



FCC v. Consumers' Research: High Court Rejects Challenge to Universal Service Fund

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In the [Communications Act of 1934](#), Congress directed the Federal Communications Commission (FCC) to [make](#) available, “so far as possible, to all the people of the United States,” wire and radio communications services “with adequate facilities at reasonable charges.” Pointing to this language, some courts have called universal service “a [basic goal](#) of” Congress’s “telecommunications regulation.”

Today, the FCC’s authority to promote “universal service” is governed in part by [47 U.S.C. § 254](#) (Section 254). Enacted as part of the [Telecommunications Act of 1996](#), Section 254 “codified the [FCC’s] long-standing commitment to ensuring universal service,” while requiring the FCC “to [restructure](#) [its] universal service support mechanisms.” Relying on Section 254, the FCC requires providers of telecommunications services to make [contributions](#) to a Universal Service Fund (USF). The USF then [subsidizes](#) a set of [programs](#) designed to make telecommunications services available and affordable throughout the country. The FCC has [appointed](#) a non-profit entity called the [Universal Service Administrative Company](#) (USAC) to administer the USF and its programs. Each quarter, USAC makes [projections](#) that the FCC uses to calculate a “[contribution factor](#)”—the percentage of telecommunications carriers’ projected revenues that the carriers must pay to the USF.

After the FCC and USAC finalized the USF contribution factor for the first quarter of 2022, several organizations and individuals—led by [Consumers’ Research](#), a non-profit organization that seeks “to increase understanding of issues of concern to consumers”—[challenged](#) the constitutionality of the procedure for funding the USF in court. Consumers’ Research [argued](#) that the procedure violates [two](#) constitutional [limits](#) on delegations of government power. The challenge [succeeded](#) at the U.S. Court of Appeals for the Fifth Circuit. (U.S. Courts of Appeals will be referenced hereinafter by their regional or jurisdictional short form, e.g., “Fifth Circuit.”) The Supreme Court [reversed](#) the Fifth Circuit’s judgment, however, [holding](#) that the funding procedure is not an exercise of unconstitutionally delegated authority. This Legal Sidebar analyzes the Fifth Circuit and Supreme Court decisions and raises some related considerations for Congress.

The USF’s Funding Mechanism

Under [Section 254\(d\)](#) of the Communications Act, “every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to

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the specific, predictable, and sufficient mechanisms established by the [FCC] to preserve and advance universal service.” Other provisions in Section 254 direct the FCC to base its universal service support on certain **enumerated principles** and to provide specified support to eligible **schools, libraries, and rural health care providers**.

To implement Section 254, the FCC issued **regulations** requiring telecommunications carriers to pay a quarterly USF contribution that is determined by applying the applicable contribution factor to the carriers’ projected revenues. The **regulations** provide that the contribution factor depends in part on USAC’s projections of the quarterly demand and administrative expenses for the USF programs.

Each quarter, USAC **submits** its projections to the FCC. USAC also **compiles** the covered carriers’ total projected revenues. The FCC publishes those numbers, and determines the quarterly contribution factor based on the ratio of projected program expenses to projected carrier revenues. The FCC **reserves** the right to change USAC’s projections, but if the agency takes no action within fourteen days of publication, the projections and associated contribution factor are “**deemed approved** by the Commission.” The contributing carriers are **permitted**, but not required, to pass the cost of their USF contributions through to their customers, and most do.

The Legal Challenge to the Funding Mechanism

Consumers’ Research **petitioned** the Fifth Circuit to review the USF contribution factor for the first quarter of 2022. The group **argued** that the USF funding mechanism violates two limits on the extent to which Congress may delegate its constitutional powers.

The Nondelegation Doctrine

First, Consumers’ Research **argued** that Section 254 is an unconstitutional delegation of Congress’s legislative power to the FCC. **Article I, Section 1** of the Constitution provides that “all legislative Powers . . . shall be vested in a Congress of the United States.” Courts interpreting this provision have developed a legal doctrine, known as the **nondelegation doctrine**, that provides that Congress **may not** “transfer to another branch ‘powers which are strictly and exclusively legislative.’” The nondelegation doctrine does, however, permit Congress to “**confer substantial discretion** on executive agencies to implement and enforce the laws.” Accordingly, a delegation of authority from Congress to the executive branch is constitutional if Congress provides “an **intelligible principle**” that guides the use of the discretion Congress is delegating.

