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## **To Delegate or Not to Delegate: U.S. Supreme Court Readies to Decide an Important Separation of Powers Issue**

This white paper discusses *FCC v. Consumers' Research*, a case recently argued before the U.S. Supreme Court and now set for decision, along with a review and analysis of the impact it may have on when and how Congress may permissibly delegate regulatory authority to federal agencies and the implications for those agencies in the administration and operation of the federal government.

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With May having begun, we have entered the zone in which the Supreme Court will be announcing decisions in the most important cases of this term.

Among them is *Federal Communications Commission v. Consumers' Research*, a case we have been following involving a major separation of powers issue, which, depending on its outcome, could dramatically alter the manner and extent to which Congress may empower regulatory agencies, including, among many others, the Department of Health and Human Services (HHS), to promulgate regulations and how agency programs can be funded and operated. The case was argued on Mar. 26, along with a companion case *Schools, Health & Libraries Broadband Coalition v. Consumers' Research*.<sup>1</sup>

In anticipation of an upcoming decision, it is a good time to look back at the oral argument and make some predictions.

The case centers around Congress' passage of the Telecommunications Act of 1996 (the 1996 Act) and the authority it granted the Federal Communications Commission (FCC) to administer the statute. More specifically, it raises the question whether Section 254 of the Act unconstitutionally delegated legislative power to the FCC when:

1. It directed the FCC to preserve and advance universal service to all telecommunications subscribers and establish and operate a Universal Service Fund (USF) designed to fund telecommunications subsidies to schools, libraries, health care facilities and low-income individuals; and
2. The FCC then appointed Universal Service Administrative Company (USAC), a private nonprofit company, as the program's administrator, authorizing that company to perform various administrative tasks.

In so doing, the case puts into play the question of when and to what extent Congress may constitutionally delegate authority to federal agencies to administer statutes and fund and operate programs without running afoul of Article I of the U.S. Constitution.

As explained below, following the argument, Justices Gorsuch and Thomas seem prepared to conclude that Congress violated the nondelegation doctrine whether applied as it has historically been applied (the "intelligible principle" standard) or in the more robust manner laid out by Justice Gorsuch in his dissent in *Gundy v. United States*, 588 U.S. 128 (2019). Justice Alito does as well, although he expressed some concern as to the impact of such a decision on rural service recipients and on prior Court decisions.

At the same time, Justices Kagan, Sotomayor, and Jackson seem certain to conclude that the delegation was clearly constitutional.

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<sup>1</sup> *Consumers' Research* is on appeal from an *en banc* decision of the Fifth Circuit Court of Appeals which held that Congress had unconstitutionally delegated authority to the FCC. The companion case is an appeal from a decision of the Sixth Circuit which held that there had been no impermissible delegation.

As for Justices Kavanaugh and Barrett, based on their questions to then Acting Solicitor General Sarah Harris representing the FCC and Paul Clement representing the Schools, Health & Libraries Broadband Coalition (SHLBC), they appear to be on the fence, perhaps leaning toward ruling that on the facts presented in this case, the delegation was constitutional and the FCC's administration of the USF may remain in place.

As for Justice Roberts, while he sided with the dissenters in the *Gundy* case (as further explained below), it is not clear how he may decide the issues in this case given that he was unusually silent during the argument.

Whatever the ultimate outcome, what does seem likely is that the decision will be on narrow grounds and will not serve as the major separation of powers ruling that might have been expected.

What follows is a discussion of the basic principles involving the constitutionality of congressional delegations to agencies followed by a review of the most important issues raised at oral argument and the justices approach to them and then some concluding thoughts.

## **I. The Basic Principles Concerning Delegations**

Article I, Section 1 of the Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” This has been consistently interpreted to mean that Congress may not transfer to another branch powers that are strictly and exclusively legislative. At the same time, it has also been recognized that Congress may confer substantial discretion on executive agencies to implement and enforce the laws.

Not surprisingly, the point of contention has centered on when, as part of the passage of legislation, Congress has impermissibly delegated to an agency powers that are strictly and exclusively legislative as opposed to the power to implement and enforce a law.

