



EDITORIAL MEMORANDUM

TO: Editorial Page Editors and Writers
FROM: Rena Steinzor, CPR President
RE: Cass Sunstein, Obama's Nominee for "Regulatory Czar"
DATE: Thursday, May 7, 2009

President Obama's nominee for "Regulatory Czar" will be up for confirmation next week (Tuesday), and the hearings should offer Congress an opportunity to weigh in on an emerging debate over the use of cost-benefit analysis as the principal method of regulatory review, and indeed on the appropriate role of the "czar" in the regulatory process. Surprisingly, the President's nominee for the job, Harvard law professor Cass Sunstein, embraces cost-benefit analysis and many of the associated mechanisms the Bush Administration used to delay, weaken and scuttle vital federal regulations.

If confirmed, Sunstein would lead the Office of Information and Regulatory Affairs (OIRA), the agency within the White House Office of Management and Budget (OMB) that monitors and oversees the creation of federal regulations. He will face the Senate Committee on Homeland Security and Government Affairs, chaired by Sen. Joseph Lieberman (I-CT), on Tuesday, May 12.

Professor Sunstein has a long and distinguished academic record, and will, in all likelihood be confirmed for the post. In that event, one of his first challenges will be to help complete the Obama Administration's promised executive order restructuring the regulatory process. At the heart of that effort are two questions: First, will the Administration continue to use cost-benefit analysis as the guide star of the regulatory process or replace it with a better approach? Second, how will OIRA's role change so that it is no longer a barrier to much needed health, safety, environmental and other regulations?

Cost-Benefit Analysis Has Failed

Since OIRA was created in the David Stockman days of the Reagan Revolution, cost-benefit has been the principal method of regulatory review by the Executive Branch. But its use has come under sharp criticism from those who point out that it has been used as a tool to stymie health, safety and environmental regulation. That was never truer than during the Bush years, but in fact cost-benefit was a significant barrier to progress even during the more regulation-friendly Clinton Administration.

The idea of quantifying costs and benefits, and then weighing them against each other sounds logical in theory, but it works terribly in the realm of regulating health and environmental protections. Here's why:

- **Quantifying many of the most significant benefits of regulations in dollar terms has proven infeasible.** Even if it were possible to establish a "fair" monetary value for such nonmarket goods as lives saved or endangered species protected, it is rarely possible to predict with accuracy the full scope of benefits that will be achieved by a particular regulation. Professor Sunstein pointed out this very problem in his academic writings, highlighting an EPA rule to reduce the amount of arsenic in drinking water. He noted that separate studies by credible sources – the EPA and the AEI-Brookings Joint Center for Regulatory Studies – calculated benefits as low as \$13 million (far below the estimated costs of the proposed regulation) or as high as \$3.4 billion (far above the estimated costs of the proposed regulation). That 260-fold difference in the projections suggests not just the inherent inaccuracy of the process, but also how subject it is to manipulation. A similar problem has emerged on the costs side of the equation. The calculations typically rely on industry estimates of future costs from complying with a regulation they oppose. Not surprisingly, those cost estimates have been consistently "generous." Nevertheless,

OIRA has treated CBA as if it were capable of producing fine-grain accuracy, and treating the results as if they were scientific proof of the specific value of a given regulation.

- **CBA has been field-tested for a quarter century and failed.** In a recent 12-month stretch in which OIRA reviewed 18 major environmental, health, and safety regulations, the federal agencies were unable to provide a quantified estimate of any of the benefits at all in seven of the cases. In two others, they could not provide any quantified estimate of costs. In one case from earlier in the Bush Administration, the EPA had proposed a regulation to restrict emissions of nitrogen oxide from large ships (nitrogen oxide is a precursor to particulate matter pollution, which results in tens of thousands of deaths in the United States every year). But the EPA lacked adequate data to quantify accurately the number of premature deaths and health emergencies that would be averted by the more stringent standard -- so OIRA assigned the value as zero. The costs of the regulation, of course, then easily outweighed the benefits. Similarly, in developing new regulations governing power plant cooling intake structures, the Bush EPA sought to calculate the monetary value of the benefit from not killing the millions of fish and tiny organisms sucked into the intake structures, a challenge complicated by a lack of data on many of the creatures and the stubborn fact that many of the tiniest ones occupy important positions in the food chain. EPA eventually gave up, acknowledging in its analysis that its estimates were grossly incomplete, and cautioned against relying on them. OIRA had no such qualms, however, and pushed the agency to use the flawed – and significantly understated – benefits estimate. Since costs could not exceed benefits, the resulting rule was far less protective than it might otherwise – and should – have been.

