

NOMINATION OF CASS R. SUNSTEIN

HEARING

BEFORE THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

OF THE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

NOMINATION OF CASS R. SUNSTEIN TO BE ADMINISTRATOR, OFFICE
OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGE-
MENT AND BUDGET

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NOMINATION OF CASS R. SUNSTEIN

TUESDAY, MAY 12, 2009

U.S. SENATE,
COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 10:05 a.m., in room SD-342, Dirksen Senate Office Building, Hon. Joseph I. Lieberman, Chairman of the Committee, presiding.

Present: Senators Lieberman, Akaka, and Collins

OPENING STATEMENT OF CHAIRMAN LIEBERMAN

Chairman LIEBERMAN. The hearing will come to order. This morning, the Committee meets to consider the nomination of Cass Sunstein to be the Administrator of the Office of Information and Regulatory Affairs, known widely, or at least here in this room, as OIRA.

OIRA is one of those government agencies that has a very low public profile but exerts great influence over the workings of our government and the daily lives of most Americans. In Congress, we pass laws that express our values and our aspirations. We draw lines between what is right and wrong, desirable and undesirable in those laws, but because we cannot foresee every circumstance in which the law will be applied or every detail that the law wisely might include, we leave many of the details to the Executive Branch of government and to its regulatory authority.

For over a quarter of a century, Presidents have asked OIRA to help oversee and coordinate this regulatory process, and over those years, we have seen how OIRA has helped the regulatory agencies protect the American people, and we, in my opinion, have seen how OIRA has helped the regulatory agencies place hurdles in the way of helping the American people, sometimes blocking their efforts to fulfill their statutory responsibilities.

Based on the record of the Obama Administration, at least for these first 100 days plus a little bit, I am optimistic that our new President and his Administration will develop a regulatory agenda forceful in its intent to protect the American people and to do so in a way that is transparent.

In Professor Cass Sunstein, the President has found someone with exceptional qualifications and extraordinary talent, clearly capable of leading OIRA in a positive direction to strengthen the Administration's efforts and intentions and to fulfill Congress' intentions as stated in the law.

When Professor Sunstein began teaching at Harvard Law School in 2008 after a long and distinguished career at the University of Chicago Law, his new employers announced that they had hired, “the preeminent legal scholar of our time—the most wide-ranging, the most prolific, the most cited, and the most influential.” This must have come as unsettling news to the many other members of the Harvard Law faculty who felt that they were exactly that. But those were the words of Elena Kagan, then Dean of Harvard Law, now the Solicitor General of the United States.

Over your career, both in the short time at Harvard and also at the University of Chicago, you have written extensively about regulation, the management of risk, and indeed about OIRA itself. I am sure that you would agree with me that the regulatory agencies of the Federal Government face a series of very significant challenges, some substantive, the unprecedented set of challenges to our economy and to our financial regulatory agencies, and also the unique challenges that the global environmental problems have placed on our environmental agencies.

We are also emerging from a period in our Administration in which there was less aggressive regulation, and that may put pressure on the existing regulatory agencies to, if you will, try to catch up, and like the rest of government, all the regulatory agencies face stringent budget constraints that can interfere with their ability to perform their functions. So that is the moment at which you come to OIRA.

In your prolific writings, you have expressed strong and, I would say, sometimes controversial views about the way regulations should be developed and reviewed, so I am particularly eager to hear your vision for OIRA and your thoughts on what role OIRA should play in this new Administration.

It is a pleasure to welcome you here, and I really do look forward to your testimony and the question and answer period. Senator Collins.

OPENING STATEMENT OF SENATOR COLLINS

Senator COLLINS. Thank you, Mr. Chairman. The question that your statement raises is, is anyone left at Harvard Law School who has not been drafted to serve in this Administration?

I join the Chairman in welcoming Professor Sunstein to our Committee today as we consider his nomination to be the Administrator for the Office of Information and Regulatory Affairs. OIRA, as the Chairman has pointed out, is one of the alphabet soup of government offices that few people outside of Washington have ever heard of, and yet it can have enormous influence on regulations that affect the everyday lives of millions of Americans.

Through the process of regulatory review, OIRA exerts significant influence over the rulemaking process. Professor Sunstein is a prolific author who has conducted an extensive study of government regulation and of the various methods that can be used to evaluate regulatory effectiveness.

If confirmed, however, he would step from the world of theory into the realm of practice where not every idea discussed in the classroom can be easily turned into governmental policy, nor should it be. This can be a challenging transition for those leaving

the academic realm for the world of the Executive Branch where their views and decisions have real consequences.

Some of the core principles that seem to guide Professor Sunstein's work appear to be appropriate for the OIRA position. For example, he is an advocate of greater transparency. I am particularly interested in his recommendation that agencies should be required to explain a decision to regulate in those cases where the costs outweigh the benefits.

The professor strongly supports the use of cost-benefit analysis as a tool for evaluating regulation while recognizing that such analysis cannot always be the sole criterion for evaluating the desirability of regulation. In one of his most recent and intriguing books, *Nudge*, Professor Sunstein makes a compelling case for regulation that does not dictate actions but instead encourages certain behavior without limiting personal freedoms. While certainly not universally applicable, this idea bears exploring as an alternative to more draconian and costly command-and-control regulations.

Professor Sunstein has, however, written some provocative and controversial statements that warrant our scrutiny. His suggestion that perhaps hunting ought to be banned is particularly troubling to those of us who represent States where hunting and fishing are part of the heritage of their families.

Finally, I want to note that, in the past, OIRA has played a significant role in setting government-wide privacy policy. Since 2001, however, it has not been clear who in the Office of Management and Budget (OMB) is in charge of privacy. As this Administration seeks to use information technology in innovative new ways, OMB should make the protection of personal information a top priority. An important first step will be to designate an individual, whether within OIRA or elsewhere in OMB, who will be directly responsible for developing policy to safeguard privacy and who will be accountable to Congress and the American people.

I look forward to discussing these issues with our witness. Thank you, Mr. Chairman.

Chairman LIEBERMAN. Thank you, Senator Collins, and we are honored to welcome Senator Amy Klobuchar, our colleague from Minnesota, to introduce Mr. Sunstein.

In asking Senator Klobuchar to introduce you, you have, without knowing, achieved a first in Senate history because I gather that Senator Klobuchar was a student of yours when she was at the University of Chicago Law School. You may not know that she was a student of mine at Yale College.

Senator KLOBUCHAR. It is an amazing coincidence.

Chairman LIEBERMAN. It is an amazing coincidence, which will be noted in some book of trivia someday. Senator Klobuchar, it is a pleasure to have you here, and we welcome your introduction at this time.

TESTIMONY OF HON. AMY KLOBUCHAR, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator KLOBUCHAR. Thank you so much, Chairman Lieberman and Senator Collins. I am honored to join you here today. I am especially honored because this is an opportunity to introduce Cass Sunstein and speak about his qualifications as the Administrator

for the Office of Information and Regulatory Affairs in the Office of Management and Budget.

I first want to congratulate Cass. He is here with his wife, Samantha, and his teenage daughter, Ellen, and also his in-laws. It is always nice to have your in-laws supporting you.

As you know, Cass and his wife, Samantha, are the proud parents of a baby boy, just born 2 weeks ago. I guess they did not bring him for this.

Back in the 1980s, as you mentioned, Mr. Chairman, I was privileged to have Cass Sunstein as my law professor at the University of Chicago. I took his administrative law class, and also he was my advisor for the law review. His career as a legal scholar was just beginning to take off, but he was already making a very strong impression as a teacher.

I think for many students, he was their favorite teacher, but of course, I will not say that given as you already stated you were also my teacher, Mr. Chairman.

When we first saw Cass Sunstein in class, he really looked like a boy in a man's suit. He was so thin, but he had such enthusiasm. These were the days before whiteboards, and so he would always get a lot of white chalk on his black suit, and he was completely oblivious to it.

But he was far from being an absent-minded professor. He would race along at a mile a minute in his lectures, a fountain with a never-ending stream of ideas. He was never boring, which is a tough standard for law students. In the 1980s, the University of Chicago Law School was well-known for its use of the Socratic Method, which meant for students trying to sit next to someone with an easier last name than theirs. So I would always, Mr. Chairman, look for Johnsons or Joneses or those kinds of people.

But when he did call on you, he would say things like, Ms. Klobuchar, I have a question for you, and then he would say A and then B and then C and then D, and once he was done talking, you would stare at him and think, I am not sure where he started. But his mind could handle it.

In his 27 years at the University of Chicago, he became legendary for both his teaching and his scholarship. Cass Sunstein is one of the Nation's most thoughtful and respected legal scholars with a distinguished record of accomplishments. A graduate of Harvard Law School, a law clerk to Supreme Court Justice Thurgood Marshall, a professor at the University of Chicago, as you noted, for 27 years, the author or co-author of more than 15 books and hundreds of scholarly articles, and as Senator Collins has noted, I am sure we will all find things in those articles we do not quite agree with.

But he is by large margin the most cited scholar on any law faculty in the United States of America. One envious observer said, if you look at what he has written and done, he should be 900 years old. Cass is not only a prolific writer, but also a wide-ranging one, everything from constitutional law and behavioral economics to Wikipedia and Bob Dylan's music.

In one recent book, he made good use of Mr. Spock of Star Trek and Homer Simpson to discuss the potential of human decision-making. But Cass has not been nominated for this position because

of his detailed knowledge of T.V. characters. It is because no one has thought harder or more deeply or more creatively about how to ensure fair cost-effective regulations in modern America.

His overriding concern is that we have smart, science-based, cost-effective, results-oriented policies to protect public health and safety, to promote energy security, and to strengthen our economy and financial system. Cass is intellectually honest and rigorous, which means he goes where the evidence takes him.

The *Wall Street Journal* recently commended him as someone who will bring an important and much needed voice to the Administration. He has been supported by 13 Nobel Prize winners from across the political spectrum. They have endorsed him because they trust in his ability to think and get things done.

