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Supreme Court Upholds FCC Universal Service Fund Against Nondelegation Challenge

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In *FCC v. Consumers' Research*, the Supreme Court upheld the Federal Communications Commission's authority to set and collect contributions to the Universal Service Fund, which promotes access to telecommunications services for underserved communities, including rural and low-income consumers, schools, libraries, and rural hospitals. In doing so, the Supreme Court reversed the Fifth Circuit's *en banc* decision, which had held that the FCC's contribution mechanism constituted an unconstitutional "double-layered delegation."

The Universal Service Fund (USF) was created under Section 254 of the Telecommunications Act of 1996. Section 254 requires every telecommunications carrier providing interstate services to contribute to the USF and establishes six principles on which the FCC is required to base its universal service policies. By regulation, the FCC requires carriers to contribute to the USF based on a quarterly "contribution factor" calculated as a percentage of projected industry revenue. The FCC has also issued regulations authorizing the Universal Service Administrative Company (USAC), a private entity, to produce financial estimates that are used to determine the quarterly contribution factor.

Consumers' Research challenged this scheme, arguing that Congress had improperly delegated legislative power to the FCC without an "intelligible principle," and the FCC had in turn unconstitutionally delegated to a private entity, the USAC, the authority to determine the required contribution amounts. The *en banc* Fifth Circuit agreed and held that the combination of Congress's grant of authority to the FCC and the FCC's reliance on the USAC for setting contribution rates violated the Constitution, even if neither delegation independently violated the Constitution.

In a 6-3 opinion authored by Justice Kagan, the Supreme Court reversed and reinstated the USF funding scheme. Applying the traditional "intelligible principle" test, the Court found that Section 254 adequately constrained the FCC's authority under the nondelegation doctrine. In the majority's view, Section 254 limits the FCC to collecting only what is "sufficient" to support universal service programs while requiring the FCC to consider specific criteria, including affordability, usage, and necessity for public health, education, and safety. "Each of the conditions, alone and together," the majority concluded, "provides the FCC with determinate standards." While the Court acknowledged that Section 254 did provide the FCC with policy discretion, the Court explained that "that kind of discretion—balancing or no—does not raise a constitutional problem: A degree of policy judgment … can be left to those executing or applying the law." The Court faulted the challengers and the dissent for instead reading Section 254 "extravagantly" to create a constitutional problem, rather than interpreting the statute "to comport with the Constitution."

The majority next rejected the challengers' private nondelegation argument regarding the USAC. The majority began with the observation that as long as an agency "retains decision-making power, it may enlist private parties to give it recommendations." In the majority's view, the USAC played an "advisory role" in setting commission rates and remained "broadly subordinate" to the FCC, because the FCC ultimately retained the decision-making authority to set commission rates.

Finally, the Court rejected the Fifth Circuit's "double-layered" theory of nondelegation, which opined that the combination of a traditional delegation to the FCC and a private delegation to the USAC violated the Constitution. The Court rejected the Fifth Circuit's analogy to *Free Enterprise Fund*, a case involving two layers of for-cause removal, and held that in the nondelegation context, a measure implicating one type of delegation "does not compound a measure implicating" another type of delegation, "in a way that pushes the combination over a constitutional line." As a result, because Section 254 did not violate either nondelegation doctrine, the statute did not exceed Congress's authority.

Justices Kavanaugh and Jackson filed separate concurrences. Justice Kavanaugh noted that despite the fact that the intelligible principle test "has not historically packed much punch," the Supreme Court's recent decisions in *Loper Bright Enterprises v. Raimondo* and *West Virginia v. EPA* make clear that executive discretion is constrained "by the scope of Congress's authorization and by any restrictions set forth in [the] statutory text." Justice Kavanaugh concluded by articulating his view that the delegation of legislative authority to *independent* agencies, rather than executive agencies, raises substantial questions under Article II. Justice Jackson wrote a separate concurrence focused on the validity of the private nondelegation doctrine, expressing skepticism that such a doctrine is grounded in the Constitution's text or history.

Justice Gorsuch dissented, joined by Justices Thomas and Alito. The dissent argued that Section 254 represents a broad and unconstitutional transfer of the taxing power to an executive agency. The dissent primarily disputed the majority's conclusion that Section 254 imposes sufficient qualitative limits on the USF to supply an intelligible principle, pointing to the statute's lack of a specific tax rate or numerical cap on the amount of required contributions. The dissent argued that Section 254's language was so broad that it effectively provides the FCC with a "blank check" to expand services, as evidenced by the large increases in the amount of required USF contributions in recent years.

Overall, the decision is a win for administrative agencies exercising delegated authority from Congress and/or delegating such authority to private organizations. The decision leaves intact the FCC's framework for administering the USF and reaffirms the validity of broad delegations of legislative authority. Additionally, the ruling indicates that a majority of the Court is unwilling to revisit the "intelligible principle" test for determining whether statutes satisfy the nondelegation doctrine.

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