The basic principles with respect to the constitutionality of a delegation were most recently summarized by Justice Kagan writing a plurality opinion for the Court in the *Gundy* case.

In *Gundy*, the Court rejected the petitioners' argument that there had been an unconstitutional delegation of authority by Congress to the Attorney General involving portions of the Sex Offender Registration and Notification Act. Per Justice Kagan, a statutory delegation is constitutional provided Congress lays down by legislative act an “intelligible principle” to which the agency is directed to conform.

As further explained by Justice Kagan, under prevailing law, these standards are not demanding. Per Justice Kagan:

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- Article I, Section 1 of the Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.”
- Based on that provision, Congress may not transfer to another branch powers which are strictly and exclusively legislative.
- Congress may, however, confer substantial discretion on executive agencies to implement and enforce the laws.
- A statutory delegation is constitutional provided Congress lays down by legislative act an “intelligible principle” to which the agency is directed to conform.<sup>2</sup>

As further explained by Justice Kagan, under prevailing law, these standards are not demanding. In fact, “[o]nly twice in this country’s history (and that in a single year) have we found a delegation excessive — in each case because Congress had failed to articulate any policy or standard to confine discretion. ... We have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”

That said, there is strong sentiment on the part of a number of justices (possibly a majority) in favor of a more robust nondelegation doctrine.

This more robust approach is reflected in Justice Gorsuch’s dissent in *Gundy*, in which Justices Roberts and Thomas joined.<sup>3</sup> In his dissent, Justice Gorsuch wrote:

“[I]t would frustrate the system of government ordained by the Constitution if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals. Through the Constitution after all the people had vested the power to prescribe rules limiting their liberties in Congress alone. No one, not even Congress, had the right to alter that arrangement. As Chief Justice Marshall explained, Congress may not ‘delegate . . . powers which are strictly and exclusively legislative.’” (citing *Wayman v. Southard*, 10 Wheat. 1, 42–43 (1825)).

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<sup>2</sup> The “intelligible principle” doctrine dates back to the Supreme Court’s 1928 decision in *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928). There, the Court upheld Congress’s empowering and directing the President to increase or decrease duties under the Tariff Act of 1922. Chief Justice Taft, delivering the opinion of the Court, wrote: “If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”

<sup>3</sup> Justice Alito, signaling agreement with the dissenters, wrote a concurring opinion concluding that he could not say that the statute at issue lacked an adequately discernible standard, but would reconsider that approach in an appropriate case. Justice Kavanaugh did not participate but based on his concurring opinion in the Court’s later denial of rehearing in the *Gundy* case and in a companion case, he also seems ready to reconsider the Court’s current approach to the nondelegation issue.

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For Justice Gorsuch, in assessing whether a particular delegation is permissible, there should be three guiding principles:

First, provided Congress makes the policy decisions when regulating private conduct, it may authorize another branch to “fill up” the details.

Second, once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding.

Third, Congress may assign the executive and judicial branches certain non-legislative responsibilities.

Accordingly, Justice Gorsuch writes:

“[t]o determine whether a statute provides an intelligible principle we must ask: Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands.”

## II. The Supreme Court’s Grant of Certiorari

In granting certiorari in *Consumers’ Research*, the Court requested that the parties brief and argue:

1. Whether Congress violated the nondelegation doctrine by authorizing the FCC to determine, within the limits set forth in Section 254, the amount that providers must contribute to the USF.
2. Whether the FCC violated the nondelegation doctrine by using USAC’s financial projections in computing universal service contribution rates.
3. Whether the combination of Congress’ conferral of authority on the FCC and the FCC’s delegation of administrative responsibilities to USAC violates the nondelegation doctrine.<sup>4</sup>

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<sup>4</sup> In granting certiorari, the Court also requested that the parties brief and argue whether the case is moot in light of the challenger’s failure to seek preliminary relief before the Fifth Circuit. The mootness question did not play a part in the oral argument.

