

DEEP DIVE: What Does Mr. Trump's Executive Order Seizing Control of Federal Agencies Really Mean—and is It Constitutional?

Article By:

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So last night Mr. Trump attempted to seize control of more or less the entire federal government. He signed an executive order purporting to bring all independent agencies—including the FCC, FTC, SEC, and perhaps most chillingly the Federal Election Commission—under his individual control.

No other president has done this. Most have avoided even the appearance of interfering in the workings of these agencies for fear of being viewed as wielding inappropriate control over the affairs of agencies designed by Congress to be independent.

But just because this feels like something a dictator would do— and to be clear, it is— does that mean Mr. Trump is actually trying to become one, and, if so, is it unconstitutional?

Maybe. And, maybe.

First, what even is an independent agency?

Independent agencies oversee certain functions of the federal government that require expertise and precision lawmaking that are generally beyond the ability of a Congress composed of—at best generalist lawmakers. These agencies have incredible power over areas of government function that require unique supervision to assure sound policy— like telecommunications, environmental protection, or how elections are conducted.

Independent agencies are unique because they tend to wield both executive and legislative powers. Using the FCC as an example, the Commission may issue rulings interpret or expand the law— such as [as the recent TCPA revocation ruling the FCC](#) adopted last year. But they may also serve an executive role by bringing enforcement actions and issuing penalties— such as [as the recent Telnyx order.](#)

And just to make sure everyone understands the difference between legislative and executive functions— legislative power involves MAKING THE LAW. Executive power involves ENFORCING THE LAW.

At the federal level Congress is responsible to MAKE the law. The president is responsible to faithfully ENFORCE the law.

That's it.

(I look forward to a presidential debate one day—assuming either elections or debates will exist in the future—where the two candidates debate nothing more than who will better faithfully enforce the laws passed by Congress since that is, essentially, their only job.)

Now sometimes making and enforcing the law can blend. For instance when Congress passes a vague enactment—never!—an agency may attempt to interpret the law via an enforcement action. This happens when an agency sues a company for violating the law based on conduct that was never previously deemed to violate that law. We call this “regulation by enforcement” and basically everybody hates it because it is very unfair.

Still regulation by enforcement was quite common during the Obama era— the CFPB loved to regulate by enforcement— and we saw a bit of it during Biden’s presidency, particularly with the FTC “telemarketing sweep” where it decided, for the first time it was a violation of the TSR for engage in lead generation. Eesh.

All right, now that you understand the background what actually happened?

So late yesterday Mr. Trump ordered all independent agencies to report directly to his delegee, the Director of the Office of Management and Budget Russel Vought—who is now instantly one of the most powerful men in the world— so that he, Vought, can dictate their policy, priorities, and budget. As the order states Vought is to: *“review independent regulatory agencies’ obligations for consistency with the President’s policies and priorities...”*

In other words, the independent agencies are now to serve Mr. Trump and not the American people as a whole.

Cringe.

To be sure, Mr. Trump is casting his order as one intended to hold the agencies accountable to the people. Per his “fact sheet” the agencies must be brought within the President’s control because he was appointed by the people to control them.

Sort of.

Independent agencies *used* to be non-political. But beginning largely with the Obama administration these agencies have become increasingly political. But the heads of most of these agencies are appointed directly by the president and the president’s party generally control the policies and priorities of the agency.

So, for example, President Trump just appointed Brendan Carr as Chairman of the FCC. Biden appointed Jessica Rosenworcel. Carr will, presumably, guide the Commission consistent with a republican state of mind, just as Rosenworcel guided the Commission with a democratic state of mind. So the agencies are within the control of “the people” because the people decide the president and the president’s party controls the agency and the president picks the head of the agency. And for all past administrations since the 1930s this control and accountability has been deemed

sufficient.

But not for Mr. Trump. Not this time.

This time he has decided that these agencies will not move without his direct control. The only way for agencies to be accountable to “the people” is for the agencies to answer directly to him.