In its challenge to the USF funding mechanism, Consumers’ Research argued that **47 U.S.C. § 254** lacks any intelligible principle because the statute “**contains** no objective limits on the amounts raised, imposes aspirational-only principles, and lets the FCC redefine its subject matter and add new principles at will.” Consumers’ Research also challenged the intelligible principle test itself, **contending** that, under the original understanding of nondelegation, Congress may not merely announce vague aspirations and hand an agency power to adopt rules to effectuate them. In addition, Consumers’ Research argued that the delegation at issue raises “**special concerns**” because USF contributions are taxes, which would implicate a “**quintessentially** legislative power.”

The FCC contended that Section 254 satisfies the intelligible principle test because the statute **requires** that universal service support be based on six **enumerated principles**, **specifies** who must pay universal service contributions, and **identifies** the purposes for which the FCC must use the contributions. In the agency’s view, the intelligible principle test is the **proper** standard for evaluating legislative delegations and is **consistent** with the Constitution’s original meaning. The FCC also **argued** that the Supreme Court has **held** that the intelligible principle test applies to challenges to delegations of the taxing power the same way it applies to any other delegation challenge.

The Private Nondelegation Doctrine

The second limit on delegations [relied on](#) by Consumers' Research—the private nondelegation doctrine—restricts private actors' ability to exercise congressional power. The private nondelegation doctrine stems from the Supreme Court's decision in *Carter v. Carter Coal Company*, in which the Court held a statutory provision unconstitutional because it allowed the majority of private coal producers in a region to impose wage and hour regulations on all coal producers in that region. The challenged statute, the Court explained, [delegated power](#) “not . . . to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.” In the Court's view, this delegation to private actors [effected](#) “a denial of rights safeguarded by the due process clause of the Fifth Amendment.” In a later case, the Supreme Court [clarified](#) that the private nondelegation doctrine does not prohibit private actors from merely providing input to government actors. After *Carter Coal*, Congress had enacted a new law that gave a [commission](#) power to impose price regulations, with coal producers “[operat\[ing\]](#) as an aid to the Commission.” The Supreme Court [rejected](#) a challenge to the updated statutory scheme, [holding](#) that there was no unconstitutional delegation because the commission was ultimately responsible for setting the price regulations.

Consumers' Research [argued](#) that the USF funding mechanism violates the private nondelegation doctrine because the FCC delegated the government's power to USAC, a private entity. In Consumers' Research's [view](#), USAC makes the determinations that dictate the amount of USF contributions, and the FCC merely performs ministerial [arithmetic](#) before approving a contribution factor.

In the FCC's [view](#), USAC provides only non-binding projections of universal service program expenses and carrier revenues, and those projections [must be made](#) in accordance with the FCC's regulations. The FCC contended that such non-binding advice from a private party is [constitutionally permissible](#).

A [previous Legal Sidebar](#) provides additional analysis of the parties' arguments.

The Fifth Circuit's Decision

In March 2023, a three-judge panel of the Fifth Circuit [disagreed](#) with Consumers' Research's arguments and denied its petition for review. Rejecting both nondelegation arguments, the panel concluded that “Congress provided the FCC with numerous [intelligible principles](#) for its administration of the USF” and that USAC makes only [non-binding proposals](#), subject to the FCC's rules and ultimate review. After the panel issued its decision, however, the Fifth Circuit [granted](#) Consumers' Research's request to hear the case [en banc](#). As a result, the original panel's decision was withdrawn and the case was reheard by [all of the active Fifth Circuit judges](#). The en banc court reversed the panel's decision and [concluded](#) that the USF funding mechanism “offends Article I, § 1 of the Constitution.” The court based its conclusion on four underlying legal determinations.