While he can debate abstract legal theories with the best of them, he is a scholar whose feet are firmly planted on the ground. He is a pragmatist. He cares about ideals, but ultimately he cares more about the right results.

In a famous essay, the historian and philosopher Isaiah Berlin made a distinction between thinkers who are hedgehogs and those who are foxes. He borrowed this from a saying by an ancient Greek poet, the fox knows many things, but the hedgehog knows one big thing.

At first glance, Mr. Sunstein would appear to be a fox given the volume and variety of his writings. But looking more closely, you can see that he is also a hedgehog. Do you like these animal analogies, Senator Collins, to get at what you were talking about?

It is no coincidence; we are also a State that likes hunting. There is one big idea, the hedgehog, that animates virtually all of his diverse work. It is the idea that we will be better off when we take into account different viewpoints and let evidence guide our decisions.

His open-mindedness and his willingness to look at all sides of an issue are virtues that will serve him well in this important position. In turn, the American people will be well served by these same virtues, as well as his dedication, hard work, and commitment to the highest standards of excellence.

So I am very pleased to present Mr. Sunstein to the Members of this Committee. Thank you.

Chairman LIEBERMAN. Thanks very much, Senator Klobuchar. That was a wonderful introduction. I appreciate it very much. If I may do something that I presume Professor Sunstein never did, you are excused for the rest of the class because I know you have a busy schedule today.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman.

Chairman LIEBERMAN. Thank you very much for that introduction. It was excellent.

Let's proceed to the hearing, and now I would say for the record that Mr. Sunstein has filed responses to a biographical and financial questionnaire, answered pre-hearing questions submitted by the Committee and had his financial statements reviewed by the Office of Government Ethics. Without objection, this information will be made part of the hearing record, with the exception of the financial data, which are on file and available for public inspection in the Committee offices.

Our Committee rules require that all witnesses at nomination hearings give their testimony under oath, so Professor Sunstein, I would ask that you please stand and raise your right hand.

Do you swear that the testimony you are about to give to the Committee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. SUNSTEIN. I do.

Chairman LIEBERMAN. Thank you. Please be seated. We would now welcome your statement and introduction of members of your family and even friends who are here.

**TESTIMONY OF CASS R. SUNSTEIN¹ TO BE ADMINISTRATOR,
OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OF-
FICE OF MANAGEMENT AND BUDGET**

Mr. SUNSTEIN. Thank you, Mr. Chairman. I am very grateful to be here. I am grateful to you in particular for your kindness over the last weeks; Senator Collins, to you for being here and for the kindness and generosity of your staff; to Members of the Committee and their staffs, for your guidance and suggestions and policy proposals and generosity.

I am grateful to Senator Klobuchar for her extremely kind statement and also for her wonderful performance as a student, which vaulted her into public prominence. I am grateful to the President, of course, and honored by him for his trust.

With your indulgence, I would like to introduce members of my family who are here. Eddie Bourke, my father-in-law; my amazing mother-in-law, Vera Delany, who played tennis at Wimbledon; my amazing daughter, Ellen Ruddick-Sunstein; and my remarkable wife, brave Samantha Power, who is a recent mother.

And noting that fact, I would like to mention two family members who are not here, my son, Declan, born 2 weeks ago, and my father, Cass Richard Sunstein, who, like Senator Akaka, fought in World War II. He was in the Navy in the Philippines, and I miss him a lot, particularly today. Thanks Dad.

Let me say a few words about my own background and my conception of the role of the Office of Information and Regulatory Affairs. As noted, for over two decades, I have taught law—constitutional law, administrative law, environmental law, labor law, and associated fields—mostly at the University of Chicago Law School, and my writing is predominately in those domains.

Recently I moved to Harvard Law School where I founded the Program on Risk Regulation, whose work overlaps greatly with that of the Office of Information and Regulatory Affairs. We explore homeland security, the economic crisis, energy security, environmental protection, occupational safety and health, and related topics.

In recent years, my own writing has emphasized three topics. Transparency and information disclosure, as mentioned by Senator Collins, particularly as a regulatory tool, is often gentler than command and control regulation.

I have explored aggregation of information through the Internet with the thought that bureaucrats in particular often know much

¹The prepared statement of Mr. Sunstein appears in the Appendix on page 19.

less than the American people do, and with the uses of the Internet, we can often obtain valuable information about the best way to protect people and about ways to improve existing regulatory regimes.

Finally, with this book, *Nudge*, I have explored behavioral economics and approaches to regulation that are based on a realistic picture of how human beings behave in situations of risk, danger, and information, and the goal is to try to provide protection to people without coercing them.

With respect to the Office of Information and Regulatory Affairs, its three fundamental tasks involve information policy, statistical policy, and, as emphasized, regulation. Information policy is absolutely fundamental, now more than ever. It bears on national security as well as on sound governance, and there are many challenges to be met in order to ensure that information is secure, that privacy is respected, that paperwork reduction actually occurs, and that the burdens on small business and on others do not become overwhelming.

Sound statistics are the foundation for much of what the Executive Branch does and the statistical work done at OIRA is the basis for much policymaking at the Federal and State levels. It is important that it be done objectively and that it be kept up-to-date.

Regulation, as you, Mr. Chairman, have noticed, has been controversial in the domain of the work of OIRA, and I would just like to emphasize three foundations for the work of OIRA in the regulatory arena. The first is everything done by OIRA, as everything done by the Executive Branch, must be consistent with the law. The foundation of regulatory review, the first question to be asked by the Office of Information and Regulatory Affairs, is “what are Congress’ instructions?” That is the starting point for any mechanism for regulatory review.

The second task is to ensure that within the boundaries set by Congress, things done are consistent with the President’s own priorities and principles. The third task is to kind of institutionalize the notion of looking before you leap so that when the government is starting a regulation, whether it involves homeland security, education, energy, or anything else, there is some sense of what the consequences are likely to be. That promotes accountability. It helps ensure that citizens and government can know what the likely effects of government action are.

The most important words in the executive orders governing regulatory review are these: “To the extent permitted by law.” Anything done within the framework of the Office of Information and Regulatory Affairs has to keep those six words in mind.

Mr. Chairman, we face a number of challenges right now involving national security, financial stability, energy security, environmental protection, healthcare reform, and educational reform. I know that Members of this Committee have exercised leadership in those domains, and when legislation is passed in the future, and with respect to legislation that has been enacted thus far, regulations will try to meet those challenges.

I look forward to working very closely with you and Members of the Committee and your staffs, if confirmed, to make sure that

those challenges are well met in the coming years. But for the moment, I look forward to answering your questions.

Chairman LIEBERMAN. Thank you very much. We will begin with the standard questions we ask of all witnesses, three in number. First, is there anything you are aware of in your background that might present a conflict of interest with the duties of the office to which you have been nominated?

Mr. SUNSTEIN. No, sir.

Chairman LIEBERMAN. Do you know of anything personal or otherwise that would in any way prevent you from fully and honorably discharging the responsibilities of the office to which you have been nominated?

Mr. SUNSTEIN. No, I do not.

Chairman LIEBERMAN. And finally, do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted Committee of Congress if you are confirmed?

Mr. SUNSTEIN. Absolutely.

Chairman LIEBERMAN. Thank you. So far you are doing very well. We will each have 7-minute rounds of questions.

I was interested in your opening statement in the extent to which I would say it was non-ideological. There is a sense that—and I want to ask you to comment on this—the Bush Administration, which just ended after two terms, because it was more skeptical of the role of government, was more halting in its regulation, whereas the Obama Administration, presumably more supportive of governmental action, will be more supportive of regulation, which is to say that this is, to use simplistic terms, a liberal Administration that follows a conservative Administration.

I want you to just talk about that common view that Members of Congress and people outside have of the regulatory process and how you relate that to what you just told us in your introductory statement, particularly about the primacy of the law?

Mr. SUNSTEIN. Well, my own approach to regulatory problems I describe as pragmatic and empirical. As an academic, that is a particular role. The role of the Office of Information and Regulatory Affairs, the Administrator, should also be pragmatic and empirical, but those would not be the first two words. The first description of OIRA is that its charge is to implement enacted legislation to ensure the terms of regulations conform to the terms of statutes, and that is the starting point.

The second point is to ensure that whatever pragmatic and empirical approach is brought conforms to the President's own commitments and priorities. And the third step, consistent with Executive Order 12866, which remains the controlling executive order, is that the analysis that accompanies the regulations is sound, that there is investigation of alternatives, and that there is some effort to assess consequences.

So in that third part, compliance with Executive Order 12866, subordinate to statutes, there is a big place for pragmatism and empiricism.

Chairman LIEBERMAN. There is no particular room there for ideology separate from the three factors that you have mentioned.

Mr. SUNSTEIN. That is correct. The only place where what could be described as ideology would play a role is if there is a statute that has a particular orientation.

Chairman LIEBERMAN. Right.

Mr. SUNSTEIN. Or if the President, as the President suggested, in the energy domain he has some ideas.

Chairman LIEBERMAN. Right, understood. Let me talk about the relationship between OIRA and the agencies themselves. I want to ask you who you think should be in the lead in setting regulatory priorities determining what type of regulation is needed and then setting the final content for the rules, the agencies that are given authority under the laws or OIRA?

Mr. SUNSTEIN. As you say, the statutes that give rulemaking authority give such authority to the agencies so they have the authority to issue rules. There is also a structure in place for regulatory review, but that must respect the policymaking authority and rule-making power of the agencies.

Chairman LIEBERMAN. Let me ask you to comment, and this in some ways takes me back to the first question, on the role of cost-benefit analysis. In your writings, you have been a strong advocate for the use of cost-benefit analysis in rulemaking.

I cannot resist asking you, early in the Bush Administration, we had a nominee before us for OIRA, John Graham, who was also an advocate, a very informed advocate, for cost-benefit analysis. But some of us voted against him because we worried that he was going to use cost-benefit analysis to frustrate the intention of Congress and the statutes. His work is actually comparable to yours, at least in the direction of it, and I wanted to ask you—and I presume you know his work—perhaps to state this as provocatively as I might, why shouldn't a senator who voted against John Graham's confirmation also vote against yours?

