



Insight

The Administration's View of Its Ability to Direct Independent Agencies

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EXECUTIVE SUMMARY

- President Trump's social media executive order (EO) highlights a debate over how much authority a president can exert over independent agencies.
- The structure of the EO seems to indicate that the administration believes it has less legal authority to exert its control over independent agencies when it comes to potentially invasive actions.

INTRODUCTION

The [executive order](#) (EO) on social media that President Trump signed escalates his ongoing feud with social media companies. Outside of its [ramifications for social media and free speech on the internet](#), however, it offers a glimpse of the extent to which this administration thinks it can legally control independent agencies.

The text of the EO implies that this administration views directing an independent agency to issue a specific regulation or direct spending as outside its legal authority (though it can attempt to influence agency actions), while it can still specifically direct lesser actions. In short, the EO demonstrates that the administration believes executive authority over independent agencies lies on a spectrum.

EXAMINING THE REGULATORY DIRECTIVES IN THE EO

The EO contains directives for both executive and independent federal agencies. While both types of agencies are part of the executive branch and help the president fulfill the constitutional duty to execute the laws of the federal government, there is a legal distinction. Both types of agencies are headed by officials appointed by the president, but those leading executive agencies serve at the pleasure of the president, while those at independent agencies can only be removed for cause. This additional protection makes independent agencies subject to less direct control than executive agencies.

The exact level of control over independent agencies, however, is up for debate. The social media EO gives clues as how the Trump Administration views its level of control, and it appears to depend on the invasiveness of the directive on the agency's discretion.

Where the EO specifically directs actions of independent agencies, these actions are not very invasive. For example, it directs the Federal Trade Commission (FTC) to develop a report describing the complaints of politically motivated content moderation it receives. A report is not a terribly invasive overture into the FTC's discretion.

In contrast, on the actions that would be invasive, such as the FTC's enforcement discretion, the EO says the agency shall consider "taking action, as appropriate and consistent with applicable law, to prohibit unfair or deceptive acts or practices in or affecting commerce." In other words, the president is asking the FTC to consider utilizing authority it already has but does not compel the agency to use it. The administration likely views its request as enough to get the FTC to use its authority to increase enforcement, but also sees it as legally risky to compel the action.

Likewise, a goal of the EO is for the Federal Communications Commission (FCC) to issue a regulation that spells out under what conditions a social media platform would violate the "in good faith" provision of section 230 of the Communications Decency Act. The EO does not specifically direct the FCC to issue a regulation, however. Instead it directs the Secretary of Commerce to petition the FCC for such a regulation. The FCC would be free to act on or reject the petition in the same way it can for any petition submitted by the public. This structure implies the administration believes directly ordering the FCC to issue a rule is too invasive and could make the EO vulnerable to a legal challenge. Whether the FCC could issue such a rule without contradicting its Restoring Internet Freedom Order is [another matter](#).

Similarly, section 3 of the EO prohibits executive agencies from spending money on advertising or marketing on a platform that the administration believes violates "free speech principles." It does not bar independent agencies from doing so since the administration seems to believe these agencies have the discretion to use money appropriated by Congress for marketing purposes as they see fit. Again, this provision seems constructed so as to avoid a legal battle.

CONCLUSION

An interesting subplot of President Trump's EO on social media is that it reveals how the administration views its legal ability to compel certain actions from independent agencies. On relatively non-invasive actions, such as issuing a report, the EO directs the action specifically. On more invasive issues such as enforcement, promulgation of rules, and budgetary control, the administration bows to independence. While the likely reasoning is to give the EO a stronger chance to survive a legal challenge, it does indicate that the administration may recognize legal limits on its ability to control independent agencies. By including soft direction in the EO, the administration is hoping to influence action without being seen as compelling it.