First, the en banc Fifth Circuit [determined](#) that the power to require payment of USF contributions is an exercise of the taxing power. In reaching this determination, the court [rejected](#) the FCC's contention that USF contributions are fees. Agencies [can exact](#) fees from regulated entities in exchange for providing a benefit. The Fifth Circuit [held](#), however, that USF contributions are not a fair approximation of the benefits conferred by the USF; are often passed on to customers, rather than borne by parties the FCC regulates; and provide benefits to a different [group of entities](#) than the telecommunications carriers and consumers paying the contribution.

Second, the Fifth Circuit [concluded](#) that 47 U.S.C. § 254 “may” be an unconstitutional delegation of Congress's legislative power to the FCC because the statute “purport[s] to confer upon the FCC the power to tax without supplying an intelligible principle to guide [the agency's] discretion.” The court [acknowledged](#) that Section 254 provides that USF funding should be [sufficient](#) to preserve and advance universal service and that USF policies should be aimed at making telecommunications services [available](#).

at affordable rates. The court, however, [viewed](#) these directions as “aspirational” and found the statutory definition of “universal service” to be “amorphous.”

Third, the court [concluded](#) that the FCC “may” have unconstitutionally delegated “government power to private entities without express congressional authorization.” Here, the court [determined](#) that the USAC had final say over the contribution amount because “FCC regulations provide that USAC’s projections take legal effect without formal FCC approval.” The court [rejected](#) contentions that the FCC independently reviews the contribution amount and that USAC merely aggregates information.

Last, despite its skepticism about the constitutionality of both delegations, the court [declined](#) to decide whether Congress’s delegation to the FCC or the FCC’s delegation to USAC would, standing alone, be unconstitutional. Instead, the Fifth Circuit [held](#) that the combination of Congress’s delegation of taxing authority and the FCC’s subdelegation to a private entity made the procedure unconstitutional.

The Supreme Court’s Decision

In June 2025, the Supreme Court in a 6-3 decision [reversed](#) the Fifth Circuit’s judgment. The Court disagreed with each of the four determinations underlying the Fifth Circuit’s conclusion that the USF funding procedure is unconstitutional.

First, the Court [concluded](#) that there is no “special nondelegation rule for revenue-raising legislation.” “Whether or not a tax is at issue,” the Court [wrote](#), “the usual nondelegation standard applies.”

Second, the Court determined that Section 254 [satisfies](#) the usual nondelegation standard—the intelligible principle test—because the statute “expresses the ‘general policy’ the FCC must pursue in setting contribution amounts, as well as the ‘boundaries’ it cannot cross.” The Court [explained](#) that the statutory direction to collect funds “[sufficient](#)” to support universal service programs [functions](#) as both a floor and a ceiling for the FCC’s fundraising authority. Section 254 [authorizes](#) the FCC to “raise what it takes to pay for universal-service programs,” but “if the Commission raises much beyond, as if it raises much below, it violates the statute.” The statute also [describes](#) what qualifies as a universal service program, according to the Court. Together, the statutory “guidance about the nature and content of universal service . . . plus the ‘sufficiency’ ceiling” [constitutes](#) an intelligible principle.

Third, the Court [held](#) that USAC “plays an advisory role” in the USF contribution determination, while “the [FCC] alone has decision-making authority.” The FCC’s choice to transfer advisory “accounting functions” to USAC [does not violate](#) the private nondelegation doctrine.

Fourth, the Court [rejected](#) the Fifth Circuit’s holding that the two nondelegation issues combine to create a constitutional violation. In the Supreme Court’s [view](#), “a measure implicating (but not violating) one” nondelegation doctrine “does not compound a measure implicating (but not violating) the other” to “push[] the combination over a constitutional line.”

Two Justices who joined the majority opinion also wrote separate concurrences. Justice [Kavanaugh](#) wrote to explain his understanding of the rationale for the intelligible principle test and to argue that delegations to [independent agencies](#) are more likely to violate the nondelegation doctrine than delegations to the President or executive agencies. Justice [Jackson](#) wrote to express skepticism that the private nondelegation doctrine “is a viable and independent doctrine.”