Mr. SUNSTEIN. Thank you for that. My own approach to cost-benefit analysis is inclusive and humanized, I would say. I would not want to characterize his in a pejorative sense, but what I have emphasized in my academic writing is that cost-benefit analysis should not put regulation in an arithmetic strait jacket; that there are values and morals, distributional, aesthetic, and otherwise, that have to play a part in the overall judgment about what is to be done. I would emphasize that there are limits to purely economic approaches to valuation of cost and benefits.

Think, for example, of the domain of protecting disabled people, where, as a scholar, I have written that consistent with the Americans with Disabilities Act, cost-benefit analysis is an inadequate approach. We are not trying to maximize money with provisions that are protecting against discrimination.

But even more than emphasizing the humanized inclusive form of cost-benefit analysis, what I would emphasize is that all of this is subordinate to the law. So if the Clean Air Act has provisions that forbid cost-benefit analysis from being the basis of decision, that is authoritative.

Chairman LIEBERMAN. You have answered the following question that I was going to ask, which is to refer to several statutes, particularly those that control environmental pollution or unsafe workplace conditions, which you referred to, or other risks to the public,

where Congress has actually prohibited a consideration of cost in comparison to benefits and has mandated that regulations be based on other considerations, such as the availability of technology or the protection of health. I think you have answered that.

Just a final question, which you have touched on in this regard. In your writings, you have described the risk in the use of quantitative cost-benefit analysis, that is, as you put it, "it is possible that in practice, quantitative cost-benefit analysis will have excessive influence on government decisions, drowning out soft variables," which is your term.

What would you do as OIRA Administrator to try to ensure that this does not happen?

Mr. SUNSTEIN. The first task would be to make sure that if the soft variables are part of what Congress wants to safeguard, those variables be safeguarded. I referred to the Americans with Disabilities Act.

Chairman LIEBERMAN. Yes.

Mr. SUNSTEIN. The second task would be to ensure that if the President has a policy initiative in a domain, it reflects his commitment to those soft variables, that those be respected. The third idea would be in any implementation of cost-benefit analysis that is worthwhile in practice as opposed to law review articles, it is very important to be attentive to moral considerations, distributional considerations, and others that sometimes animate government action. And that is how I would respond to the soft variables.

Chairman LIEBERMAN. Very interesting. Thank you. My time is up. Senator Collins.

Senator COLLINS. Thank you, Mr. Chairman. Mr. Sunstein, I want to get right to the controversial issue that I raised in my opening statement before exploring other issues with you.

In a 2007 speech you said, "We ought to ban hunting." Now that was just one speech, but then in doing a search through some of your documents and legal articles, we also found a statement saying, "We might ban hunting altogether, at least if its sole purpose is human recreation."

First let me say that you certainly have the right to have any view on hunting that you wish. My concern, as someone who represents a State where hunting and fishing and the outdoors are very much a part of our heritage, is that you not take steps, if you are confirmed, to try to influence regulation in such a way that it would affect the decisions that individuals make in conformance with State and local laws on whether or not to hunt.

Can you give me assurances that if you are confirmed you will not seek to implement your personal view that hunting should be banned?

Mr. SUNSTEIN. Yes, Senator, I can pledge that to you in the strongest possible terms. The only thing I would add is that the law is authoritative, first. Second, I am a strong believer in the Second Amendment to the U.S. Constitution. I am on record as saying that the Second Amendment protects the right to hunt. That reflects my own personal view.

The statement you quoted is a provocation, an offhand remark in a speech that was on another topic, and not only would I not want to ban hunting if that were my personal view, it actually is not my

personal view. Hunters are among the strongest environmentalists and conservationists in the United States, and it would be preposterous for anyone in a position like mine to take steps to affect their rights or their interests.

Senator COLLINS. Thank you for that strong statement. Similarly, I read a primer that you wrote on the rights of animals when you were at Chicago, and you seemed to be suggesting that animals should have greater legal rights in the court system.

Now I will tell you, in reading this fascinating treatise, I cannot always tell when you are throwing out an idea for the purpose of exploring all of the ramifications and all the possibilities versus where you are actually advocating for a position.

So perhaps I will ask you right now, why don't you help me with the issue of legal rights for animals?

Mr. SUNSTEIN. Thank you for that. As OIRA Administrator, as opposed to an academic suggesting possible ideas for consideration, the question would be, what does, for example, the Endangered Species Act say or what does the Animal Welfare Act say, not what does a law review article say? So I would follow the law.

In terms of my own academic writings, the suggestion, which was meant as a suggestion for contemplation, was that under State law that prevents cruelty to animals, it might be that the enforcement by criminal prosecutors could be supplemented by suits by private people protecting animals from violations of existing State law, very much like under the Endangered Species Act, where people rather than elephants initiate lawsuits.

So the idea was actually very conventional and a little boring, though maybe my rhetoric made it seem less so. It was just about ensuring enforcement of existing State anti-cruelty law, and I know you have been a pioneer actually in the domain of animal welfare.

So the idea here was a suggestion about State anti-cruelty law, and it would not be legitimate for the head of the Office of Information and Regulatory Affairs to be playing any role in a Federal system in rethinking State anti-cruelty law.

Senator COLLINS. Thank you. Let me turn to another issue that concerns me. You have recommended that the process of regulatory review that OIRA undertakes should be broadened to include independent agencies such as the Federal Trade Commission (FTC), the Federal Communications Commission (FCC), and the Consumer Product Safety Commission. That recommendation concerns me greatly because the whole reason that Congress creates independent regulatory agencies is to insulate them from Administration policies, whether it is a Democratic or a Republican Administration.

Congress has deemed that this particular area needs to be protected from the changing agendas of different Administrations. If you bring these independent agencies within the regulatory purview of OIRA, you defeat the whole purpose of having them be independent agencies. You are treating them as if they are members of the President's cabinet. So why do you advocate expanding OIRA's reach to independent agencies?

Mr. SUNSTEIN. Well in my academic writing, the suggestion was that a process of "look before you leap," which included reflections within the Executive Office of the President on the views of, say,

the Federal Trade Commission, might be a reasonable way of ensuring dialogue and participation.

This is the academic argument, fully consistent with everything you have pointed to, which is clearly correct, and I am sure the Department of Justice would put an exclamation point next to what you have said.

In my capacity as nominee for this office, the judgment of what relationship the FCC, FTC, or the U.S. Securities and Exchange Commission (SEC) has with the President is a judgment for the President within the confines of the law. And the only thing I would add—this is really not something for the Office of Information and Regulatory Affairs to select—is whatever is done, and nothing of the sort has ever been done, as you suggest, must respect the legal independence of these very different entities.

Senator COLLINS. Thank you, Mr. Chairman.

Chairman LIEBERMAN. Thank you very much, Senator Collins. Senator Akaka, good morning. Welcome.

OPENING STATEMENT OF SENATOR AKAKA

Senator AKAKA. Good morning, Mr. Chairman and Ranking Member Collins. I am delighted to be here at this hearing and to see Dr. Sunstein again.

First I want to welcome you, Dr. Sunstein, and your family and congratulate you on your newborn son, Declan. Secretly, I was hoping he would be here. But thank you very much for bringing your family and also your friends to this hearing today.

As you may know, I am a strong advocate for greater protection of personal privacy by the government, and too many government agencies and private companies have failed to adequately protect personal privacy. As Administrator of OIRA, you would oversee numerous regulations that protect the privacy rights of millions of Americans.

I believe that more can be done to protect personal information and I hope that privacy protection will be a priority at OIRA under your leadership. You did respond to the Chairman's question about what you would do in protecting privacy and did mention some steps you would take as Administrator.

My further question to expand on that point is to ask whether you have other possible ways in mind that you would like to do this?

Mr. SUNSTEIN. Thank you for that, Senator. With respect to privacy, the Office of Information and Regulatory Affairs works with the Privacy Act of 1974, and the first task would be to consult with the head of the Office of E-Government, who works with the Office of Information and Regulatory Affairs on privacy issues, and to talk through the existing guidance, which has been provided by the Office of Information and Regulatory Affairs, to assess its adequacy.

I would want, if confirmed, to speak first with Vivek Kundra, who is terrific, second with OIRA staff, who have expertise in privacy issues, and third, to engage in a process of outreach with interested stakeholders of various sorts to see what problems have emerged, in what circumstances are people's privacy being compromised, and in particular for the next 5 or 10 years what sorts of threats to privacy are there going to be. Often the government

is reacting to problems of last year and not foreseeing the problems of the next 5 years.

And then my goal would be, if confirmed—I would want to hit the ground running on this one in particular—to look to what reforms ought to be made within the framework you have provided under the Privacy Act to ensure that when people do not want third parties to learn what they have on Amazon or anything about their medical records, all of this is kept private.

Senator AKAKA. Dr. Sunstein, the Privacy Act and the E-Government Act are the primary mechanisms for protecting Americans' privacy. This is an especially important issue with the growing use of electronic information and technology by the government and increased information collection in response to the threat of terrorism.

Do you believe that the Privacy Act and the E-Government Act currently provide adequate privacy protections?

Mr. SUNSTEIN. I think the Privacy Act of 1974 was amazingly prescient. It is a law that was enacted a generation ago, and the basic foundations of the Act have really stood the test of time.

What is not clear, and I gather this is the heart of your question, is whether the communications revolution that we have seen in the last 15 years unsettles some of the practices that have emerged under the Privacy Act. On that one, it is clear that a very careful look on the regulatory side makes sense, and I understand that this Committee is investigating whether legislative change is desirable, and I would look forward to working with you very closely on that.

That is one that, as I said, in the next 5 or 10 years is going to be even more urgent than it has been in the last 5 or 10 years.

Senator AKAKA. Thank you. Dr. Sunstein, recently the Homeland Security and Governmental Affairs Committee reported my bill, the Plain Writing Act, favorably. That bill would require Federal agencies to start issuing documents in plain, easy-to-read writing. OMB would develop plain-writing guidance and would help oversee implementation.

