Opinion

NCR Voices



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We have passed the six-month mark in President Donald Trump's second term. Congressional Republicans have provided no check on the president. Universities are caving to his demands, as have some once prestigious but now collaborating law firms. Our third branch of government, the judiciary, however, is holding its own.

Last week, the U.S. Supreme Court sided with the Trump administration, allowing it to fire Democratic appointees to the Consumer Product Safety Commission while a challenge to the firings makes its way through the lower courts. The decision was a bad, but not surprising, one. It also represents no threat to the constitutional order.

The decision followed one in May regarding political appointees to the National Labor Relations Board and the Merits Systems Protection Board. The justices stated that the decision "reflects our judgment that the Government faces greater risk of harm from an order allowing a removed officer to continue exercising the executive power than a wrongfully removed officer faces from being unable to perform her statutory duty." Those words were repeated in last week's order from the court.

Conservative legal theorists have long been concerned with the idea of independent commissions. Yes, Congress established them and previous presidents signed their existence, and thus their independence, into law. Conservatives point out that the Constitution is pretty clear when it states in the very first sentence of Article II: "The executive Power shall be vested in a President of the United States of America." The founders did not believe anyone was disinterested, and even the drafters of state constitutions left the most politically charged offices, such as those that oversee elections, in the hands of the political branches. They believed that the voters alone should have the power to change things, not independent judges.

As the government grew, the civil service emerged. Eventually, there was seen to be a need for boards like the three involved in these recent cases. Congress decided to make them independent of executive interference for one reason or another.

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The most important such independent board, the Federal Reserve, would not be able to fulfill its twin statutory functions of controlling the money supply and

strengthening employment if a president could interfere. The independence of the Fed is one of the foundations of our economic system. During a visit to the Fed's headquarters on Thursday, July 24, Trump joked about firing Fed chair Jerome Powell. Other times, he has not seemed like he was joking.

In retrospect, Congress should have proposed a constitutional amendment to allow for the creation of independent boards and agencies. There is a lesson here going forward: When there is wide consensus on any given issue, but the constitutional status is murky, amend the Constitution while the consensus is in place!

In March, the Supreme Court sided against Trump ordering him to disburse foreign aid funds for work that had already been completed. In June, the court limited the ability of a district court judge to issue a nationwide injunction on a presidential order, which was seen as a victory for Trump. That ruling will haunt future conservative plaintiffs when they seek such injunctions against the decisions of a Democratic president. And, last year, in *Trump* v. *United States*, the court established some parameters for presidential immunity that, in context, helped Trump but will strengthen the hand of all future presidents.

We can debate the merits of any of these decisions. In the most recent cases, I would have sided with the liberal minority arguing that Congress can establish independent commissions. I certainly would have more restrictive immunity for any president. I was more sympathetic to the ruling on nationwide injunctions. But whatever you or I think about this decision or that, the point is that the constitutional order has held. Conservative jurists are not illegitimate just because they make a decision with which we disagree.

It is important to remember that one of the major points of disagreement between liberal and conservative legal theories is precisely the degree to which judges should consider the practical outcomes of their decisions. Liberals say such outcomes are vital. Conservatives say outcomes are the business of legislatures and executives, not judges. Both sides are partially right. Neither threatens to hand the Constitution over to Trump or someone like him.

Looking ahead, the one case that could challenge the constitutional order is that regarding Trump's efforts to restrict birthright citizenship. This involves the plain meaning of the 14th Amendment. The Ninth Circuit Court of Appeals ruled against Trump last week. I suspect if the case makes it to the Supreme Court, Trump will lose there, too. If he doesn't, we're in trouble.