

Whither FERC?

By Steve Huntoon

As Yogi Berra *didn't say* (at least not first): It's tough to make predictions, especially about the future.

But I'm going to stick my neck out and predict that the dozens of independent federal agencies like FERC will survive the Supreme Court's revisiting of *Humphrey's Executor v. United States*.

The conventional wisdom is that the court will invoke something called the *"unitary executive theory"* to reverse 90 years of precedent, and allow the president to unilaterally fire whoever he wants from any federal agency for any reason at any time.

The unitary executive theory doesn't make any sense because it's premised on the notion that Congress can't pass a law granting a federal agency some element of independence from the whims of a president. Why can't Congress do that? It's the first branch of our government with the power to pass laws. That's what it's supposed to do. And let's remember that the president can always veto a law he or she doesn't like, which then



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requires Congress to muster an overwhelming majority to override the veto. And let's note that the veto is a "legislative" power (it's in Article I after all), which discredits the notion that legislative and executive powers can't mix.

But somehow the idea emerged that Congress' legislative power to pass laws, subject to veto, is circumscribed by a president's executive power to override such laws because, well, he's the president.

Let's put aside all the intricacies and nuances that have inspired countless law review articles on this subject.

Instead let's surmise what the swing justices think of Donald Trump's conduct. Justices don't live in a vacuum. They see the same stuff that we do (or at least I hope so).

Prior drafts of this column listed 34 of Trump's worst Constitutional, legal, ethical and aesthetic outrages in 2025 (actually 37 when I added the latest offshore wind, Greenland and battleship-naming outrages). But having depressed myself assembling the list, I realized that I shouldn't pass it on, at least not in the holiday season. You may have your own list. And I hope the swing justices do as well.

Why This Matters

The unitary executive theory doesn't make any sense because it's premised on the notion that Congress can't pass a law granting a federal agency some element of independence from the whims of a president, writes Steve Huntoon.

I am guessing, and hoping, that the cumulative effect on the swing justices will be that they just can't stomach giving Trump more power. They won't take this *further step* toward autocracy, as happened in other countries. "Centralization of head-of-state control over the executive branch of government provides a pathway to autocracy. Indeed, unilateral presidential control of the executive branch constitutes a defining characteristic of autocracy."

But maybe this is just wishful thinking.

Speaking of wishes, I wish you and yours the best for the year ahead. ■

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