IT IS A COMMON AND LEGAL PRACTICE FOR THE PRESIDENT TO WEIGH IN ON FCC POLICYMAKING.

Congress recently announced investigations into whether the President improperly influenced the FCC’s decision in Open Internet Rules proceeding. This has raised the question of the legality and history of Presidents and their administrations weighing in on the policies of independent agencies, like the FCC.

“Independent agency” simply means the president cannot fire the commissioners, not that he may not meet or converse with them.

Independent agencies are commissions typically made up of members from both parties, with the president’s party in majority. The President appoints commissioners and designates the Chair, but a President cannot fire a commissioner even when their policies run counter to the President’s wishes. This is in contrast with other departments where heads of agencies serve “at the pleasure of the president,” and can be dismissed by him if they do not follow his directives. Presidents may appoint new commissioners or designate a different chair, but those decisions still require confirmation by the Senate. The independent structure provides for insulation from the political process while retaining general political accountability.

The Commission may take the administration’s views into account, but is by no means obligated to follow those views.

Independent agencies typically are created to address subject areas where there is a particular need for nuanced expertise and reasons to worry about politicizing the agency. The FCC, for example, is the expert agency on communications networks, which often requires technical knowledge of discrete issues. In addition, Congress did not want the President directly regulating broadcasters so as to influence political coverage. Congress created the FCC for this role to utilize its expertise and protect the public interest as industry dynamics change.

Presidents are still free to weigh in on an issue, and the Commission is free to take that into account - or not. The 1990s and 2000s saw many attempts by Presidents Clinton and Bush to weigh in on FCC action - their success rate was mediocre.

There are strong reasons why an administration might weigh in on agency decisions. Because communications is a critical component of our national economy, national security, and civic discourse, the President will feel the need to weigh in directly, rather than relying on the usual channels of having the National Telecommunications Information Administration (NTIA) or Department of Justice (DoJ) file comments. Additionally, the President may make public statements to inform the public of his official position.

Ultimately, the President has the same right to make public statements or have private communications with the FCC as any member of the public. As long as the President files the appropriate notice (called an ex parte) after a private conversation, there is nothing illegal or inappropriate. Of course, since the President is not just any private citizen, and his words will
carry considerable weight, Presidents make such direct communications only rarely, and generally only on matters of significant national importance.

**There are constraints on the agency that prevent them from changing course just because the president wants to.**

Even if the agency *does* want to follow the president’s wishes, it may not do so absent proper justification. The agency must follow the guidelines of the Administrative Procedures Act, including cultivating an appropriately robust record to demonstrate that it has thoroughly examined the matter, addressed all objections, and provided a rational basis for adopting or repealing the new rules. If a reviewing court finds the FCC did not adequately justify the rules, or lacked a sufficient record, the court will reverse the rules. Example: when the FCC was pushed by the Bush administration to deregulate media ownership to close the record in the face of mounting public opposition, the court reversed the decisions - not because the president had inappropriately interfered, but because the FCC did not adequately justify its decision.

**President Obama’s statements on net neutrality and Title II merely reflected the sentiment of 4 million Americans and provided no new “plan” or details.**

It is well-known that between the Chairman’s initial net neutrality proposal in May 2014 and the early fall, the Commission accumulated an unprecedented amount of input for the record on the open internet docket. Reports indicated that the Chairman’s position shifted significantly towards Title II reclassification during that time. Even before the President’s remarks, Chairman Wheeler was reportedly deciding between a “hybrid” Title II or full reclassification – a dramatic shift from his initial proposal and extremely close to the final decision Wheeler announced in February. By the time President Obama publicly voiced his own support of Title II, the question at the FCC was no longer *whether* to adopt Title II, but instead to what degree.

Additionally, the President’s two-minute public address on YouTube simply endorsed the views expressed by nearly 4 million Americans. It also exaggerates to call what the President proposed a “plan.” It listed three important features: classifying broadband as Title II, banning paid prioritization and other forms of discrimination, and applying the same rules to wireless and wireline. The Republican “plan” in the form of the draft legislation claimed to achieve the same goals as the President’s plan. That Wheeler’s plan includes the same general elements is therefore hardly a surprise.

The bottom line is that whether the President’s statement was a high level endorsement on a matter of critical national policy, similar to other public statements made by other Presidents over the last 30 years, whether President Obama’s brief public statement was the final push the Chairman needed to finally embrace Title II, or whether the Chairman had already arrived at that conclusion, it was neither inappropriate nor compromised the independence of the FCC.