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Fifth Circuit Rules USF Contribution Scheme Violates Legislative Vesting Clause

by

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On July 24, the U.S. Court of Appeals for the Fifth Circuit issued an [en banc decision](#) that the universal service contribution mechanism violates the [Legislative Vesting Clause](#) of the U.S. Constitution. By a 9-7 vote, the court in [Consumers' Research v. FCC](#) determined that Congress's broad delegation of tax authority to the FCC under [Section 254](#) of the Communications Act combined with the agency's delegation of tax authority to a private entity amounted to a constitutional violation.

The Universal Service Fund (USF) distributes over \$8 billion annually in subsidies to telecommunications service providers to serve high-cost area consumers, low-income consumers, schools, libraries, and hospitals. Section 254(c) of the Communications Act defines universal service as "an evolving level of telecommunications services that the Commission shall establish periodically" and "consistent with the public interest, convenience, and necessity." Under Section 254(d), telecommunications providers are required to financially contribute to

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FCC-established universal service mechanisms, and Section 254(b)(1) provides that service rates should be affordable.

The FCC established the Universal Service Administrative Company (USAC), a private corporation, to administer the USF. Each quarter, the USAC proposes a USF contribution rate based on input from telecommunications providers. If the FCC takes no direct action, the proposed rate goes into effect. Telecommunications providers pass contributions costs onto consumers as USF line items on their monthly bills.

In November 2021, the USAC proposed the USF contribution amount for the first quarter of 2022. It was [deemed approved](#) without direct FCC action in December 2021. A challenge to the contribution amount by petitioner Consumers' Research was [rejected](#) by a Fifth Circuit panel. Consumers' Research filed a petition for rehearing en banc.

After addressing threshold procedural matters of standing and issue preclusion, the court determined the first quarter 2022 contribution amount violated the U.S. Constitution, specifically Article I, Section I's provision that "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." The court's opinion, by Judge Andrew S. Oldham, determined "the power to levy USF 'contributions' is the power to tax—a quintessentially legislative power." The court held that USF contributions are taxes and not fees under [NCTA v. FCC](#) (1974) and other precedents. USF contributions are "are not incident to a voluntary act but rather are a condition of doing business in the telecommunications industry," and they do not "represent a fair approximation of the benefits" conferred on telecommunications providers but instead are intended to subsidize high-cost area consumers, low-income consumers, schools, hospitals, and libraries. Moreover, USF contributions are not ultimately shouldered by FCC-regulated parties because providers pass the costs on to consumers. And the benefits of USF contribution payments do not go to consumers but to providers.

The court further determined that Section 254 poses grave concerns under public nondelegation precedents, such as [J.W. Hampton Jr., & Co. v. U.S.](#) (1928). According to the court, Section 254(c)'s definition of "universal service" does not supply an "intelligible principle," Section 254(d) is not meaningful because its aspirational terms do not limit the amount of money the FCC disburses on universal service projects, and Section 254(b)(1) provides no guidance regarding affordability. Unlike precedents upholding delegations that implicated special agency expertise, the USF implicates the taxing power, and "taxation has always been an exclusively legislative function."

In the court's analysis, the FCC delegated to the USAC "the power to dictate the size of the universal service contribution amount, which controls the size of a tax levied on American consumers." Also, the FCC does not appear to independently review contribution amounts or exercise sufficiently "pervasive surveillance and authority" over the USAC. Under FCC regulation, the USAC "is run almost entirely by stakeholders who stand to benefit financially when universal service subsidies grow." Furthermore, the court determined that Section 254 does not authorize subdelegation, and that no precedent allows federal agencies to subdelegate powers without statutory authorization.

According to the court, presidential removal authority precedents [Seila Law LLC v. CFPB](#) (2020) and [Free Enterprise Fund v. PCAOB](#) (2010) recognize that “two or more things that are not independently unconstitutional can combine to violate the Constitution’s separation of powers.” Based on the double-layered delegations to the FCC and USAC as well as the lack of any other government program like the USF or historically analogous to it, the first quarter 2022 contribution amount violated the Legislative Vesting Clause.

In a concurring opinion, Judge Jennifer Walker Elrod wrote that the public and private delegations each violate the Legislative Vesting Clause. Judge James C. Ho’s concurring opinion characterized the delegations of taxing power in the case as “threats to democracy presented by the administrative state” and “a deliberate design to turn consent of the governed into an illusion.”

The primary dissent, by Judge Carl E. Stewart, sided with prior Sixth, Eleventh, and D.C. Circuit decisions that Section 254 satisfies the intelligible principle test. According to Judge Stewart, Congress set out in Section 254 the policy goal of ensuring nationwide access to advanced telecommunications and information services. Section 254(b) “lays out the principles that the FCC must adhere to,” including “the specific directive that the FCC ‘shall [create] policies for the preservation and advancement of universal service.’” And Section 254(c) and (d) impose additional limits.

Judge Stewart wrote it was “a classic case where an agency enlists a private entity to assist with ministerial support in the form of fee calculation and collection.” In his view, “the FCC maintains complete control over USAC and holds final decision-making authority regarding the USF and its programs.” Any party aggrieved by a ministerial act of USAC may seek FCC review.

Furthermore, Judge Stewart cited prior Fifth and D.C. Circuit decisions upholding Section 254 under the Origination Clause and Taxing Clauses and characterizing USF contributions as fees and not taxes. In Section 254(d), Congress set out that a charge must be collected from telecommunications providers for the voluntary act of doing business, and providers benefit from direct dispersals of USF money from a specific fund. Whether or not providers pass-through costs to consumers is irrelevant to the constitutional analysis.

A dissenting opinion by Judge Stephen A. Higginson criticized the court’s majority for “going beyond even petitioners’ arguments to adopt a novel theory”—that “two *non*-violations” can combine to violate the Legislative Vesting Clause. He faulted the majority for offering no test for determining when two non-violative delegations become unconstitutional.

Judge Higginson wrote that, even if presidential removal authority precedents imply a different review standard, lower courts should follow nondelegation precedents that directly control.

On June 10, 2024, the Supreme Court [denied](#) petitions for review of [Sixth](#) and [Eleventh](#) Circuit decisions that rejected identical challenges to the USF contribution mechanism under the Legislative Vesting Clause. By holding a multibillion-dollar annual subsidy program

unconstitutional and creating a circuit split, the Fifth Circuit's decision is a strong candidate for Supreme Court review. On July 25, Petitioners Consumers' Research filed a supplemental brief at the Supreme Court, urging it to reconsider the June 10 order based on the Fifth Circuit's en banc decision.

In the meantime, Congress should take instruction from the Fifth Circuit's decision in *Consumers' Research v. FCC* by reforming the USF and putting the program's contribution mechanism on [firmer constitutional footing](#). Congress should ensure that taxing and appropriations powers are exercised in a transparent manner that is accountable to the public and that any delegations of power to the FCC are clearly authorized and guided by intelligible principles. Such reforms also ought to modernize the USF's contribution base to ensure the program's fiscal sustainability and provide relief to consumers who must pay a [34.4%](#) "surcharge" on the interstate portion of their service bills during the third quarter of 2024. One [reform option](#) is for Congress to authorize the FCC to require universal service contributions from online companies that generate the most internet traffic or the most revenues via universally-accessible broadband networks. Another option is for Congress to make direct appropriations to fund universal service.

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