As you know, OIRA's mission includes overseeing dissemination of and access to government information, so I would expect that OIRA would take the lead with OMB on implementation. You have told me that you are an advocate for plain writing.

As the head of OIRA, do you feel you would be well prepared to spearhead implementation if the plain writing bill was enacted?

Mr. SUNSTEIN. I do, Senator. I would defer to the Director of the Office of Management and Budget on allocation of resources and such issues. He would be my boss. But the answer is absolutely.

Senator AKAKA. Well thank you very much, and thank you for your responses, and thank you for bringing your family and your wife here today.

Mr. SUNSTEIN. Thank you.

Senator AKAKA. Thank you.

Chairman LIEBERMAN. Thank you, Senator Akaka. We will do a second round insofar as Members have additional questions. I have a few.

Let me just focus in on the other side of your responsibilities from the privacy side that Senator Akaka focused on, which is the accessibility that the public has to governmental actions.

The Paperwork Reduction Act is one of several pieces of legislation that this Committee adopted and the Congress adopted to make government more accessible to the citizenry. The statute now states that the OIRA administrator will assist the OMB director to “develop and oversee the implementation of uniform information resource management policies, principles, standards, and guidelines” that will “promote public access to public information.”

As Senator Akaka mentioned later, the E-Government Act was passed saying that the Administrator of E-Government would work with the OIRA Administrator to fill the statutory responsibilities. I want to ask you generally, you mentioned that you would be working with the Federal Chief Information Officer, Vivek Kundra, what are your goals to establish clear guidelines for Federal agencies when it comes to information management on the public accessibility side?

Mr. SUNSTEIN. First priority, Mr. Chairman, would be the Regulations.gov website, which should make very clear to affected citizens, and even interested citizens who are not affected but who are curious about what their government is doing, what the regulations say and what the burdens are and what the benefits are.

Regulations.gov at present is a very impressive start, but it is not clear that it satisfies the plain English test. As an administrative law teacher, I have spent considerable time on the Regulations.gov website and learned a great deal, but it just is not as accessible as it ought to be to citizens, and that is where I would start.

Chairman LIEBERMAN. I agree totally with you about that. We understand it is an enormous challenge to do what we have asked Regulations.gov to do, and they are off to a decent start, but I agree with you, if I hear you correctly, that it needs a lot of improvement. Because I think the congressional intention here was not just to provide some access to information, but really to give individuals the opportunity to comment on proposed regulations, which is to an extent that they have never had the ability before because of the Internet. So do you have any specific ideas about how you might make it better?

Mr. SUNSTEIN. Yes. First of all, much more simplicity and much more plain English. And the architecture of the website should be altered so that you do not have to click so much before you start to read something that is itself quite complicated. So much greater simplicity of the sort that the private sector often has.

In terms of public comment on regulations, I think we have just started to realize the promise of an era of public reaction and input with respect to regulations, and this is something I have worked on as an academic. It is something that Vivek Kundra is interested in and that the Director is also interested in, that is, enlisting private sector knowledge in terms of seeing what is working well and poorly for existing regulations, exploring gaps in regulatory protection, some that can be filled by agencies without any legislation, and also getting a clear sense by affected people who often do not

know what the regulations are, let alone have input until the regulations are imposed on them.

So simplicity, clarity, and publicity would be watch words. And the beauty of this is it is not just realizing democracy in a way we have not been able to do before. That is great. But also great is we have regulations that will be much better. They will be much more suited to people's actual situations.

Chairman LIEBERMAN. Exactly, because they will reflect their circumstances. I learned long ago when I was in the State Legislature in Connecticut, and it relates to anybody in government, that we come to government with our own experiences, obviously, inherently limited, and then we are asked, in our case, to legislate, and you are now asked to regulate across the widest array of human experience.

It struck me that it pays to listen to the people who happen to live in the area or field that you are regulating, and the Internet does give us an opportunity to do that better than we ever have before. Moving on, talking about my State Senate career, you wrote an article called, "Is OSHA Constitutional?"

On a particularly strange day in my legislative career at a hearing on the Occupational Safety and Health Administration (OSHA), I raised the question, is OSHA kosher? So I want to thank you for giving me the opportunity to remember that day.

But I go on more seriously. You wrote a similarly titled article awhile back, about a decade ago, "Is the Clean Air Act Constitutional?" So I wanted to ask you to explain your view about the constitutionality of these landmark statutes to protect public health and the environment.

Mr. SUNSTEIN. Thank you for that. The conclusion of the Clean Air Act paper was the Clean Air Act is constitutional. The conclusion of the OSHA paper was OSHA is constitutional, and at first glance, this would be the most boring and obvious conclusion a law professor could ever reach.

What inspired the two articles was a set of decisions within the D.C. Circuit, the Court of Appeals, that actually raised questions about both statutes. I tried to say the Clean Air Act was constitutional and the D.C. Circuit should not have suggested otherwise. The Supreme Court eventually agreed with that.

The OSHA question is newly alive because of some D.C. Circuit decisions from the 1990s, which upheld the statute with a little bit of difficulty. There are some intervening Supreme Court cases that raise questions about those decisions, upholding the statute.

The point of my article was to say here are some routes by which it could be held constitutional. So both are constitutional.

Chairman LIEBERMAN. Thank you. This leads, of course, to the question of whether you would feel it was within your purview as Administrator of OIRA to apply a constitutional test of your own to regulations or whether this would be dependent, as it was in the articles you have cited, on court decisions?

Mr. SUNSTEIN. I would feel it would be my obligation to refer the matter to the Department of Justice.

Chairman LIEBERMAN. If you had a constitutional question?

Mr. SUNSTEIN. Yes.

Chairman LIEBERMAN. Thank you. Senator Collins.

Senator COLLINS. Thank you, Mr. Chairman. I, too, want to follow-up on the privacy issues that my two colleagues have raised and that I raised in my opening statement.

I certainly agree with you that the Privacy Act of 1974 has withstood the test of time amazingly well. I believe that parts of it still nevertheless need to be updated, but when you consider that it was written before the Information Age, the basic principles of the Act still very much apply.

But no matter how good our laws are, if there are not individuals in government who are charged with implementing them, over-seeing them, they tend to not be enforced as effectively as they should be. I mentioned in my opening statement that back in 2001, there was a chief counselor for privacy within OIRA. Nowadays, the privacy officer of the Department of Homeland Security tends to be the premiere privacy expert in the Federal Government, in part because of the many challenges that the Department faces in weighing privacy concerns.

But really there should be someone within OMB who has that specific privacy portfolio. As I have mentioned in the past, the chief counselor for privacy was part of OIRA. Do you intend to reestablish that position if you are confirmed?

Mr. SUNSTEIN. I intend to look very carefully at what institutional structure is best suited to the protection of privacy. I agree very much that accountability on any matter, emphatically including privacy, requires a person whose responsibility is to provide that protection.

My understanding is that there is a notice out right now to hire someone whose sole job at OIRA would be to protect privacy. My understanding also is that there are several people at OIRA who are spending a great deal of time on this issue, but I very much take your point that there is a question whether these are adequate ways of providing what was provided in the past.

Senator COLLINS. In my previous round of questions, I mentioned my concern about a proposal that you put forth to extend OIRA to independent regulatory agencies. Let me balance that now by telling you a proposal you put forth that I think is an excellent idea, and that is to require agencies to explain why they are moving ahead with the regulation in a case where the costs outweigh the benefits as shown by a cost-benefit analysis.

Do you believe that currently agencies provide adequate justification for moving forward on a regulation that has failed the cost-benefit analysis?

Mr. SUNSTEIN. It is a crucial question: Whether, when agencies are imposing big burdens on business and they are not providing big benefits to people, they are adequately explaining themselves. I do not have a general conclusion to that because I have not done a systematic study of the cases in which agencies proceed, even when the costs are higher than the benefits.

What I would say is for the future, and this is very much consistent with the existing executive order, agencies would have to say something, such as the law requires us to proceed or there are soft variables that matter. So I am not sure what the right generalization is about past practice, but I can tell you for the future, to have a full explanation is part of ensuring accountability.

Senator COLLINS. Do you expect that the President is going to issue a new executive order?

Mr. SUNSTEIN. I do not know the answer to that. I do know that he has asked for recommendations, but whether he is going to issue a new executive order, I do not know.

Senator COLLINS. And have you given recommendations to the White House in this area?

Mr. SUNSTEIN. As a senior advisor to the Director, I have shared thoughts.

Senator COLLINS. And are they along the lines of the recommendations that you have made in some of your academic writings?

Mr. SUNSTEIN. I would say there is some but very incomplete overlap between my recommendations as a temporary advisor and my academic thinking.

Senator COLLINS. Would you like to share those recommendations with us?

Mr. SUNSTEIN. I think if the Director would like to tell you—

Senator COLLINS. Very good. I did not really expect you to say yes to that, I must say. I am also interested in proposals that you have to increase the transparency of decisionmaking in the regulation area. It is very frustrating to many of my constituents that the rulemaking process appears to be so opaque and so difficult and that ironically the prohibitions against third-party communications, or just discussions in some ways, although they are necessary to guard the integrity of the process, impede the process because it seems to many of my constituents that their concerns are not heard, that they go into this black hole.

And it is not just everyday citizens. The governor and State officials feel that way in some cases as well. We are going through this now with an issue involving the listing of the Atlantic salmon. It is frustrating not to be able to communicate fully all that the State of Maine is doing to restore habitat for the salmon.

Do you have any recommendations on how we can make rulemaking more transparent, more accessible?

Mr. SUNSTEIN. I do. An open door may be, to some extent, an open virtual door, but also an open real door on the part of OIRA and its Administrator makes a great deal of sense for your reason and the Chairman's that often affected stakeholders know things that the agency and OIRA do not.

So participation as a foundation of rulemaking, as a way of ensuring transparency, that would be first. Second, no secret or back-room participation, open in public in the sense that if OIRA is meeting with people, then people get to know about that; that would be the starting point.

