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The Private Nondelegation Doctrine

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To preserve the separation of powers inherent in the U.S. constitutional structure, the Supreme Court has recognized legal doctrines prohibiting one branch of government from giving away its powers to another branch or entity. The private nondelegation doctrine is one such principle and is potentially implicated whenever the federal government—be it Congress, the President, or an agency—grants federal powers or assigns governmental duties to an individual or entity outside of the government (i.e., a private actor). Essentially, the doctrine provides that the government may not confer unsupervised governmental authority on a private actor. The government may enlist the assistance of private actors only if they "function subordinately to" a federal agency that "has authority and surveillance over [their] activities."

Unsupervised delegations of governmental authority to a private entity can, in addition to raising separation-of-powers concerns, violate the Fifth Amendment's Due Process Clause. That Clause prohibits the federal government from "depriv[ing]" a person of "life, liberty, or property, without due process of law." The Supreme Court has said that allowing a few private businesses to choose the rules that govern their industry, for example, risks subjecting the "personal liberty and private property" of other industry members to the whims of competitors with potentially "conflicting" or "even antagonistic interests."

Origins of the Private Nondelegation Doctrine

Two Supreme Court cases define the basic contours of the private nondelegation doctrine. *Carter v. Carter Coal Co.*, a 1936 decision, involved a federal statute that set minimum wage and maximum hours requirements for coal miners based on agreements to be negotiated between the country's largest coal producers and mine workers in their districts. The Court called this arrangement "legislative delegation in its most obnoxious form; for it is not even delegation 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." The Court held that by allowing private businesses to regulate their competitors, the law violated the due process rights of smaller coal producers.

Four years later, in *Sunshine Anthracite Coal Co. v. Adkins*, the Court considered a part of the amended act that tasked a federal commission with adopting minimum coal prices and other rules for certain coal producers. The act authorized regional boards of producers to propose minimum prices and other rules to the commission, which could "approve, disapprove, or modify" those recommendations. The Court held that in these provisions, Congress did not improperly delegate legislative power to the coal industry because the boards "function[ed] subordinately" to the commission, which had "authority and surveillance over [their] activities."

Modern Applications of the Doctrine

In 2025, the Supreme Court rejected a private nondelegation challenge involving "universal service" requirements for telecommunications carriers in *Federal Communications Commission (FCC) v. Consumers' Research*. By statute, carriers must contribute to the FCC's "mechanisms" for making telecom services available to the U.S. population at "reasonable" rates. The FCC created the Universal Service Fund (the Fund) for these purposes and has long used a private, nonprofit corporation, the Universal Service Administrative Company (USAC), to administer the Fund. USAC estimates the Fund's expenses and submits projections about carriers' revenues that the FCC uses to calculate required contribution amounts.

The Supreme Court upheld this arrangement in the *Consumers' Research* case, reasoning that USAC is "broadly subordinate to" the FCC. In addition to appointing USAC's board and approving its budget, the FCC reviews and may revise USAC's projections and "sets the contribution factor" that determines the amounts carriers must pay into the Fund. Addressing the challengers' concern that the FCC "simply 'rubber-stamp[s]'" USAC's work, the Court said it is "sufficient in such schemes that the private party's recommendations . . . cannot go into effect without an agency's say-so, regardless of how freely given." *Consumers' Research* thus built on the Court's ruling in *Sunshine Anthracite*, explaining that a private actor can serve "an advisory role" so long as federal officials have "decision-making authority."

After issuing the *Consumers' Research* decision, the Court remanded several private nondelegation cases for further consideration based on that decision. The pending cases involve the Horseracing Integrity and Safety Act (HISA), a federal statute that authorizes a private corporation, the Horseracing Integrity and Safety Authority (the Authority), to propose and, along with the FTC and another private entity, enforce "nationwide rules governing doping, medication control, and racetrack safety in the thoroughbred horseracing industry."

On remand, circuit courts have divided over whether the Authority's enforcement powers violate the private nondelegation doctrine. The Fifth Circuit found a private nondelegation defect, concluding the Authority, not the FTC, is "in charge of enforcing HISA." The Authority can initiate investigations, impose fines, and sue a regulated entity in federal court to enjoin violations of rules promulgated under the act or to enforce its own sanctions. The Fifth Circuit called these authorities "quintessentially executive functions." It observed that HISA does not require the Authority to seek the FTC's approval before undertaking these actions or otherwise "empower the FTC to countermand any of the Authority's investigatory or charging decisions." Although the FTC can reverse an Authority sanction after an agency adjudication, the court found this "tail-end" review insufficient to make the

Authority subordinate to the FTC. Penalties take "effect as soon as the Authority makes its decision" unless an administrative law judge (ALJ) or the FTC "exercises its discretion to implement a stay pending appeal." Additionally, the Fifth Circuit reasoned that with enforcement under way, a regulated party might opt to settle to avoid further exposure.

