist No. 33, Alexander Hamilton called the federal government's authority to tax "the most important of the authorities proposed to be conferred upon the Union."

Significantly, Article I, Section 8, Clause 8 reflects the important separation of powers principle that the power of taxation is a legislative power. "No taxation without representation" was more than just a rallying cry of the American Revolution. It expressed the underlying idea that a free people should not be taxed and, therefore, deprived of their property without consent through their elected representatives. And the requirement that the taxing power only be exercised by Congress provides an important measure of accountability to citizens. But Section 254 of the Communications Act's delegation of revenue-raising authority to the FCC amounts to a congressional refusal to responsibly discharge the important taxing power expressly assigned to it by the Constitution.

Moreover, Section 254's delegation of taxing and spending power to the FCC appears, at the very least, to push the boundaries of what is permissible under the Supreme Court's nondelegation doctrine. The doctrine reinforces the separation of powers by barring excessively broad delegations of lawmaking authority to other government institutions. Additionally, the doctrine may be inferred from Article 1, Section 1's proviso that all legislative powers granted under the Constitution shall be vested in Congress. According to the nondelegation doctrine set forth by the Supreme Court in *J.W. Hampton v. United States* (1928), when Congress passes a law delegating legislative authority to a federal agency, the legislation must set forth an "intelligible principle" to guide the agency or its officials in carrying out that delegated authority. Although Congress has not invalidated a federal law under the "intelligible principle" test since 1935 when it did so in both *A. L. A. Schechter Poultry Co. v. United States* and *Panama Refining Co. v. Ryan*, it remains the judicial standard for evaluating nondelegation challenges.

In the statute, Congress nowhere identifies precisely what services are to be subsidized, but instead leaves that key question open-ended, even empowering the Commission to subsidize new services. As Section 254(c)(1) states, "[u]niversal service is an evolving level of

telecommunications services that the Commission shall establish periodically... taking into account advances in telecommunications and information technologies services." That elastic proviso is made even more expansive by Section 254(a)(2)'s authorization for the Commission to establish rules to define what services are to receive universal service support and when they are to receive them.

Additional ambiguity can be found in provisions such as Section 254(c)(3), which authorizes the Commission to subsidize "additional services" – that is, services other than what the Commission defines are eligible for universal service subsidies – for schools, libraries, and health care providers. And Section 254(d) is less than clear in requiring telecommunications providers to make "equitable" universal service contributions according to support mechanisms that the Commission is empowered to establish as it sees fit. Such provisions lack definite standards for evaluating the legality of the Commission's exercising of authority.

Section 254's delegation is broad and vague enough that it at least is constitutionally questionable. And the issue could become even more serious if the Supreme Court decides, as many constitutional scholars predict, to more vigorously enforce the nondelegation doctrine in the future. A majority of the current Justices have provided hints that they may do so. The nondelegation issue, and the institutional concerns behind the Constitution's lodging of the taxing power exclusively in Congress, should at least prompt Congress to consider exercising its powers of taxation in a more transparent, disciplined, and accountable manner.

Although the constitutionality of Section 254 has been upheld by the U.S. Courts of Appeals of the Fifth and D.C. Circuits, both decisions directly addressed challenges based on the Article I Section 7 Origination Clause – and *not* the nondelegation doctrine. The Origination Clause provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." The Framers placed the power of originating money bills in the House of Representatives – and directed that money be spent only by pursuant to law in the Article I, Section 9 Appropriations Clause – in order to provide democratic accountability for taxing and spending. Incidentally, no party has ever succeeded on an Origination Clause challenge. In his *Commentaries on the Constitution* (1833), Justice Joseph Story wrote that the clause "has been confined to bills to levy taxes in the strict sense of the word, and has not been understood to extend to bills for other purposes, which may incidentally create revenue."

In rejecting Origination Clause challenges to Section 254, circuit courts ruled that the Telecommunications Act of 1996 was not a bill for raising revenue and that universal service revenues constitute "fees" or "surcharges" rather than taxes raised for general revenue purposes. This linguistic parsing seems hardly satisfying given that nearly all U.S. adults subscribe to voice services and pay the surcharges – and also given the significant amount of revenues involved with USF. Approximately \$8.5 billion in universal service revenues were raised and distributed in 2020 alone.

But universal service reform ought not depend on judicial intervention. The Constitution places the powers to tax and make appropriations within the purview of Congress. And so those powers should be exercised in a transparent manner by Congress so that there will be accountability to

the public for the revenue-raising and the spending. Replacing the existing system of FCC-administered taxes and spending with congressionally-appropriated subsidies for voice and broadband services would bring the universal service support regime more in line with what the Founders envisioned and the Constitution requires.

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