



Insight

Throw Back Thursday: When the FCC Used to be Independent

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Remember when the Federal Communications Commission (FCC) acted like an independent agency? Remember when the White House took a hands-off attitude toward the FCC? Those days are over.

The Obama Administration has chimed in on FCC policy, putting its weight behind [new set top box rules](#). The endorsement follows a similarly unprecedented move from late 2014 when the president recommended reclassification of the Internet to support an expansion of government power, forcing an abrupt change of policy at the Commission and sparking [inquiries by Congress](#). Regardless what you might think about the FCC's set top box proposal, the conversation has been effectively silenced in a way that isn't helpful to rational policymaking. Yet again, the administration pushed the agency even further down a path of unnecessary partisanship. And as recent events show, the ultimate result is poorly designed policy, harming consumers and taxpayers alike.

As an independent agency, the FCC answers to Congress. It doesn't serve at the behest of the president like a cabinet level executive agency. This independence comes as a direct result of the enabling statute, the Communications Act, which separates the agency from the executive branch's centralized rules. As AAF [has detailed before](#), the distance between the agency and the executive means that the FCC isn't subject to the cost benefit requirements of cabinet level agencies. But in lieu of this kind of oversight, the agency [has been understood](#) to be an expert agency that can effectively render objective judgment about difficult and often technical policy questions.

By putting the weight of the executive behind a specific proposal, as it did with the set top box proposal, the Obama Administration has yet again upended the traditional hands off relationship between it and the FCC. Instead of allowing the policy to be played out through normal rulemaking procedure, the Obama Administration has tipped the scales.

The move echoes something similar that occurred in November 2014 when the White House pressed the FCC to adopt onerous Title II regulations. As a Senate Committee [report found](#), the nonpartisan career staff at the FCC were working on a draft order to be considered on the FCC's December 2014 Open Meeting. But immediately after the president made a statement in support of Title II reclassification, edits to that draft were put on pause. Soon after, Chairman Wheeler instructed FCC staff to change course and draft an order that would follow the president's proposal of a Title II reclassification, which "raised concerns about the agency following proper notice-and-comment procedure, as required under the APA [Administrative Procedure Act]." The order is currently the subject of litigation and could be overturned because of APA illegality.

While it is [not illegal](#) for the president to weigh in a proposal, it is [rare](#) and reverberates throughout the institution. Advocacy by the White House changes collegiality in the agency and entrenches the soft power that the Chairman is able to wield. Especially under Chairman Wheeler, the FCC has become far less consensus based and appreciably more partisan. Indeed, since the Chairman assumed the office in 2013, there have been 20 separate party-line votes, which is [double the number](#) that occurred during the tenures of Chairmen Martin,

Copps, Genachowski, and Clyburn, *combined*.

While many decry Washington as being overtly partisan and lacking consensus driven solutions, the Obama Administration in concert with Chairman Wheeler has made things worse. As Communications Daily has reported, “the FCC stands out for its extensive use of events where officials speak on behalf of the agency to groups of reporters but the officials can’t be identified by name or quoted verbatim.” Ostensibly the purpose of these media leaks, which PR experts say is unique to the FCC, is to pressure Commissioners to vote for the Chairman’s preferred proposals.

There are countless examples of this strong-arm approach being applied, most recently seen in proposed changes to the Lifeline program. As [AAF has written](#), the program needs reform and in a rare moment of agreement, a deal was struck across party lines that seems to have been far better for both taxpayers and Lifeline users. Upon [learning of this deal](#), Chairman Wheeler swooped in and eventually rammed through his own proposal, which [added \\$1.15 billion](#) to the budget of this unaudited program, on a 3-2 party line vote. The top down approach that the White House has helped to create erodes the FCC’s independent expert status.

Because of the technical nature of its regulatory subject matter, the FCC was designed in part to insulate it from the political whims of the executive, but also to ensure consensus driven policy. Sadly, both the Obama Administration and Chairman Wheeler have changed the tenor at one of the last remaining consensus driven institutions in Washington.