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A Trio of "Sleeper" Nondelegation Doctrine Challenges

by

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For those, like me, who harbor hopes that abuses of authority by administrative agencies might be curbed, a meaningful revival of the nondelegation doctrine has been a target that has not yet been realized. Of course, the Supreme Court's decision last term in [West Virginia v. Environmental Protection Agency](#) was encouraging on this front.

In *West Virginia*, the Court held that Congress did not grant EPA authority in the Clean Air Act to establish emissions caps based on what the agency called a “generation-shifting” approach to moving electricity production from higher-emitting to lower-emitting sources. In doing so, the majority relied on, and more firmly embedded in its jurisprudence, what is now known as the “major questions doctrine.” This doctrine holds there are certain “extraordinary cases” that require a “clear congressional authorization” for the agency to exercise the powers that it claims.

The extent to which the major questions doctrine – which like the nondelegation doctrine is grounded in separation of powers principles – will be invoked successfully by those claiming agencies have exceeded their authority remains to be seen. You don't need to be an

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administrative law or constitutional law scholar to surmise that it's likely to take years for key questions regarding the doctrine to be answered more definitively – including, for example, how to distinguish between "major" and "non-major" questions.

In the meantime, it may be premature to forget about a potential revival of the nondelegation doctrine. For now, and for a majority of the Supreme Court Justices, it may be that reliance on the major questions doctrine has supplanted a rebirth of the long dormant nondelegation doctrine as the preferred means of cabining the exercise of administrative power within the bounds of congressionally delegated authority. But it's worth pointing out there are still nondelegation doctrine challenges making their way through the judicial system.

Here I want to call your attention to three "sleeper" nondelegation doctrine challenges of Federal Communications Commission actions now pending in the Fifth, Sixth, and Eleventh Circuits. They are all styled *Consumers' Research v. FCC*, and brought by the same lead petitioner, and they all raise essentially the same claim: That Congress's delegation of authority to the FCC to impose "surcharges" on all interstate telephone calls, which are used to provide subsidies to high-cost geographical areas, schools and libraries, certain health facilities, and low-income persons, violates the nondelegation doctrine. The surcharges, which are paid into a Universal Service Fund by telecommunications service providers, invariably are passed through by the carriers to be paid by the end-user consumers. The size of the surcharge has grown steadily over the past two decades and now amounts to 30% added on top of the ordinary charge for each call. If you look closely, you can find the surcharge on your telephone bill. It's labeled "Federal Universal Service Charge," or some such term very close to that.

The FCC's authority to impose the surcharge to support the various "universal service" programs was added to the Communications Act of 1934 by the Telecommunications Act of 1996. New Section 254 ([47 USC §254](#)), titled "Universal Service," defines "universal service" as an "evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services." The provision states that the agency, in directing subsidies, shall consider which services (1) are essential to education, public health, or public safety; (2) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers; (3) are being deployed in public networks; and (4) are consistent with the public interest.

It's a bit more complicated, of course, but the gravamen of the Consumers' Research argument runs like this. The surcharges imposed to support the Universal Service subsidies violate the nondelegation doctrine because Congress has engaged in a standardless delegation of authority to the FCC to raise and spend nearly unlimited amounts via the Universal Service Fund. The surcharges are, in effect, taxes because, at least in part, they provide benefits for the general public – indeed, the term 'universal service' confirms the goal is to provide subsidies to as many people as possible.

Moreover, even if Congress can delegate taxing power to a federal agency, Consumers' Research claims that, in this instance, it has done so in an unconstitutional manner because the statute establishes no meaningful limitations. Furthermore, Consumers' Research claims the Universal

Service programs also are unlawful because the FCC has redelegate, without congressional authorization, whatever authority it might possess to a private entity, the Universal Service Administrative Company (USAC), to administer the programs.

The FCC responds that Section 254 contains sufficient direction to the agency to establish its Universal Service programs and to delegate certain tasks to USAC to administer the Universal Service Fund. According to the Commission, the delegation of authority is constitutional if Congress has provided “an intelligible principle to which” the Commission “is directed to conform.” *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). The agency says the Supreme Court has applied this “intelligible principle” test for nearly a century, and Section 254's delegation clearly meets the "intelligible principle" test. And the Commission claims the tasks performed by USAC are merely ministerial.

If you wish to delve more deeply into the arguments, you can review Consumers' Research's and the FCC's principal briefs in the Fifth Circuit [here](#) and [here](#). [A Pacer subscription is required.] The briefs in the other circuits, on the central nondelegation claim, are essentially the same. And, in the interest of disclosure (as they say), I joined an [amicus brief](#) supporting Consumers' Research in the appeals in all three circuits. [A Pacer subscription is required.]

For even more on the constitutionality of the FCC's Universal Service programs, and whether they make sense as a matter of policy, you can watch this informative Federalist Society [webinar](#), "Consumers' Research v. FCC and the Legality of the Universal Service Fund."

Finally, as pointed out, both the nondelegation and major questions doctrine are grounded in fundamental separation of powers principles. So, on the chance you're still trying to figure out the relationship, after last June's Supreme Court's *West Virginia v. EPA* decision and the other significant administrative law and constitutional law decisions of the past several years going back, say, to 2019's *Gundy v. United States*, please see my forthcoming South Carolina Law Review article, with co-author Andrew Magloughlin, titled, [NFIB v. OSHA: A Unified Separation of Powers Doctrine and Chevron's No Show](#). In the main, the article explores the way in which Justice Neil Gorsuch, in his notable concurrence in *NFIB v. OSHA*, presents a novel unified theory of the nondelegation and major questions doctrines that fuses the doctrines into two distinct sides of the same separation-of-powers-protective coin.

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