## III. The 1996 Act

The Communications Act of 1934 established the FCC and generally provided that everyone in the United States should have access to rapid, efficient nationwide communications services at reasonable charges

The 1996 Act expanded on this by directing the FCC (along with a joint federal/state board established by the FCC) to preserve and advance universal service to all telecommunications subscribers and establish and operate a universal services fund designed to fund telecommunications subsidies to schools, libraries, health care facilities and low-income individuals.

The 1996 Act provides that the FCC in establishing and operating the USF is to base its policies for the preservation and advancement of universal service on seven principles:

1. Quality services should be available at just, reasonable and affordable rates.
2. Access to advanced telecommunications and information services should be provided in all regions of the country.
3. Consumers in all regions, including low-income consumers and those in rural, insular and high cost areas, should have access to telecommunications and information services that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.
4. All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.
5. There should be specific, predictable and sufficient federal and state mechanisms to preserve and advance universal service.
6. Elementary and secondary schools and classrooms, health care providers and libraries should have access to specified advanced telecommunication services.
7. Such other principles as the FCC (and the joint board) determine are necessary and appropriate for the protection of the public interest, convenience and necessity and are consistent with the statute.

## IV. The Oral Argument

Against this background, the oral argument principally focused on:

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- Whether the absence of a dollar cap on the amount that the FCC can charge telecommunications carriers results in the delegation being unconstitutional;
- Whether Section 254 adequately sets forth and defines the parameters the FCC must consider and the criteria against which to measure them;
- Whether the answer to the constitutional question turns on the characterization of amounts levied as either fees or taxes; and
- Whether, if the delegation were held to be unconstitutional, the Court would be required to reverse prior cases testing the constitutionality of congressional delegations.

There was also some discussion as to how the nondelegation doctrine should be applied – i.e., as applied by the majority in *Gundy* or as would be applied by Justice Gorsuch in his dissenting opinion. For purposes of the case, both sides appeared to agree that the approach taken by the majority in *Gundy* could be applied.<sup>5</sup> While not a “front and center” issue, Justices Gorsuch and Thomas were certainly not “expressly agreeing” that this approach was proper as evidenced by some of their questions which flowed from Justice Gorsuch’s *Gundy* dissent.

## **The Argument Presented by the Acting Solicitor General on Behalf of the FCC**

Ms. Harris asserted that the nondelegation doctrine should not apply because:

1. Congress had directed the FCC as to the policy to follow: to give all Americans access to basic telecommunications services at reasonable charges, i.e., universal service;
2. Congress said how to do it, by charging carriers a fee, then reimbursing carriers that serve universal service programs;
3. Congress dictated how much to charge, only what is “sufficient” to achieve universal service, i.e., no more than needed to support specified programs;
4. Congress prescribed how to allocate fees – must be equitable and non-discriminatory;
5. Congress detailed what underserved areas the FCC must target and enacted Section 254 against the backdrop of a half-century history of the FCC advancing universal service for rate subsidies;

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<sup>5</sup> While agreeing to the application of the standard in that manner, counsel for Consumers’ Research, R. Trent McCotter, made clear his view that this was not necessarily the correct standard especially in a case involving a tax. He stated that his client agreed to it because it would win either way.



6. The delegation leaves key policy choices to Congress and is sufficiently definite and precise to allow courts to decide whether the FCC followed Congress's limits when filling in details;
7. By requiring the FCC to abide by these specific limiting principles, Congress sufficiently restrained the FCC such that a statutory cap was unnecessary – qualitative limits had been “baked into” the statutory scheme;
8. Ruling against the FCC would effectively require that the Court overturn a number of precedents; and
9. The USF program is well-established and has been well-received, garnering bipartisan support.