Senator COLLINS. Thank you, Mr. Chairman.

Chairman LIEBERMAN. Thank you, Senator Collins. Do you have any further questions?

Senator COLLINS. I do not.

Chairman LIEBERMAN. Neither do I, so Mr. Sunstein, thanks very much for your testimony today. Thanks for your willingness to come into Federal public service. We congratulate you and your wife for the birth of the baby and thank her for her service as well.

I cannot end without noting the presence of your friend and mine, Leon Wieseltier, long-term literary editor of *The New Republic*. Seeing him out there, and I apologize for even entering this in the record, reminded me of the scene from “The Godfather” movie where the witness is about to spill the beans on the organized crime family and they bring his brother from Italy who he has not seen in a long time, and he clams up.

In this case, he is here looking directly over your shoulder just to make sure that I do the right thing. I certainly do intend to support your nomination.

We are going to keep the record open until 12 noon tomorrow for the submission of any written questions or statements. I hope to be able to move your nomination as quickly as we can from the Committee out to the Senate floor for consideration. Obviously that depends on the inclinations of the other Members of the Committee.

But again, it has been a very substantive and interesting morning, and I thank you for your willingness to serve. The hearing is adjourned.

[Whereupon, at 11:10 a.m., the Committee was adjourned.]

A P P E N D I X

Prepared Statement of Cass R. Sunstein May 12, 2009

Mr. Chairman and Members of the Committee:

I am most grateful, and immensely honored, to appear before you today.

I am thankful to the Committee, to its staff, and to the Chairman for wise counsel, generosity, and multiple kindnesses. As a citizen, I thank the Committee for its leadership role in keeping our country safe and in ensuring that the executive branch is faithfully executing the law. If I am confirmed, I will look forward to working closely with the Committee to ensure that the job of the OIRA Administrator is done well.

Mr. Chairman, let me say a few words about my own background and my understanding of the role of OIRA.

I have taught constitutional law, administrative law, and regulatory policy for more than twenty-five years; I have also taught environmental law and labor law. Much of my writing is in these fields. I have spent most of my career at the University of Chicago Law School. Recently I moved to Harvard Law School, where I founded the Program on Risk Regulation, which explores a wide range of issues relating to risk reduction, ranging from national security to environmental protection to the financial crisis. I have also done a great deal of work on behavioral economics, on transparency and information disclosure, and on uses of the Internet to obtain and aggregate information.

As you are aware, OIRA has a number of functions, including information policy, statistical policy, and regulatory policy. The first two are of course exceedingly important, because sound statistical policy provides a foundation for much private and public action, and because the Federal government obtains, generates, and disseminates so much information. In accordance with the Paperwork Reduction Act, reducing paperwork burdens on the American public is a high priority. Information must be compiled and disseminated in a way that respects privacy, protects national security, and promotes clarity rather than confusion.

Of the three functions, review of regulatory policy has proved the most controversial, but when it is working well, it promotes several goals.

First, regulatory review helps to ensure that regulations are consistent with the law as enacted by Congress and also with the president's principles and priorities. In this respect, regulatory review is a close cousin of budgetary review by the Office of Management and Budget.

Second, regulatory review promotes coordination among different parts of the executive branch. Often the positions of one agency are usefully informed by the views of other agencies. For example, a regulation from the Department of Transportation might have environmental consequences, and it is valuable for a coordinating institution to ensure a degree of input from the Department of Interior and the Environmental Protection Agency.

Third, regulatory review ensures a kind of “second look” at agency decisions and supporting analyses, with particular reference to anticipated consequences. Both Congress and the President have imposed important analytic requirements on those agencies. OIRA review helps to ensure that such requirements are respected. Under Executive Order 12866, issued by President Clinton in 1993 and in effect since that time, the President has required a regulatory impact analysis, drawing attention to the likely consequences of regulations and of possible alternatives.

It is important to see that when it is working well, regulatory review is sharply disciplined. Such review must always respect the authority given to agencies by law. I believe that of the many words in Executive Order 12866, the most important words are these six: “to the extent permitted by law.” Both the substance and the structure of regulatory review are limited and guided by Congress. Statutory constraints, time limits, and deadlines must be honored. When Congress has required an agency to go forward, then OIRA review must respect that requirement. Any process of regulatory review must be consistent with legislative enactments.

It is also important to underline the fact that within the executive branch, agencies, and not OIRA, have been delegated rulemaking authority by law. Under the Constitution and relevant statutes, the President does have a degree of supervisory power over those who implement federal law. It follows that OIRA review must be conducted with close reference both to the law and to the President’s own commitments.

These are unusually challenging times, and Congress and the President have embarked on many important initiatives. These include restoring the financial system and ensuring a better regulatory framework for the future; promoting energy security; reforming health care; and improving education.

In each of these areas, the President is committed to transparency, to pragmatism, and to respect for science. One of OIRA’s central jobs is to help to ensure that his commitments are honored, especially when difficult tradeoffs must be made.

I know that members of the Committee are exercising important leadership in all of those domains. OIRA should play a constructive role in these efforts. If confirmed, I will work with you to ensure that we make good progress in the coming years.

I look forward to answering your questions.

BIOGRAPHICAL AND FINANCIAL INFORMATION REQUESTED OF NOMINEES

A. BIOGRAPHICAL INFORMATION

1. **Name:** (Include any former names used.) Cass Robert Sunstein
2. **Position to which nominated:** Administrator, Office of Information and Regulatory Affairs
3. **Date of nomination:** April 20, 2009
4. **Address:** (List current place of residence and office addresses.)
Residence: REDACTED
Office Address: 1650 Pennsylvania Avenue, Room 260, Washington, D.C. 20503
5. **Date and place of birth:**
September 21, 1954
Salem, MA
6. **Marital status:** (Include maiden name of wife or husband's name.)
Married to Samantha Power
7. **Names and ages of children:** Ellen Ruddick-Sunstein, age 19
8. **Education:** List secondary and higher education institutions, dates attended, degree received and date degree granted.
Middlesex School, Concord, MA, high school, 1968-1972, class of 1972
Harvard College, 1972-1975, AB, 1975
Harvard Law School, 1975-1978, JD, 1978
9. **Employment record:** List all jobs held since college, and any relevant or significant jobs held prior to that time, including the title or description of job, name of employer, location of work, and dates of employment. (Please use separate attachment, if necessary.)
Office of Management and Budget, Counselor to the Director, January 20, 2009-present (Washington, DC)

I worked on the Presidential transition team, on regulatory issues, from approximately December 8 - January 19, 2009 (Washington, DC) (unpaid)

Harvard Law School, Felix Frankfurter Professor of Law, 2008-2009 (on leave of absence as of 1/20/09) (Cambridge, MA)

University of Chicago Law School, 1981-2008 (Assistant Professor, Professor, Karl N. Llewellyn Professor, Karl N. Llewellyn Distinguished Service Professor) (Chicago, IL)

Office of Legal Counsel, United States Department of Justice, 1980-1981 (Washington, DC)

Supreme Court of the United States, Law Clerk to Justice Thurgood Marshall, 1979-1980 (Washington, DC)

Supreme Judicial Court of Massachusetts, Law Clerk to Justice Benjamin Kaplan, 1978-1979 (Boston, MA)

I have also been a visiting professor at Columbia Law School (1986) and Harvard Law School (on several occasions)

10. **Government experience:** List any advisory, consultative, honorary or other part-time service or positions with federal, State, or local governments, other than those listed above.

Informal, unpaid, occasional advisor to Internal Revenue Service, in connection with social norms and tax compliance, 1999-2000

Member, Presidential Advisory Committee on the Public Service Obligations of Digital Television, 1997-1998 (unpaid)

Member, Institute of Medicine, Committee on Reducing Tobacco Use: Strategies, Barriers and Consequences, 2004-07 (unpaid)

11. **Business relationships:** List all positions currently or formerly held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business enterprise, educational or other institution.

Contributing Editor to The New Republic, 1999-2008 (unpaid)

Contributing Editor to The American Prospect, approximately 1989-2008 (unpaid)

National Council, World Wildlife Fund, 1994-1997 (unpaid)

Co-Director, Center on Constitutionalism in Eastern Europe, University of Chicago, 1990-1997 (part of academic appointment at University of Chicago)

Did academic work for professional journals and resulting book funded in part by Exxon in connection with punitive damage awards, late 1990s and early 2000s (paid)

Have served (but no longer serve) on editorial board of several academic journals (unpaid), including *Ethics, Regulation & Governance*, *Judgment and Decision Making*, *Journal of Political Philosophy*, and *Constitutional Political Economy*

Senior Nonresident Fellow, Brookings, approximately 2003-2008 (unpaid)

Member, Advisory Committee, AEI-Brookings Joint Center on Regulatory Policy, approximately 1999-2008 (unpaid)

Director, Program on Risk Regulation, Harvard University, approximately 7/2008-1/2009 (part of duties as faculty member)

Co-Chair, Advisory Committee, AEI Center for Regulatory and Market Studies, approximately 6/2008-1/2009 (unpaid)

Adjunct Professor, University College, Cork (Ireland), approximately 10/2008-4/2009 (unpaid)

12. **Memberships:** List all memberships, affiliations, or and offices currently or formerly held in professional, business, fraternal, scholarly, civic, public, charitable or other organizations.

In addition to the activities listed in my response to Question 11, above, I am or have been a member of the following organizations.

District of Columbia Bar

American Bar Association (including subgroups relating to separation of powers and the Federal Trade Commission)

American Law Institute

American Academy of Arts and Sciences

Association of American Law Schools, Administrative Law Section

National Council, World Wildlife Fund, 1994-1997

13. **Political affiliations and activities:**

- (a) List all offices with a political party which you have held or any public office for which you have been a candidate.

None.

- (b) List all memberships and offices held in and services rendered to any political party or election committee during the last 10 years.

