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Legal Sidebar

# *Consumers' Research v. FCC*: The Legislative Vesting Clause and Taxing Power Delegation

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On July 24, 2024, in *Consumers' Research v. Federal Communications Commission*, 109 F. 4th 743 (2024), the en banc U.S. Court of Appeals for the Fifth Circuit held that the universal service contribution mechanism that Congress and the Federal Communications Commission (FCC) used to fund the Universal Service Fund (USF) violated the Legislative Vesting Clause. The Legislative Vesting Clause provides that "All legislative Powers . . . shall be vested in a Congress of the United States" and is the basis of the nondelegation doctrine. The Supreme Court has interpreted this Clause to mean that Congress "may not transfer to another branch 'powers which are strictly and exclusively legislative.'" Still, "Congress may confer substantial discretion on executive agencies to implement and enforce the laws." Thus, the Court "has held, time and time again, that a statutory delegation is constitutional as long as Congress" provides an "intelligible principle" that guides an executive agency's use of the discretion Congress has delegated. In *Skinner v. Mid-America Pipeline Co.*, the Supreme Court concluded that delegations of the taxing power were not subject to a "different and stricter" application of the nondelegation doctrine.

In *Consumers' Research*, the FCC argued, in defense of the "USF scheme," that Congress had not delegated its taxing power to the FCC because contributions to the USF were fees, not taxes. The en banc Fifth Circuit disagreed. In the court's view, USF contributions "d[id] not have any" of the characteristics of fees. In making the first of four legal determinations to reach its holding, the Fifth Circuit concluded that Congress, through the universal service contribution mechanism in 47 U.S.C. § 254, "delegated its taxing power" because it "bestowed upon [the] FCC the power to levy taxes," "a quintessentially legislative power."

The FCC appealed the en banc Fifth Circuit's decision to the Supreme Court, and the Supreme Court granted certiorari. On March 26, 2025, the Court heard oral argument. The Court is expected to issue an opinion in this case this term.

Previously published Legal Sidebars provide additional analysis of the parties' arguments before the Fifth Circuit, the Fifth Circuit's decision, and issues before the Supreme Court. This Legal Sidebar focuses on the Fifth Circuit's conclusion that Congress delegated its taxing power. It provides an overview of the USF scheme, summarizes the Fifth Circuit's Legislative Vesting Clause fee-versus-tax analysis, and discusses related considerations for Congress.

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# The USF Scheme

Enacted as part of the Telecommunications Act of 1996, 47 U.S.C. § 254 authorized the FCC to establish the "specific, predictable and sufficient . . . mechanisms to preserve and advance universal [telecommunications] service." Section 254(d) states "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." Relying on Section 254, FCC regulation requires telecommunications carriers providing interstate telecommunications services to make "contributions" to the USF. According to 47 C.F.R. § 54.709(a), contributions to the USF are "based on contributors' projected collected end-user telecommunications revenues, and on a contribution factor determined quarterly . . . ." Under 47 C.F.R. § 54.712, USF contributors may pass "contribution costs" "through to their customers." The revenue raised from USF contributions subsidizes universal service programs that make telecommunications services available and affordable throughout the United States.

According to the Fifth Circuit, the FCC has "charged" the Universal Service Administrative Company (USAC) with a "myriad" of tasks to administer universal service programs. The USAC is a non-for-profit organization governed by a board of directors from "'interest groups affected by and interested in universal service programs' who are 'nominated by their respective interest groups'" and approved by the Chairman of the FCC. As part of its administrative duties, the USAC bills and collects USF contributions and disburses USF funds. "Most prominently," in the Fifth Circuit's view, the USAC determined the "contribution factor" in practice, although the court also acknowledged that the contribution factor was subject to the FCC's approval.

# Fees Versus Taxes

While the Fifth Circuit acknowledged the difficulty of distinguishing fees from taxes, it reviewed prior fee-versus-tax jurisprudence and decided that fees had three characteristics. The first characteristic was that a fee was "incurred 'incident to a voluntary act'" or charged by the government to "defray the cost of providing benefits to a regulated party." In addition, the court determined that when a fee was charged by the government, the fee had to represent a "'fair approximation of services, facilities, or benefits furnished.'" The second fee characteristic identified by the court was that the administrative agency that imposed the fee generally imposed it only on "'persons, or entities, subject to its regulation for regulatory purposes.'" Citing *Skinner*, the court explained the third fee characteristic was that the revenue raised by the fee was "used to supply benefits [that] inur[ed] to the persons or entities paying them rather than to the public generally."

The Fifth Circuit concluded that USF "contributions d[id] not have any of these characteristics." Neither option for satisfying the court's first fee characteristic was present. USF contributions were "a condition of doing business in the telecommunications industry," therefore they were "not incident to a voluntary act." The contributions also were not "a fair approximation of the benefits conferred by government regulation on telecommunications carriers." The court explained that there was no relationship between contributions and regulatory costs, because the USF was designed to provide "telecommunications subsidies to schools, libraries, healthcare facilities, and low-income individuals."

The court determined that the second characteristic of a fee was not present either because an FCC regulation permitted telecommunications carriers to pass the "cost of contributions on to consumers." Thus, contributions were "not borne by parties [the] FCC regulate[d]." The court reasoned that contribution costs were "widely shared by the population in a manner reminiscent of a 'classic tax.'"

Finally, the court concluded that the third characteristic of a fee was not present because the "benefits associated" with USF contributions did not inure to USF contributors. Rather, the benefits inured to telecommunications subsidy recipients. The court stated that there was "no overlap" between the "recipients of subsidized telecommunications services" and "American telecommunications consumers who s[aw] USF charges on their phone bills each month."

The Fifth Circuit expressed that if it were to adopt the FCC's position that USF contributions were fees, not taxes, Congress could fund large-scale government programs, such as Medicare, Medicaid, the Supplemental Nutrition Assistance Program (SNAP), and affordable housing, "without 'taxing' anyone." Congress could delegate the task of funding government programs to government agencies, which could then subdelegate tasks to private actors. A private actor could set government program budgets and have a government agency "rubber-stamp" the private actor's government program tax, "which could be passed through to consumers." The court advanced that these potential consequences warranted a ruling that the universal service contribution mechanism was a tax.

# Considerations for Congress

The Supreme Court agreed to review the Fifth Circuit's decision and, at oral argument, the U.S. Acting Solicitor General conveyed some willingness to yield to treatment of the universal service contribution mechanism as a tax for the purposes of Consumers' Research's challenge. She explained, "We just don't think it matters for constitutional purposes because the non-delegation framework doesn't distinguish on this basis. And this is also a Commerce Clause power." If the Supreme Court agrees, it might decide only whether the universal service contribution mechanism comports with the nondelegation doctrine, without reaching the question of whether the contribution mechanism is a tax or fee in the context of the Legislative Vesting Clause.

Even if the Supreme Court does not revisit its conclusion in *Skinner* that there is no "different and stricter" application of the nondelegation doctrine for delegations of the taxing power, the nondelegation doctrine nevertheless requires statutory delegations of Congress's discretion to include "intelligible principles." At oral argument, several Justices observed the novelty of the universal service contribution mechanism. In a search for boundaries and constraints on the contribution mechanism's ability to raise revenue for a government program that benefits the public, the Justices made multiple inquiries about fee and tax delegations that did not have numerical limits—monetary limits, rate ceilings, or caps. Accordingly, when reflecting on potential nondelegation challenges in this context, Congress might consider enacting legislation that constrains the amount of revenue that can be raised using mathematical formulas that weigh the relevant factors and take those factors into account.

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