## **The Argument Presented by Counsel for Consumers' Research**

Mr. McCotter argued that the delegation to the FCC violated the nondelegation doctrine because:

1. The heart of the case is about taxation without representation;
2. Billions of dollars are paid into the USF each year;
3. The nondelegation inquiry is different in this context and determining the amount of public revenue to raise is a quintessential legislative determination, not some minor detail to be filled in later;
4. In deciding how much to raise, the FCC is guided by aspirational-only principles in Section 254(b) – there are no numerical limits or caps, and is even permitted to redefine universal service based on an evolving standard;
5. “Sufficiency” in this case is a principle not a requirement;
6. The same conclusion should apply even if the contributions to the USF are treated as fees rather than taxes;
7. If the Court rules against the FCC, Congress could always step in and amend the statute to impose a cap;
8. In ruling against the FCC, no precedents would need to be reversed; and
9. The court could rule in favor of Consumers' Research on narrow grounds – perhaps limiting the relief only to Consumers' Research.

## **The Argument Presented by Counsel for Schools, Health & Libraries Broadband Coalition**

Mr. Clement, arguing against the application of the nondelegation doctrine, asserted that:

1. There is no delegation problem because what Congress did in 1996 was to make explicit the universal service subsidies that had long been implicit in monopoly rate regulation;
2. The rate regulation prior to 1996 did no more to guide the FCC than simply telling it to regulate in the public interest;
3. When Congress in 1996 decided not only to deregulate but to expressly embrace these subsidies and delegate to the FCC how they should be administered, there was no nondelegation problem; and
4. The resulting statute is fully consistent with all of the Court's precedents and there is no reason to confront the "massive reliance interests" on the USF program or on many other programs that might be "taken out" if the Court were to overrule prior cases.

## **The Justices Question and Comments**

Justices Thomas, Gorsuch and Alito signaled their readiness to rule against the FCC, strongly so in the case of Justice Gorsuch, while Justice Alito did express some concern as to the impact of so doing.

Justice Thomas responding to Ms. Harris's argument questioned how revenue raising is in fact restrained in the absence of direct statutory constraints. He asked whether there are any other cases in which fees or taxes did not have monetary limits and where the indirect approach suggested by Ms. Harris had been accepted for nondelegation purposes.

Justice Gorsuch, clearly unconvinced by Ms. Harris's arguments, asked her first to confirm that there are no numerical limits – no caps. He then questioned whether the constraints that she asserted were present actually were. He further questioned whether there was any grounded meaning of the term "advanced telecommunications services" for purposes of what is covered in the 1996 Act.

He commented that it seemed possible that the term could evolve over time at the discretion of the FCC and questioned what would prevent the FCC from coming up with new principles not found anywhere in the statute. By way of example, he called out provisions in the statute that empower the FCC to designate additional services in addition to those mentioned in the 1996 Act and he questioned whether the prior cases that Ms. Harris asserted are precedents are in fact so given that they involve fees

designed to cover the costs of a program or services rendered, which he stated is not the case here.

Further, he questioned whether there were in fact boundaries clearly delineated such that there can be meaningful judicial review. He also signaled disagreement with Mr. Clement's argument that the Act simply followed from the regime that had long been in place, instead characterizing the pre-1996 FCC as regulating a monopoly via rate-setting.

Justice Alito questioned why, irrespective of whether the delegation to the FCC itself comported with Article 1, did the subdelegation to USAC, a private party, not either eliminate or diminish that. He also questioned whether the FCC simply rubber-stamps what USAC does suggesting that USAC's function is more than just ministerial. All that said, and while recognizing that it may not matter, he did express concern about the effects of declaring the USF invalid especially as it would impact recipients of service in rural areas (assuming Congress did not step in and save the 1996 Act). He also expressed concern as to the effect on other statutes if the delegation to the FCC was held unconstitutional, especially so given that there was no briefing on this.

Justice Kavanaugh's and Justice Barrett's questions and comments suggested they were open to concluding that the nondelegation doctrine should not be applied in this case, and certainly suggested that they were on the fence.

In particular, they challenged Mr. McCotters' argument that the delegation was invalid because there was no numerical limit — no cap — on what the FCC could collect from the carriers. They questioned what would actually be accomplished if the delegation were held to be invalid on that basis, but Congress could then cure the invalidity by putting in place any limit it chose, even a dollar amount that was way beyond anything that could ever be required. Why would use of the word "sufficient" not be better than some random number as a cap?

