

# Separating Power Series: Presidential Influence v. Control Over Independent Agencies

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Congressional committees have [launched probes](#) to determine whether the White House exerted “improper influence” on the development of the Federal Communication Commission’s (FCC) recently approved net neutrality rule. [The FCC](#) is an independent agency headed by five commissioners, one of whom is selected by the President to be the Chairman. Critics of the approved rule argue that it noticeably deviates from initial proposals put forth by the FCC and, instead, closely aligns with the approach the President publicly outlined in November 2014. Because of this shift, and reports that the White House was involved in “[thwart\[ing\]](#)” the FCC in its initial proposals, the committees question whether the President has overstepped his authority in a manner that threatens the independence of the FCC. It is generally thought that because the President cannot control independent agency action, such agencies are free from presidential influence; however, news of the events at the FCC has given rise to the age-old question—just how independent are independent agencies? This two-part post examines whether there are any legal limitations that prevent the President from influencing independent agencies.

The President may influence and exert control over the policy direction of a traditional executive branch agency even though an agency derives its authority and statutory responsibilities from Congress. Presidents are able to wield this influence because they can appoint agency heads who share their policy priorities; and, through a series of [executive orders](#), Presidents have established an elaborate system of procedures to further supervise and coordinate the activities of executive branch agencies. Notwithstanding these tools, because “[the power to remove is the power to control](#),” it is the President’s power of removal that arguably provides him with the greatest leverage to exert influence and control over executive branch agencies. Should an agency head consider shifting away from, or moving in a direction inconsistent with, an administration’s priorities, the threat of removal is generally sufficient to dissuade non-compliance with the President’s priorities.

The President’s ability to influence and control independent agencies—i.e., agencies with some level of independence from the White House—is much different. Independent agencies—like the FCC, Securities and Exchange Commission, and the National Labor Relations Board—are tasked with carrying out duties that Congress has concluded should be conducted with some degree of autonomy from presidential, and arguably partisan, control. While the leaders of independent agencies are appointed by the President subject to Senate confirmation, just like the heads of traditional executive branch agencies, there are other traits identified by [scholars](#) and the [courts](#) that distinguish independent agencies from traditional executive agencies.

Agency independence derives not from the Constitution, but from statutory provisions meant to insulate the agency from the President and external political pressures. Most significantly, Congress has provided leaders of independent agencies with statutory “for cause” removal protection—meaning an official cannot be removed by the President for [mere political disagreements](#). Moreover, independent agencies are often exempt from the requirement that they participate in the executive branch’s centralized review of rules, [testimony](#), [legislative submissions](#), and [budget requests](#). In addition, Congress has also structured independent agencies to be headed by a commission, whose members often have fixed or staggered terms and restrictions on party affiliation. Although these types of requirements are therefore intended to limit presidential control and encourage agency autonomy, these statutory provisions do not expressly prohibit the President from using whatever political capital he can muster to *influence* agency operations.

While the President may refrain from outwardly exerting influence on an independent agency’s decision-

making process in order to avoid political backlash, or by virtue of the expectation that he not interfere with an independent agency's operations, there are nevertheless some instances where he has done so. Despite the many statutory provisions intended to limit presidential control over independent agencies, the President may have increased influence over the leaders of many independent commissions, given that he generally has the authority to designate a confirmed member to serve as chairman. Because the "[power of removal \[is\] incident to the power of appointment](#)," it is generally implied, absent a statutory restriction, that the President is thus free to *remove* and replace a chairman for any reason (returning him to the status of commissioner for the remainder of his term). This power to demote a chairman is arguably a powerful tool in driving independent agency policy. For example, after the 1979 accident at Three Mile Island and aiming to move forward with safety reforms, President Carter [demoted](#) Joseph Hendrie, the existing Chairman of the Nuclear Regulatory Commission (NRC), who had been criticized as being "too closely associated with the [nuclear] industry." Citing a need for "fresh leadership" at the NRC, the President expressed that he would seek to appoint a new commissioner to serve as Chairman. To further highlight how political forces sometimes influence chairman selections, Hendrie was later re-designated to be chairman by the new Reagan Administration in 1981.