By comparison, the Sixth Circuit held that the Authority is sufficiently "subordinate to" the FTC—at least in the context of a facial challenge to the act requiring the plaintiffs to prove that "no set of circumstances exists under which the Act would be valid." An "internal enforcement action" is a "permissible" application of HISA, the Sixth Circuit decided, because the Authority "may not impose a sanction without oversight" in the form of ALJ, and potentially FTC, review. The Sixth Circuit also reasoned that the FTC could also use its own rulemaking power to enhance its oversight by, among other things, "constraining the Authority's investigations and increasing the procedural rights of suspected rulebreakers" or requiring the Authority "to seek [the FTC's] permission before pursuing *any* enforcement action."

Parties from both cases have asked for the Supreme Court's review. The United States is seeking the Court's review of the Fifth Circuit's decision, arguing the appellate court "misapplied the private nondelegation doctrine, contravened this Court's precedents limiting facial challenges, and misconstrued the scope of the FTC's statutory power to oversee the Authority." The petitions are pending as of the date of this writing.

Related Legal Concepts

The private nondelegation doctrine is just one of the principles the Supreme Court has developed to preserve the Constitution's structure and requirements for exercising federal governmental powers. Related concepts, such as the public nondelegation doctrine, the distinction between governmental and private actors, and Appointments Clause case law, serve similar purposes. Courts sometimes apply these legal frameworks instead of, or in addition to, private nondelegation principles, depending on the context in which a nondelegation challenge arises and the parties' arguments in the case. When it comes to separation-of-powers arguments, these doctrines tend to be "two sides of the same coin."

Public Versus Private Nondelegation. Congress alone holds the federal legislative power and may not assign or transfer it to another branch. Congress may, however, delegate to a coordinate branch some discretion in interpreting or implementing federal statutes. The public nondelegation doctrine—or simply "nondelegation doctrine"—helps to ensure that Congress does not give away its lawmaking authority while still allowing Congress to enlist another branch's assistance in "fill[ing] up the details" of federal law. A court applying the doctrine asks whether Congress has provided an "intelligible principle" to guide the agency's discretion in the delegated matter. The question is "whether Congress has made clear both 'the general policy' that the agency must pursue and 'the boundaries of [its] delegated authority.'" The Supreme Court has thus far applied this test flexibly, upholding "even very broad delegations," such as those authorizing an agency official to "set 'fair and equitable' prices."

Thus, the public and private nondelegation doctrines both prohibit unconstitutional delegations of legislative authority in their respective spheres, but they "do not operate on the same axis" in that they concern different delegees.

Government Versus Private Actors. Given the distinct principles at play under the private and public nondelegation doctrines, a threshold question in nondelegation cases might be whether the delegee is, for constitutional purposes, a government actor or a private actor. A statutory designation that an entity is not an agency or instrumentality of the U.S. government, or that an individual is not a federal officer or employee, is not dispositive of constitutional status. For example, to determine whether a congressionally created or designated corporation is a government actor, some courts apply the test set out in the Supreme Court's 1995 decision in *Lebron v. National Railroad Passenger Corp*. There, the Court held that Amtrak was "part of the Government" for First Amendment purposes because Congress (1) created Amtrak as a corporation by statute (2) to advance "governmental objectives" and (3) "retain[ed]" for the government "permanent authority to appoint a majority of [Amtrak's] directors." In 2015, the Court again held that Amtrak was a governmental entity—this time for separation-of-powers purposes—because the "political branches created Amtrak, control its Board, define its mission, specify many of its day-to-day operations, have imposed substantial transparency and accountability mechanisms, and, for all practical purposes, set and supervise its annual budget." This decision led some courts to apply a more holistic approach to evaluating an entity's governmental or private status that considers factors beyond the *Lebron* elements.

A reviewing court might apply the private nondelegation doctrine if both parties agree that the delegee in question is private, or if the delegee is a nominally private entity that does not meet the *Lebron* elements or related factors. If, instead, a court finds that an entity is governmental in nature, the court might decide that delegations to that entity must satisfy the intelligible principle test under public nondelegation principles.

Appointments Clause. Like the private nondelegation doctrine, the Constitution's Appointments Clause (art. II, § 2, cl. 2) limits *who* can exercise the federal government's powers. The Clause applies to those who "occupy a continuing position established by law" and "exercise[] significant authority pursuant to the laws of the United States"—that is, "Officers of the United States." Officers must be appointed in a particular manner, the default being presidential appointment with the Senate's advice and consent, so that those who execute the law are accountable to elected officials who are accountable to the people.

Most Appointments Clause cases involve government positions and thus do not implicate the private nondelegation doctrine. Where a litigant challenges an entity's authority on both Appointments Clause and private nondelegation grounds, a court might opt to first decide whether the entity is governmental or private for constitutional purposes (the question discussed in the previous section).

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