Justice Barrett also explored with Ms. Harris the scope of services that could be considered universal services and asked about the possibility that, in holding the delegation to the FCC invalid, the Court could be overturning precedents and jeopardizing many other statutes and programs. Ms. Harris explained why that would be the case.

Based on the questions and comments of Justices Sotomayer, Kagan and Jackson, it was clear that they will conclude that the nondelegation doctrine does not apply, basically agreeing with Ms. Harris's arguments, i.e., that (i) there exists sufficient constraints on what can come within the definition of universal services and on the FCC's revenue-raising ability; (ii) the tax versus fee question should not determine the result; (iii) what USAC is doing is basically ministerial; and (iv) in declining to invalidate the delegation, no prior precedent would be impacted and there would be no impact on other agencies and other programs.

As it turned out, very little attention was paid to the subdelegation issue. There was, on the other hand, extensive discussion as to whether the amounts charged to the carriers were fees or taxes.

When queried, Ms. Harris answered that the amounts charged can be considered taxes rather than fees, but that characterization did not matter because the nondelegation doctrine is applied the same to both taxes and fees. Mr. McCotter agreed that it did not matter for purposes of this case since his client should win whether it is a fee or a tax.

That said, he went on to assert that the USF surcharge should be considered a tax, that taxation is a quintessential legislative function and that Congress provided no objective rule to limit the amount the agency could raise. He argued that this delegation of the taxing power was unique in American history, and that coupled with the lack of substantive limits on the USF program itself, it violated the nondelegation doctrine. Justice Gorsuch's comments and questions indicated that he agreed with this.

There was also discussion as to the potential adverse consequences to rural service recipients if the Court were to invalidate the USF and to the fact that the program has received bipartisan support.

To narrow the scope of a ruling that the delegation was impermissible, Mr. McCotter suggested that it could be limited to the parties in the case or could be held in abeyance to give Congress the opportunity to cure the problem. These suggestions did not get much support from the justices.

## So Where Does That Leave Us

- Against this backdrop, it seems likely that, whatever its outcome, the case will be decided on narrow grounds and will not turn out to be the major separation of powers case that was anticipated. It also seems clear that the outcome will likely turn on how Justices Kavanaugh and Barrett come out on the issues.
- Perhaps significantly, there was the concern expressed by a number of justices as to how invalidating the USF could adversely impact telecommunications services generally and in particular rural communities and how it might invite similar challenges to the funding and operation of other agencies and programs. Notably, this could include the Federal Reserve, the Federal Deposit Insurance Corporation and the Federal Housing Finance Agency, along with others including HHS, with a direct impact on the health care sector. It is unclear how, if at all, this might impact the decision.
- Given the manner in which the arguments were briefed and the oral argument itself, it seems unlikely that the case will be the one in which the Court considers head-on whether to move away from the "intelligible principle" standard in favor of a more robust nondelegation doctrine along the lines of

what Justice Gorsuch has suggested and which appears to have the support of a majority of the justices.

- If it were to adopt a more robust nondelegation doctrine and thereby make it more difficult for Congress to delegate regulatory authority to the agencies, the Court would be acting consistently with what it has done in other contexts recently.
- In *West Virginia v. EPA*, 597 U.S. 697 (2022), the Court held that, with respect to “major questions,” there must be clear congressional authorization for the authority the agency claims in promulgating a particular regulation.
- More recently, in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), the Court overturned the *Chevron* doctrine so that judicial deference to an agency’s interpretation of a statute is no longer required.
- There are pending cases that will likely be before the Court at some point and that will in other ways impact the structure and operations of many agencies. These include cases such as *Wilcox v. Trump* concerning President Trump’s attempt to remove a member of the National Labor Relations Board and *Slaughter v. Trump* involving President Trump’s firing of two commissioners of the Federal Trade Commission. In each instance, the question is the extent to which the president should be empowered to remove agency officials both with and without cause.

It can be expected that the Court will issue its opinion in the *Consumers’ Research* case near the end of its current term in late June.