Justice Gorsuch, joined by Justices Thomas and Alito, [dissented](#). Each dissenting Justice has, in past cases, [expressed a willingness](#) to [rethink](#) the intelligible principle test. In this case, Justice Gorsuch’s dissent [noted](#) that he has “urged the Court to reconsider its approach to assessing legislative delegations” but would focus here on an argument that Section 254 does not satisfy the intelligible principle test as it stands. Justice Gorsuch [contended](#) that the Supreme Court has never approved of legislation that permits an agency to impose a domestic tax without prescribing the permissible tax rate or a total revenue cap. He

then explained why he [disagreed](#) with the majority's conclusion that limiting the FCC to collecting funds "sufficient . . . to preserve and advance universal service" functions as a revenue cap for Section 254. In Justice Gorsuch's [view](#), Section 254 "does not say what 'universal service' is, and the phrase bears no established meaning," so the statute leaves the FCC free "to decide for itself how much to collect."

Congressional Considerations

Because the Supreme Court rejected Consumers' Research's constitutional challenge to the USF funding mechanism, the FCC can continue funding and implementing the universal service support programs authorized by Section 254. Congress may, however, amend Section 254 to create new or different programs or to direct the FCC to [reform](#) or cease universal service support.

FCC v. Consumers' Research is not necessarily the last word on the constitutionality of the USF. The Court's opinion [stated](#) that the case presented no occasion to address nondelegation issues raised specifically by Sections 254(c)(3) and 254(h)(2), provisions that apply to "additional" and "advanced" services. In dissent, Justice Gorsuch [argued](#) that the Court's reasoning about why Section 254 includes an intelligible principle does not apply to these two provisions because the FCC may designate services as "additional" or "advanced" services even if they would not otherwise qualify for a universal service program under the statute. Justice Gorsuch [contended](#) that Consumers' Research remains free to challenge funding for programs authorized by Sections 254(c)(3) and 254(h)(2).

The Supreme Court's decision in *FCC v. Consumers' Research* [reaffirmed](#) that the intelligible principle test governs its evaluation of nondelegation challenges. That reaffirmation was not a foregone conclusion. As mentioned, a number of Justices [appeared](#) willing to [reconsider](#) the test. One [commentator](#) explains how—[looking](#) to several [opinions](#) from 2019—"one could count to five" votes "to ditch the intelligible principle test and embrace a more-exacting nondelegation doctrine." Amici in *FCC v. Consumers' Research*, including the [Chamber of Commerce of the United States of America](#), had [argued](#) that this case provided an opportunity for the Court to take that step. The majority's unwillingness to do so may [indicate](#) that the current Court is content to leave the intelligible principle test in place.

The Court could, however, reassess the standard governing nondelegation challenges in a future case. In addition, leaving the intelligible principle test in place does not necessarily suggest a willingness to rubber stamp delegations of authority. The majority [opinion](#), Justice Kavanaugh's [concurrence](#), and the [dissent](#) all emphasized that the acceptable degree of delegated discretion varies according to "the scope of the power congressionally conferred." Justice Kavanaugh also [highlighted](#) separate legal doctrines that can cabin the executive branch's exercise of delegated authority. He [pointed](#) to recent applications of the [major questions doctrine](#) and the Court's overruling of [Chevron](#) deference. Those cases, Justice Kavanaugh [argued](#), require that executive agencies act within the scope of applicable statutory authorizations and reflect a presumption that statutory authorizations do not impliedly delegate authority to issue rules of great political and economic significance. The opinions in *FCC v. Consumers' Research* thus identify several tools the Court may use in future cases to scrutinize delegations of authority. Under the intelligible principle test, the Court could hold that a delegation of broad power requires enhanced statutory boundaries to limit an agency's discretion. The Court may also reject an agency's claim that a statute authorizes its actions based on the major questions doctrine or a [de novo](#) review of the statute.

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