I was an informal, unpaid, occasional adviser to then-Senator Obama's campaign for the presidency, from the early days of the campaign to his election. I worked on the transition team, on regulatory issues, from approximately December 8 until January 19, 2009.

- (c) Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of \$50 or more during the past 5 years.

Since January 1, 2004 I have made the following contributions:

- \$400 to DNC, 2004
- \$500 to Obama for Illinois, March 2004
- \$2000 to Illinois Senate 2004 (Joint Fundraising Contribution final recipient Obama for Illinois)
- \$500 to Obama for America, 2007
- \$2300 to Hillary Clinton for President, 2008
- \$1000 to Obama for America, 2008

14. **Honors and awards:** List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals and any other special recognitions for outstanding service or achievements.

Phillips Prize, American Philosophical Society, 2007

Graduate Teaching Award, University of Chicago, 2003

Henderson Prize, Harvard Law School, 2002

Goldsmith Book Award, Harvard University, 1994

Certificate of Merit Award of American Bar Association for contribution to public understanding of American legal system, 1991, for *After the Rights Revolution*

Award of American Bar Association for best scholarship in administrative law, 1987, for "Interest Groups in American Public Law," 38 *Stanford Law Review* 29 (1985).

Award of American Bar Association for best scholarship in administrative law, 1989, for "Interpreting Statutes in the Regulatory State," 102 Harvard Law Review 405 (1989).

Award of American Bar Association for best scholarship in administrative law, 1999, for "Is the Clean Air Act Unconstitutional?," 98 Michigan Law Review 303 (1999), and "Informational Regulation and Informational Standing," 147 University of Pennsylvania Law Review 613 (1999).

Goldsmith Book Award, Harvard University, 1994, for Democracy and the Problem of Free Speech (awarded for best book on free speech)

Honorary Degree, Lake Forest College, 2002

15. **Published writings:** Provide the Committee with two copies of any books, articles, reports, or other published materials which you have written.

List is attached.

16. **Speeches:**

- (a) Provide the Committee with two copies of any formal speeches you have delivered during the last 5 years which you have copies of and are on topics relevant to the position for which you have been nominated. Provide copies of any testimony to Congress, or to any other legislative or administrative body.

I typically work from notes, rather than a prepared text, when I give speeches. A list of speeches and the substance of my speeches can be found as described below, 16(b).

Testimony is attached.

- (b) Provide a list of all speeches and testimony you have delivered in the past 10 years, except for those the text of which you are providing to the Committee. Please provide a short description of the speech or testimony, its date of delivery, and the audience to whom you delivered it.

I have given a large number of speeches over the last ten years. The attached list is the product of a review of my personal records and a search of publicly-available electronic databases. Almost all of my speeches are based on, or became parts of, published writing. Most of these speeches had content that appears in Nudge (2008); Republic.com 2.0 (2007); Worst-Case Scenarios (2007); Why Groups Go To Extremes (2007); Are Judges Political? (2006); Laws of Fear (2004); Why Societies Need Dissent (2003); Republic.com (2000).

17. **Selection:**

- (a) Do you know why you were chosen for this nomination by the President?

I believe I was nominated because my work on and understanding of administrative and constitutional law and of government regulation, along with my work on information technologies, equip me for this particular position. My work on behavioral economics and cost-benefit analysis is also pertinent.

- (b) What do you believe in your background or employment experience affirmatively qualifies you for this particular appointment?

I have worked for many years on government regulation and on how to make it better. I have focused on regulation in particular since 1981, with special reference to health, safety, and the environment. I am the coauthor, with Justice Stephen Breyer and several others, of one of the leading casebooks in the field, *Administrative Law and Regulatory Policy*. That book focuses on regulation and how to improve it; it devotes considerable attention to OIRA. More recently, I have explored how to use the lessons of behavioral economics to make government regulation more effective, emphasizing how people sometimes make inadequate decisions about complex subjects (such as financial planning and the environment). Some of the relevant ideas can be found in *Nudge: Improving Decisions About Health, Wealth, and Happiness (2008)* (with Richard Thaler), which appeared on several lists of the best books of 2008, including those from *The Economist* and *The Financial Times*.

My 1997 book, *Free Markets and Social Justice*, won the 2002 Henderson Prize from Harvard Law School for the best administrative law book in the preceding five years; it offers many ideas about government regulation and about what works and what doesn't. My 1990 book, *After the Rights Revolution: Reconceiving the Regulatory State*, attempts to defend government regulation while also acknowledging its problems and exploring how they might be solved. I have also worked, informally and on occasion, with the legislative and executive branches on this topic. My work on constitutional law and administrative law is also relevant, because legal issues arise frequently at the Office of Information and Regulatory Affairs.

B. EMPLOYMENT RELATIONSHIPS

1. Will you sever all connections with your present employers, business firms, business associations or business organizations if you are confirmed by the Senate?

Yes. I have taken an unpaid leave of absence from Harvard.

2. Do you have any plans, commitments or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, explain.

No.

3. Do you have any plans, commitments or agreements after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization, or to start employment with any other entity?

I have taken a leave of absence from Harvard.

4. Has anybody made a commitment to employ your services in any capacity after you leave government service?

If I take a leave of absence of less than two years, Harvard is committed to rehiring me.

5. If confirmed, do you expect to serve out your full term or until the next Presidential election, whichever is applicable?

Yes.

6. Have you ever been asked by an employer to leave a job or otherwise left a job on a non-voluntary basis? If so, please explain.

No.

C. POTENTIAL CONFLICTS OF INTEREST

1. Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the Office of Management and Budget's designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the Department's designated agency ethics official and that has been provided to this Committee. I am not aware of any other potential conflicts of interest.

2. Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration or execution of law or public policy, other than while in a federal government capacity.

In 1999, I helped write a brief defending the constitutionality of the Violence Against Women Act. *See United States v. Morrison*, 1999 WL 1034453.

Additional activities directly or indirectly seeking to influence legislation include a book, *Punitive Damages: How Juries Decide* (University of Chicago Press 2002). Research for the book and underlying papers were funded in part by the University of Chicago Law School and Exxon Corporation.

In much of my academic work I have discussed issues relating to legislation and public policy. My work in this regard is reflected in my testimony, attached, and my publications.

3. Do you agree to have written opinions provided to the Committee by the designated agency ethics officer of the agency to which you are nominated and by the Office of Government Ethics concerning potential conflicts of interest or any legal impediments to your serving in this position?

Yes.

D. LEGAL MATTERS

1. Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, provide details.

No.

2. Have you ever been investigated, arrested, charged or convicted (including pleas of guilty or nolo contendere) by any federal, State, or other law enforcement authority for violation of any federal, State, county or municipal law, other than a minor traffic offense? If so, provide details.

No.

3. Have you or any business of which you are or were an officer, director or owner ever been involved as a party in interest in any administrative agency proceeding or civil litigation? If so, provide details.

No.

4. For responses to question 3, please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity.

Inapplicable.

5. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.

None.

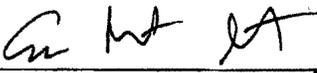
E. FINANCIAL DATA

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

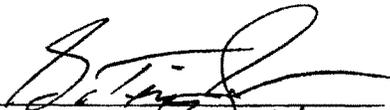
REDACTED

AFFIDAVIT

CASS ROBERT SUMSTEIN being duly sworn, hereby states that he/she has read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of his/her knowledge, current, accurate, and complete.



Subscribed and sworn before me this 22nd day of April, 2009


Garrison 24925 2/19/2013

Notary Public

**U.S. Senate Committee on Homeland Security and Governmental Affairs
Pre-hearing Questionnaire
For the Nomination of Cass R. Sunstein
to be Administrator of the Office of Information and Regulatory Affairs**

I. Nomination Process and Conflicts of Interest

1. Why do you believe the President nominated you to serve as Administrator of the Office of Information and Regulatory Affairs (OIRA)?

I believe that he nominated me because of my work and experience in working on regulatory issues, principally as a law professor at the University of Chicago and at Harvard.

2. Were any conditions, express or implied, attached to your nomination? If so, please explain.

No.

3. What specific background and experience affirmatively qualify you to be Administrator of OIRA?

Since 1981, I have worked on government regulation and on how to improve it. I have focused in particular on health, safety, and the environment. More recently, I have explored how to use the lessons of behavioral economics to make government regulation more effective in many domains (including financial planning and the environment).

I am the coauthor, with Justice Stephen Breyer and several others, of one of the leading casebooks in the field, *Administrative Law and Regulatory Policy*. That book devotes considerable attention to OIRA; it also explores how regulation sometimes succeeds and sometimes fails. My 2007 book, *Worst-Case Scenarios*, explores low-probability events and various problems in responding to them. My 1997 book, *Free Markets and Social Justice*, won the 2002 Henderson Prize from Harvard Law School for the best administrative law book in the preceding five years; it offers many ideas about government regulation and about how to improve it. My 1990 book, *After the Rights Revolution: Reconceiving the Regulatory State*, attempts to defend government regulation while also acknowledging its problems and exploring how they might be solved. I also founded the Program on Risk Regulation at Harvard Law School, which explores how to improve risk regulation in many domains, including financial markets, occupational safety and health, and environmental protection.

I have also worked, informally and on occasion, with the legislative and executive branches on this topic. My work on constitutional law and administrative law is also

relevant, because legal issues arise frequently at the Office of Information and Regulatory Affairs.

4. Have you made any commitments with respect to the policies and principles you will attempt to implement as Administrator of OIRA? If so, what are they and to whom have commitments been made?

No.

5. If confirmed, are there any issues from which you may have to recuse or disqualify yourself because of a conflict of interest or the appearance of a conflict of interest? If so, please explain what procedures you will use to carry out such a recusal or disqualification.