Get it?

At best this is ultimate bureaucratic micromanagement. At worst, it is a mechanism by which Mr. Trump can set all of the machinery of government to work to serve his personal agenda— wherever the whims of the day may take him.

Yeah, I know, sounds like a dictator. (For those of you who really like Trump, just imagine Hillary Clinton becoming president in 2028 and having all of these new fun toys to play with Trump left for her.)

So... is it legal?

Maybe. And it depends just how expansive the intended control Mr. Trump is trying to seize really is.

*If all Mr. Trump’s order is intended to do is dictate that no federal agency shall take any *enforcement* action without his approval— or, stated alternatively, that Mr. Trump is plans to dictate (there’s that word again) what enforcement activity the agencies engage in before it is taken—and nothing else, then I think this is likely constitutional.*

Executive powers ARE preserved to the president in the Constitution and Congress can’t delegate away executive powers that don’t belong to it. So although this move would still make Trump the most powerful president since Lincoln the constitution permits this sort of thing in my view. So I have no problem with it. (I am a strict adherent to constitutional principles and have no problem with Mr. Trump helping himself to as much as the constitution permits.)

To the extent, however, Mr. Trump is stating he intends to dictate what regulations and rules are implemented by these agencies— i.e. that he intends to seize control of their LEGISLATIVE function— *that* would be a very serious problem. At that point the legislative and executive function would collapse into a single individual creating, as Madison wrote, “the very definition of tyranny.” Mr. Trump could then write the law to serve his agenda, and then have it enforced it as he saw fit. *That* would be unconstitutional in my view, and pretty horrifying frankly.

Unfortunately the Order is vague as to its implications and intentions on regulatory matters. The [“fact sheet” speaks](#) repeatedly about “executive power” yet suggests agencies must “submit draft regulations”—i.e. LEGISLATIVE actions— to the President. The order itself provides “**No *employee of the executive branch* acting in their official capacity may advance an interpretation of the law as the position of the United States that contravenes the President or the Attorney General’s opinion on a matter of law, including but not limited to *the issuance of regulations, guidance, and positions advanced in litigation, unless authorized to do so by the President or in writing by the Attorney General.***” So it does seem the big play is in play, but maybe not. The limitation requiring only “executive branch” employees to abide may mean this rule only applies to agency enforcement activities and not to broader rulemaking.

Like I said... unclear.

So where does this leave TCPAWorld?

First, none of this applies to rules the Commission has already passed. The new requirements kick in 60 days from now and all past activity appears to be protected from the need for Mr. Trump's blessing. This means the [FCC's current TCPA revocation rule](#)—set to go into effect April 11, 2025— is likely to go into effect on that date, although I could see an effort to have the ruling stayed based on this order.

Second, we can expect all FCC enforcement activity to effectively cease pending Mr. Trump's review. How he plays this will be very interesting. We can imagine a highly weaponized version of the FCC that goes after left-wing interests in social media and broadcast television. Then again we can imagine a neutered FCC that does very little enforcement of anything. What is unclear is where Mr. Trump stands on telemarketing, "robocalls," or the TCPA more broadly. So it is unclear where in the pantheon of priorities the TCPA and enforcement proceedings against callers and carriers will land.

Third, the courts will need to decide how much power Mr. Trump now wields over the FCC's legislative functions. I am looking forward to a statement from Chairman Carr on this subject—I'd expect that to be out today. Perhaps it will be business as usual. Or perhaps all FCC rulemaking and policy will now flow through Mr. Trump's office— meaning Trump will ultimately have to sign off on whether or not the FCC takes action on the [R.E.A.C.H. petition everybody is focused on right now](#).

This last piece is critical to understand.

When something massive and bizarre happens the most immediate impact tends to be paralysis. I'd expect a whole lot of nothing for a few months while people take in the true enormity of what just happened. In the meantime only actions Mr. Trump expressly dictates are likely to gain any traction with the Commission for the time being.

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