While the President can wield influence and control over the activities of a traditional executive branch agency, his relationship with an independent agency differs since he cannot compel action or dictate its decisions. None of the statutory provisions arguably intended to limit presidential control over an independent agency necessarily prevent the President from taking the opportunity to persuade the agency of the merits of a particular viewpoint. Yet, Congress may view such attempts as a violation of longstanding inter-branch arrangements or perceive presidential involvement as running counter to, and perhaps undermining, rationales underlying the independent agency model. In that scenario, Congress has numerous tools at its disposal (most notably the power of the purse) to discourage either a President from pressuring an independent agency, or an independent agency for succumbing to presidential influence.

As discussed in the next [Sidebar](#), there are other legal principles that may dissuade the President from applying political pressure on an independent agency's activities.

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## Legal Sidebar

# Separating Power Series: Presidential Influence v. Control Over Independent Agencies Continued

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As described in the prior [Sidebar](#), existing statutory provisions generally insulate how an independent agency reacts to presidential pressures, rather than restrict the President's ability to impose those pressures. Though a President may assert himself into independent agency decision making, he is likely to face political repercussions. Moreover, there are some legal principles that may prohibit him from engaging in such behavior. With respect to agency proceedings, one key limitation relates to [ex parte communications](#)—i.e., “an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given... .” During judicial or quasi-judicial proceedings, off the record ex parte communications between the White House and an agency are [prohibited](#) by the Administrative Procedure Act (APA). Because significant due process concerns are raised when improper contacts occur during an agency adjudication involving private rights, courts have not hesitated to invalidate agency decisions due to improper White House influence.

These same concerns, however, are generally not present when an agency is engaged in informal rulemaking. As a result, courts have generally found that the APA's limitation on ex parte communications does not apply with equal force during the informal rulemaking process. Thus, the permissibility of certain presidential communications would appear to vary with the form of the agency proceeding. Notably, because the APA makes no distinction between executive and independent agencies, an independent agency is not subject to more rigorous ex parte communications restrictions.

In [Sierra Club v. Costle](#), the U.S. Court of Appeals for the D.C. Circuit addressed the question of whether an Environmental Protection Agency (EPA) rulemaking was tainted by off the record conversations between the White House and the agency after the comment period had closed on a proposed rule. The court found the communications permissible, so long as the agency did not attempt to base the final rule on information gathered through those communications. Had the agency done so, such action would have violated the bedrock principle of administrative law that an agency must be able to justify its choices on information found in the rulemaking record. The court nonetheless acknowledged that political pressures likely play a role in the rulemaking process:

Of course, it is always possible that undisclosed Presidential prodding may direct an outcome that is factually based on the record, but different from the outcome that would have obtained in the absence of Presidential involvement. In such a case, it would be true that the political process did affect the outcome in a way the courts could not police. But we do not believe that Congress intended that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power.

It is unclear whether the court's reluctance to question political influences in agency rulemaking would change if the agency were an independent regulatory commission. Although the APA does not distinguish between executive and independent agencies, it is important to note that much of the reasoning in [Costle](#) [relied on](#) the “basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy.” The President's role of “monitor[ing]” independent agency rulemakings, however, is greatly diminished. Indeed, the court appears to have identified the fact that presidential communications with independent agencies may be treated differently, [noting](#) that “in the particular case of EPA, Presidential authority is clear since it has never been considered an independent

agency,' but always part of the Executive Branch." Perhaps to counteract the appearance of impropriety, many independent agencies have adopted regulations, though not expressly required under the APA, that place restrictions during informal rulemakings on the use of ex parte communications, including those from the White House.

Finally, in addition to the type of agency proceeding involved, courts have also tended to distinguish between political communications relating to "[relevant factors](#)" and those communications intended to apply improper political pressure on an agency. For example, the D.C. Circuit [invalidated](#) a decision by the Secretary of Transportation to approve the construction of a bridge between Virginia and the District of Columbia because of "extraneous pressure" from Congress. In that case, a Member of Congress had announced that he would block all funding to the D.C. transit system until the Secretary approved construction of the bridge. The court found that because the extraneous congressional pressure "clearly and unambiguously" had an impact on the Secretary's decision, the decision was invalid. Agency determinations, the court clarified, must be "based strictly on the merits and completely without regard to any consideration not made relevant by Congress in the applicable statute." This same standard would presumably apply to improper presidential influence. If it could be [shown](#) that presidential pressure "was intended to and did cause the [agency] to be influenced by factors not relevant under the controlling statutes," then a court may invalidate an agency action for improper political influence.

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