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A Nondelegation Doctrine Challenge to the FCC's Universal Service Regime

by

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On October 29, the Supreme Court [decided to hear challenges](#) to the Environmental Protection Agency's authority under the Clean Air Act to regulate greenhouse gas emissions from power plants. Many observers anticipate that the Court could – I emphasize could – use the cases to reinvigorate the moribund nondelegation doctrine. As a [Washington Post article](#) put it, legal scholars say the Supreme Court, invoking the nondelegation doctrine, possibly "could undermine Congress's authority to delegate power to federal agency."

The nondelegation doctrine, as least in theory but not so much in practice (at least since 1935!), requires that, for a delegation of authority to be lawful, Congress must provide "an intelligible principle" to guide the agency exercising the authority. In short, the nondelegation doctrine is required by constitutional separation of powers principles and is intended to ensure that binding laws are made by those who are politically accountable. Most observers agree, based on the various opinions in the June 2019 [Gundy v. United States](#) decision and the Justices' remarks in

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other opinions and writings, that it is possible, even likely, that a majority of the Supreme Court is looking, in one way or the other, to bolster enforcement of the nondelegation doctrine.

There will be plenty of time in the coming months for pundits and prognosticators to speculate on the outcome of the challenges to the EPA's exercise of authority. Here I want to focus attention on a recent petition for review filed in the U. S. Court of Appeals for the Sixth Circuit, [*Consumers Research v. FCC*](#), that challenges – explicitly on nondelegation doctrine grounds – the lawfulness of the FCC's "Universal Service" programs through which the agency provides subsidies, via a Universal Service Fund, to telecom providers in high cost areas, schools and libraries, certain health care providers, and low income persons.

Long story short. The FCC raises revenues for the Universal Service programs by imposing so-called "universal service surcharges" on all interstate and international telephone calls. Yikes! Don't look now at your bill, but the current surcharge, which is adjusted quarterly, is 29.1%! This compares to a 5.6% surcharge in 2000. The reason for the steep increase: The size of the subsidies has been growing steadily over the years, while the revenue support base – traditional interstate and international telephone calls – has been shrinking. Hello Internet!

The gravamen of the Consumers' Research petition runs like this. The surcharges imposed to support the Universal Service subsidies are, in effect, taxes "because they, at least in part, provide benefits for the general public – indeed, the term 'universal service' confirms the goal of providing benefits for as many people as possible from this pot of money." According to the petitioners, even if Congress can delegate taxing power to a federal agency, in this instance it has done so in an unconstitutional manner because it has established no meaningful limitations in the relevant Communications Act provision. Furthermore, the petitioners claim that the Universal Service programs are also unlawful because the FCC has redelegated, purportedly based on the congressional authorization, whatever authority it might possess to a private entity, the Universal Service Administrative Company (USAC), to administer the Universal Service Fund. (To the extent that USAC is not considered to be a private entity because the FCC chair appoints members of USAC's board, there may be an Appointments Clause violation. For more on the latest Supreme Court decisions on separation of power issues and the President's exercise of his authority to appoint and remove agency officials, see Christopher Walker, [*The Supreme Court's Recent Separation of Powers Decisions and Their Implications for the FCC*](#), Perspectives from FSF Scholars, October 21, 2021.)

For my purposes here, it is sufficient to quote Point 1 from the petition for review: "Congress's *standardless delegation* to the FCC of legislative authority to raise and spend nearly unlimited money via the Universal Service fund violates Article 1, section 1 of the U.S. Constitution." Without pulling out your Constitution, you already know this is the section declaring that "All legislative Powers" are vested in Congress. Hence the claimed nondelegation doctrine violation.

I will have more to say about this case as the litigation progresses, but for now, I'll just say I think the claimed violation of the nondelegation doctrine has considerable merit. Of course, much may turn on whether the court considers the universal service surcharges imposed on

consumers "taxes." Certainly, nearly universally, economists would agree that, in practical effect, they are.

In any event, the FCC's Universal Service regime is in dire need of reforms to ensure that whatever subsidies are disbursed – now over \$9 billion per year – are properly targeted to serve those areas, institutions, and low-income persons truly in need and that waste and fraud, which in the past have been problems, are minimized. If the nondelegation doctrine challenge succeeds, and Congress wishes to reestablish a Universal Service regime, presumably it will be forced to undertake such reforms and provide sufficient legislative guidance to assure the political accountability that the nondelegation doctrine is intended to secure.

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