I will not participate personally and substantially in any particular matter that has a direct and predictable effect on the financial interests of Harvard University, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for either the exemption at 5 C.F.R. § 2640.203(b) or another regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

I have recently resigned from my unpaid positions as a Contributing Editor of *The New Republic* and *The American Prospect*; a member of the Editorial Boards of the *Journal of Political Philosophy* and *Constitutional Political Economy*; and a Consulting Editor of the *Journal of Judgment and Decisionmaking*. Additionally, I have resigned from the following unpaid positions: Co-Chair of the Advisory Committee of the American Enterprise Institute's Center for Regulatory and Market Studies; Senior Non-Resident Fellow at the Brookings Institution; Member of the Advisory Committee of the AEI-Brookings Joint Center on Regulatory Policy; and Adjunct Professor at the University College, Cork, Ireland. I also resigned, in June of 2008, from my paid position as a Professor at the University of Chicago. To prevent any potential appearance of loss of impartiality and pursuant to 5 C.F.R. § 2635.502, for a period of one year after my resignation from the entities listed above, I will not participate personally and substantially in any particular matter involving specific parties in which that entity is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

II. Role and Responsibilities of the Administrator of OIRA

6. What do you consider to be the mission of OIRA, and what would you consider to be your role and responsibilities if you are confirmed as the OIRA Administrator?

The most important role of the OIRA is to promote compliance with law. Within the scope of the law, OIRA's mission includes (a) ensuring coordination and interagency review within the executive branch, (b) promoting adherence to presidential priorities and

commitments, and (c) ensuring that regulations are based on sound analysis and serve the interests of the American people. OIRA's other missions include promoting compliance with several statutes involving information acquisition and management, including the Paperwork Reduction Act. If confirmed, I would act in accordance with these understandings.

7. What are the major challenges facing OIRA? What objectives would you like to achieve in your tenure as Administrator? How do you propose to address these challenges and objectives?

In the current period, the nation faces large challenges, including national security; the state of the economy; energy and the environment; health care; and education. I would like to help to ensure that in all of these domains, regulations obey congressional instructions and serve the interests of the American people, in the sense that they are effective in achieving their intended goals and promote economic growth. I would also like to ensure the primacy of law, objective science, and evidence-based judgments in the regulatory process. Increased transparency and disclosure, including use of disclosure as a regulatory tool, are among my objectives.

8. Have you, Director Peter Orszag, and Deputy Director for Management (DDM)-designate Jeffrey Zients discussed what your and their respective roles with respect to the functions of OIRA would be, and what your role, if any, outside of the functions of OIRA would be? In light of those discussions (or, if there were none, then, in the absence of such discussions),
- a. How do you see your role, and what is your understanding of the role of the Office of Management and Budget (OMB) Director and the OMB DDM with regards to the role and responsibilities of the OIRA Administrator?

I have discussed some of these questions with Director Orszag and with DDM-designate Zients. The primary functions of OIRA include ensuring compliance with the Paperwork Reduction Act and engaging in regulatory oversight, consistent with law. I would work closely and directly with Director Orszag and, if he is confirmed, with Mr. Zients. OIRA has a distinct and separate mission from that of other offices within OMB, but it is important for OIRA to coordinate with other offices having relevant expertise.

- b. What do you see to be your relationship between OIRA and other offices within OMB, including the Office of Electronic Government?

With respect to the Office of Electronic Government, I understand that our responsibilities may be closely related. Implementation of the Paperwork Reduction Act is OIRA's responsibility, but in other domains, the Office of Electronic Government takes the lead. I would work closely with the Office of Electronic Government to ensure coordinated and consistent policies.

9. What are your views on the organization of OIRA and the allocation of resources among the various activities undertaken by the office? Do you have any plans to reorganize or reallocate resources of the office?

I have not yet formed an opinion on the organization and allocation of resources within OIRA, and hence I have no plans at the present. If confirmed, I look forward to working with Congress and the Director to explore possible options.

10. OIRA is a relatively small office within OMB, but it has many responsibilities under various statutes and executive orders. Administration and statutorily mandated initiatives in recent years have also added more oversight duties to OIRA's staff, in areas such as oversight of information quality, peer review, reports on costs and benefits of all rules, and reviews of regulatory agencies' guidance documents.

a. Do you believe OIRA has sufficient staff to carry out all of these tasks effectively?

I have not yet formed a view on that question; I would look forward to a careful review if confirmed.

b. Alternatively, do you believe any of these tasks can or should be eliminated, reduced, or delegated to other federal officials?

At the present time, I tend to think that none of its current tasks should be eliminated, reduced, or delegated, but I would look forward to exploring that question in more detail with the Congress and the Director.

11. What have your role and responsibilities been since January, when you were appointed as Counselor to the Director at OMB? In that capacity, how familiar have you become with OIRA's responsibilities and operations, and with the Administration's plans and objectives in which you, assuming that you are confirmed, and OIRA may participate?

As counselor, my role has been to learn about the operations of OMB and OIRA, to familiarize myself with current procedures and policies, and to assist the Director in his ongoing analyses of pending policy issues. I have advised him on a number of issues, especially in the domain of information disclosure and behavioral economics.

III. Policy Questions

A. Regulatory Matters Generally

12. What is your understanding of the Obama Administration's agenda in the area of regulation, and how would you, if confirmed as Administrator of OIRA, help the Administration to fulfill that agenda?

The President has made it clear that his priorities include solutions to the current economic crisis; energy and environmental reform; health care reform; and education

reform. If confirmed, I would attempt to promote that agenda by helping to ensure that regulations are consistent with law, with the President's goals, and informed by the best possible analysis. I would also seek to ensure that regulations are effective in achieving their objectives.

13. Some public interest advocates believe that OIRA over the years has used cost-benefit analysis, regulatory review, and other aspects of centralized management of regulatory efforts as tools to resist regulation that is needed to protect public health, safety, and the environment, and have expressed concern that OIRA under your leadership might have a similar role in this Administration. How would you respond to these concerns?

My answer has three parts. First, cost-benefit analysis must be subordinate to law. If Congress has told the executive branch to act even though the costs exceed the benefits, OIRA and other institutions must act in accordance with the law. Second, cost-benefit analysis should be based on sound science and economics; it should not be politicized, or operate as a basis for blocking desirable regulations. Third, cost-benefit analysis is a tool meant to inform decisions; it should not be used to place regulatory decisions in an arithmetic straightjacket.

B. Regulatory Review

The role of OIRA

14. Presidential oversight of federal regulation, primarily through the mechanism of OMB reviews of agencies' draft rules, has been conducted under successive administrations for more than 25 years. What is your opinion of OIRA's track record in the area of regulatory review? What, if anything, do you believe should be done differently?

I do not have a view of OIRA's overall track record; practices have differed over time, and although GAO, CRS, and others have reviewed OIRA practices and procedures, I am not aware of a systematic study of OIRA's performance. I do believe, however, that the most important words in the relevant Executive Orders are "to the extent permitted by law"; that greater transparency would be helpful; that OIRA should try to review rules more quickly; that it would be desirable for OIRA to help agencies to eliminate unnecessary or unduly burdensome regulations while also helping them to fill unjustified gaps in regulatory protection; that OIRA should promote sound, sensible, evidence-based regulation, without any ideological bias.

15. At different periods in the history of OIRA, its Administrators have shifted back and forth between maintaining a more collaborative and consultative relationship with the agencies, or exercising more of an enforcement role. The Government Accountability Office (GAO) reported in 2003 that, during the mid-1990s, OIRA Administrators sought to shift from the relationship during previous administrations by seeking to have rule writers and reviewers work together "as partners rather than as adversaries," establishing relationships that were "collegial" and "constructive," and functioning "more as a

counselor during the review process than as an enforcer of the executive order.”¹ Administrators during that period also told GAO that their goal was to achieve a mutually agreeable result, and that they viewed the use of return letters as a failure of collaboration. By contrast, the Administrator during the early years of this decade described himself as “the gatekeeper for new rulemakings,” using “a carrot and stick” strategy to encourage better regulatory analysis, and revived the use of return letters as the “stick.”² How would you describe your approach to the working relationship between OIRA and agencies under your leadership?

I strongly believe that a collaborative approach is best.

16. OIRA has also shifted its emphasis towards becoming involved earlier in the rulemaking process, rather than waiting until a proposed rule is presented to OIRA. Do you support this shift in emphasis and do you want to continue it? Is there a point at which there can be too much early OIRA involvement in the rulemaking process, or at which OIRA involvement can be too early?

As a supporter of collaborative approaches, I believe that earlier OIRA involvement is sometimes appropriate, certainly if the relevant agency finds such involvement useful. Whether OIRA involvement is too early depends on the context.

17. In *Risk and Reason*, you wrote, “All in all, Executive Order 12866 did not seem to have much impact under President Clinton. The office in charge of administering the order – the Office of Information and Regulatory Affairs (OIRA) – was largely passive and toothless, serving a coordinating function without trying to steer regulation in any particular direction. Cost-benefit analysis operated not as a sharp constraint on agency action but as a technique for gathering information about the effects of government policies.”³

- a. Do you believe that OIRA should be an activist office, steering regulation in particular directions?

I believe that OIRA has a role to play in promoting compliance with the law and with the President’s commitments and priorities -- and that it can do so in a manner fully consistent with its mission.

- b. If so, in what direction would you seek to move regulation if confirmed as OIRA Administrator?

I would seek to work with others to ensure that regulation is consistent with congressional instructions and with the President’s priorities and commitments.

¹ “Rulemaking: OMB’s Role in Reviews of Agencies’ Draft Rules and the Transparency of Those Reviews.” At pages 38-44. (GAO-03-929, September 2003).

² *Id.*

³ Sunstein. *Risk and Reason*, p. 21.

18. E.O. 12866 states that one of its goals is to “reaffirm the primacy of Federal agencies in the decision-making process.”

a. Do you agree with this goal? Please explain.

I do, because rulemaking authority has been conferred, by statute, on Federal agencies, not on OMB.

b. The development of regulations requires conducting analytic work and reaching judgments in many professional disciplines and subject areas, including economics, science and technology, law, and others. In conducting such work and reaching such judgments, what generally should be the agencies’ responsibility and what generally should be OIRA’s responsibility?

