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Exploiting Simplicity

One disagrees with a scholar as respected as Cass Sunstein at risk; and he is right that there is much we agree on. In the brief format that remains (our readers will be glad to know that we now are to observe a word limit), I focus on checks-and-balances considerations that in my judgment he mistakenly puts aside.

In considering the virtues of simplicity, one needs to worry how a fox might exploit it. What are the implications of Professor Sunstein's analysis, I'd ask, for presidential behaviors and claims, released from a judicial check? Professor Sunstein's last entry in this debate, entitled *The Virtues of Simplicity*, only addresses the behavior of particular agencies, as if that were all that was at stake. The President appears only in a brief passage declining to distinguish between independent regulatory commissions and other agencies. In focus rather are such matters as the EEOC's conclusions whether typing or running are "major life activities."

That brief passage acknowledges what is otherwise only implicit in his essay, that "executive action" is subject to "multiple forms of presidential control." I invite him, then, to focus on the effect of presidential instructions to agencies regarding how they should interpret laws committed to their administration—in particular, to notice what rejecting *Mead*'s caveat to *Chevron* might do for presidential signing statements. In signing new legislation empowering some agency to act, the President tells the agency how he interprets the new law, and therefore how it must interpret it. Probably the agency will obey these instructions; it is perhaps even the case that, as an internal matter, it *must,* although this is a question that has divided attorneys general since the beginning of the Republic. (The Constitution, after all, twice speaks of "Duties" or "Powers" being assigned to "officers," not to the

President;[1] and this is typically how Congress legislates. Under the statutory terms, then, it is for the agency to decide what to do, subject only to the President's possible decision to replace its administrator with one more willing.)

See how signing statements permit the President to evade the checks and balances we ordinarily imagine at work. As an alternative to the veto, they permit him to escape the veto's considerable political costs. And if the view he states is one that will command judicial deference, how will his subordinates escape his claim to obedience? Dismissal, like the veto, is publicly visible, politically costly, is checked by the Senate's role in appointments. The signing statement does not share these characteristics.

Sunstein's view encourages the President's attorney to argue for *Chevron* deference to his interpretation—as in the *Gonzales v. Oregon*[2] example Sunstein still does not address. It does not matter, since the President is the chief executive, that the decision was assigned elsewhere. Nor does it matter that the public has not been heard, that the President is not an expert (as the EEOC is) in assigning meaning to such phrases as "major life activities," indeed that the issue has arisen in the abstract (outside the informing context of some particular dispute), nor, finally, that the President's responsibility for such particulars is at best diffuse. Free of the political costs of the veto or high-visibility firing, free of the legality checks of procedural conformity and public discussion, the President has also found the means to be free of significant judicial control. He has escaped the checks and balances engine that has so long helped preserve our rule-of-law culture.

Why should we wish so to uncabin an authority whose ambitions and dangers are already so evident? To be sure, assigning the responsibility for complex and subtle analysis to fallible and sometimes political judges has its risks. They can fail to protect us against presidential excesses. But they might succeed in asserting the claims of law, as five Justices did in *Gonzales* and *Hamdan v. Rumsfeld*.[3] Would we be safer to remove those tools from their hands? Simple rules put in the hands of the ambitious and readily turned to the service of their ambitions have insufficient virtue.

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1. U.S. CONST. art. I, § 8, cl. 18; *id.* art. II, § 2, cl. 1.
2. 126 S. Ct. 904 (2006).
3. 126 S. Ct. 2749 (2006).