- **The reliance on cost-benefit ignores the law.** CBA is just one method of regulatory impact analysis, popular with conservative administrations precisely because it has the effect of watering down regulations. Remarkably, however, in the vast majority of public health, safety and environmental statutes, Congress has directed that regulatory decisions be made on the basis of *some method of analysis other than CBA*. It has instead directed agencies to use a variety of well-established alternative methods for setting standards, including technology-based standard-setting, effects-based standard-setting and multi-factor balancing. As a result, OIRA's review of individual rules through the lens of cost-benefit analysis is almost always at odds with the agency's congressionally delegated rule-making authority. Indeed, my colleagues at the Center for Progressive Reform have prepared a [chart](#) (see link at bottom) of the 31 statutory provisions undergirding the nation's health, safety and environmental regulations. In only two instances did Congress direct agencies to use CBA. In six cases, CBA is one of several standards identified by law, and in the remaining 23 provisions, Congress directed agencies to use one of several other standards.

There Is a Better Way: Pragmatic Regulatory Impact Analysis

One reason that some past administrations have continued to use cost-benefit even though it is unsupported by statute is that it perfectly suited their ideological purposes, slanting regulatory analysis in opposition to protective regulations, so as to benefit industry. The current administration, concerned as it is about protecting health, safety, and the environment should not fall back on cost-benefit analysis, or be cowed into using it, simply because it has been in use a long time. “We’ve always done it this way” isn’t good enough. In comments to OMB in advance of the President’s forthcoming executive order on regulatory review, I joined my fellow board members at the Center for Progressive Reform in urging the administration to replace CBA with Pragmatic Regulatory Impact Analysis, a method that begins with the standard of regulatory analysis established in the particular statute, and then seeks out and considers a full range of views on the factors specified by the applicable statute. So, for example, if an environmental statute calls on EPA to set limits for a particular pollutant at the lowest level technologically and economically feasible – as it does in 11 of 31 statutory provisions – the agency would explore the pollution control alternatives that are available throughout the industry, determine the reductions in pollution that those technologies provide, and analyze whether it would be feasible for plants to obtain and install the best of the technologies that are available.

OIRA's New Role: Help Regulatory Agencies be Effective

Washington has grown accustomed to an OIRA that sees itself as the place where regulations mandated in statute are delayed, watered down, gutted or even killed. As noted, its insistence on the uniform use of cost-benefit analysis as the gold and only standard for regulatory review ignores plain congressional mandates. And it has for decades been a barrier to regulatory agencies doing their jobs. But if the past several months have taught us anything, it is that it's long past time to cure deregulatory fever. The economic meltdown, poisoned peanut butter, lead-slathered toys, heart-attack-inducing Vioxx, and innumerable other examples scream out the need for a more serious approach. OIRA should stop being a barrier to regulation, and start seeing itself as the White House office that helps regulatory agencies do their jobs by helping them calculate and secure the resources they need to accomplish their mission, helping solve interagency disputes, and helping agencies set their regulatory agendas.

Abandoning CBA is key to fixing OIRA and fixing what ails the regulatory system. History shows that CBA has repeatedly failed to assess fairly the benefits of proposed regulations, while consistently overstating the costs, becoming a tool for bottling up needed protections. That's exactly why many anti-regulatory advocates support it. Professor Sunstein's nomination is an opportunity to discuss its use in the new Administration. I hope you will explore the issue on your editorial pages in the coming days.

If you'd like more information, please feel free to contact Ben Somberg or Matthew Freeman in the Center for Progressive Reform's media office at 202-747-0698, or by email at bsomberg@progressivereform.org or mfreeman@progressivereform.org.

Thanks very much for your consideration.

The Center for Progressive Reform is a nonprofit research and educational organization dedicated to protecting health, safety, and the environment through analysis and commentary. Visit CPR on the web at www.progressivereform.org.

Some resources that might be of use:

- CPRBlog post by Rena Steinzor, "What I Will be Listening for at the Cass Sunstein Confirmation Hearing," May 6, 2009:
<http://www.progressivereform.org/CPRBlog.cfm?idBlog=1675B1A4-1E0B-E803-CA71AA924F43F1ED>
- CPR's paper, *Reinvigorating Protection of Health, Safety, and the Environment: The Choices Facing Cass Sunstein*:
<http://www.progressivereform.org/articles/SunsteinOIRA901.pdf>.
- CPR Member Scholars' comments on the President's forthcoming Executive Order on the Regulatory Process:
http://www.progressivereform.org/articles/CPR_Comments_New_EO_Reg_Rev.pdf.
- A chart breaking down the 31 statutory provisions undergirding the nation's environmental, health and safety regulations, listing the regulatory standards in those laws. (CBA is mandated in only two):
http://www.progressivereform.org/articles/CPR_RegStandardsChart.pdf.
- CPR Perspective: Cost-Benefit Analysis:
<http://www.progressivereform.org/perspcostbenefit.cfm>.