The answer depends on statutes and on relevant executive orders. Under Executive Order 12886, agencies do the primary work, and OIRA has a reviewing and coordinating role.

c. In the development and issuance of regulations, in what areas do you believe the agency head should make the decisions, and in what areas do you believe OIRA should make the decisions, and under what circumstances, if any, should OIRA’s opinion prevail in the event of disagreement?

Because I believe in collaborative approaches, I believe in exchanging views and information, in reasonable responses to arguments and counterarguments, and hence in avoiding disagreement. If an agency head and OIRA disagree and cannot resolve their disagreement, any resolution must be in accordance with what the law requires. Under Executive Order 12866, the resolution is made by the Vice President, to the extent permitted by law.

19. How do you believe disagreements between OIRA and a regulatory agency should be resolved?

a. Under what circumstances, if any, do you believe the Administrator of OIRA or the Director of OMB may and should overrule the judgment of an agency head?

I believe in collaborative approaches and in exchanging information and reasons, and I would not think in terms of “overruling.” Under Executive Order 12866, the Vice President resolves the very rare intractable disagreements between OIRA and the agency head.

b. In that regard, what significance would you attribute to statutory language by which Congress may have authorized or required the agency head to decide whether to publish the regulation?

The longstanding position of the Department of Justice is that the process described in Executive Order 12866 is consistent with law. I agree with that position.

- c. Section 7 of Executive Order 12866 states that unresolved conflicts between OMB and regulatory agencies shall be resolved by the President, "to the extent permitted by law." If Congress specifically gives rulemaking authority to an agency head, what power do you believe the President has to overrule the agency head? Do you believe that this element of Executive Order 12866 needs clarification?

This is a difficult question debated by legal specialists; I would defer to the Department of Justice on the answer. I do not have a view about whether clarification is required.

20. Should the OIRA Administrator be cognizant of the political implications of a regulatory analysis, or should the focus be on the economic and other technical forms of analysis, while leaving the political questions to others?

The OIRA Administrator should focus on the quality and objectivity of the analysis that is the foundation of the rulemaking process.

21. In your writings, you have expressed concern that regulation is sometimes driven by public concern that is not merited by the facts. In situations where irrational fear is driving government action, you have written that "the government should not expend significant resources merely because an uninformed public believes that it should."⁴ How should OIRA respond if it believes that regulation is being driven by uninformed public fear?

OIRA's role is to respect the law and the commitments of the President.

22. At the request of the President, the OMB Director is developing a set of recommendations for a new Executive Order on Federal Regulatory Review.
- a. What do you believe have been the strengths and weakness of the existing Executive Order, E.O. 12866, and what do you believe can be accomplished by development and issuance of a new one?

In accordance with a Presidential Memorandum of January 30, 2009, the Director of OMB is in the midst of developing those recommendations, based on a careful review of past practice. Among other things, I believe that a new Executive Order should promote transparency, emphasize the rule of law, and affirm the central importance of objective science to the regulatory process.

- b. Have you been involved in the process of developing the recommendations for a new Executive Order?

⁴ Sunstein, "Cognition and Cost-Benefit Analysis," 29 *Journal of Legal Studies* (2000).

As a counselor to the Director, I have discussed some of the underlying issues with the Director and others at OMB.

23. E.O. 12866 opens with the following statement:

The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of state, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today.

Do you agree with these principles as expressed? Do you believe that the assessment that “[w]e do not have such a regulatory system today” is still accurate?

Yes.

24. The previous Administration updated or proposed new guidance for agencies in a number of areas, including on economic analysis of proposed regulations, on information quality, and on peer review.

- a. Do you plan to further modify or to rescind any of the guidance issued in the last several years?

I have not studied that guidance in any detail, but if I am confirmed, I will do so promptly. I would expect to work closely with Congress, with the Director, with relevant agencies, with state and local governments, and with the private sector to improve existing guidance and to ensure that is objective, up-to-date, and consistent with law.

- b. Are there other areas where you still see a need for new or updated guidance to regulatory agencies?

I believe that information disclosure is exceedingly important, and it might be appropriate to produce new guidance on the use of disclosure as a regulatory tool.

- c. Will you be evaluating the effect of these guidance documents on the performance of regulatory agencies? If so, in what ways?

I would. I would begin by asking affected agencies for suggestions about improvements in existing guidance.

25. The previous Administration issued Executive Order 13422 in February 2007 (revoked in February 2009), which, among other things, increased the power of presidentially-

appointed regulatory policy officers to control rulemaking in federal agencies, and required significant agency guidance documents to be reviewed by OIRA.

- a. What did you think of this executive order?

The President revoked this Executive Order in January 2009, and I agree with the President's decision.

- b. Will you be taking any actions to reinstate its provisions?

This is a decision for the President, not for the Administrator of OIRA.

26. In your article "A New Executive Order for Improving Federal Regulation,"⁵ you advocated that independent multi-member regulatory commissions (e.g., the Securities and Exchange Commission and the Federal Communications Commission) be required to submit their significant rules to OIRA for review before they are published in the Federal Register. However, some have argued that Congress established these multi-member commissions to be more independent of the President's influence than Cabinet departments and agencies with singular heads who serve at the President's pleasure.

- a. What is your current thinking about the extent to which the regulatory activities of the independent regulatory commissions should be subject to oversight, review, and guidance of OIRA?

That question raises difficult issues of both law and policy, and I would defer to Congress and the President on those issues.

- b. What do you believe is the relevance and significance of the view that Congress intended these entities to be relatively more independent of the President's influence?

The legal question here is complex, and I would defer to the Department of Justice.

Transparency and disclosure requirements

27. What is your opinion of OIRA's and the regulatory agencies' track records regarding disclosure of information about OIRA's and agencies' activities and actions associated with regulatory review?

- a. Are there areas where you believe more transparency or better public documentation would be desirable to help the public better understand OIRA's role in regulatory policy?

⁵ Hahn and Sunstein, "A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis." 150 U. Pa. Law Review 1489, 1495-1496 (2002).

I believe strongly in transparency and in uses of the Internet to promote accountability. I would favor a clear and specific description of OIRA's role, so that the public can know exactly what OIRA does. I would also favor clear disclosure of the existence of any substantive communications between OIRA and the private sector on pending rulemaking. For starters, a redesign of the existing website could provide more clarity and transparency.

- b. Are there ways in which you believe OIRA's and the regulatory agencies' current practices involve more transparency and public disclosure with respect to regulatory review than is appropriate?

No.

- c. What would be your plans, if confirmed, to foster greater transparency and public documentation, or less transparency and public disclosure, as the case may be?

I would seek to use the Internet to promote greater transparency.

28. After a regulatory action has been published in the Federal Register, section 6(a)(3)(E) of Executive Order 12866 requires agencies to "identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA." In 2003, GAO reported that previous OIRA Administrator John Graham had told GAO that this requirement only applied to the period of formal OIRA review, which occurs after the agency submits a draft regulation to OIRA, but he also said that OIRA had its biggest impact during informal reviews that precede formal submission of a rule.⁶ However, as GAO described in that report, some rules had months of informal OIRA review, followed by only one or two days of formal review. In light of those findings, GAO recommended that agencies be instructed to document substantive changes made at OIRA's suggestion to draft rules submitted for review whenever they occur, not just changes that OIRA recommended during formal reviews.⁷ Do you believe that agencies should be required to disclose all of the changes that were made at OIRA's recommendation, even those during informal review?

A balance must be achieved between protecting the deliberative process and ensuring transparency. I would look forward to a careful investigation, with Congress and the Director, of how that balance is best achieved.

29. GAO also recommended other improvements in the transparency of OIRA's reviews.⁸ For example, GAO said that OIRA's website could provide clearer information when OIRA meets with outside parties about what rule is at issue, who the individuals represent, and the nature of the communications. GAO also said that either the agencies

⁶ GAO report, note 1 above.

⁷ *Id.* at 14-15.

⁸ *Id.* at 14-16.

or OIRA should disclose why rules are withdrawn from review. What is your opinion of these proposals for increased transparency?

I strongly believe in transparency, but I have not studied this report in detail and would like to do so before reaching a final judgment on particular proposals.

30. You have written that “the principal objection to disclosure requirements is that they will impose a ‘chilling effect’ on desirable communications. But there is no evidence of any such effect. Indeed, the Clean Air Act imposes relatively onerous disclosure requirements on the Environmental Protection Agency (EPA), with apparently no adverse consequences for EPA rule making. Moreover, there is no reason to believe that there are high costs to keeping track of what has been done.”⁹ Is this still your view, *i.e.* –
- a. That there is no evidence that disclosure requirements will impose a chilling effect on desirable communications regarding regulation development?

I wrote that in the specific context of disclosure requirements regarding communications between government officials and private citizens. In that context, although I have not recently studied the issue in detail, I am aware of no empirical evidence of a chilling effect.

That there is no reason to believe there are high costs to keeping track of what has been done?

I do not disagree with my own statement in a law review article in 1995, but I would hope to investigate the issue thoroughly before reaching a final judgment for purposes of developing a policy in 2009.

31. If confirmed as OIRA Administrator, will you disclose written communications between your office and the issuing agency regarding regulations? If so, should disclosure requirements apply to only those communications made during the formal period of OIRA review, or to communications made before and after the formal period of OIRA review as well?

Here too a balance must be achieved between protecting deliberative processes and ensuring transparency. The particular issue must be resolved with close reference to the views of Congress, the President, the Director, and relevant agencies.

32. Should OIRA and/or the agency disclose draft proposed and draft final regulations submitted to OIRA for review? If so, when should these drafts be made available to the public? Upon submission to OIRA? After the review is completed?

Please see the answer to 31.

⁹ Pildes and Sunstein, “Reinventing the Regulatory State,” 62 U. Chicago Law Rev. 1 (1995).

33. What is your view on the disclosure of significant oral communications between agencies and OIRA?

Here again a balance must be achieved. There are advantages in allowing informal, open exchanges, but transparency also has its virtues.

Cost-Benefit Analysis

34. E.O. 12866 requires: "Each agency shall assess both the costs and the benefits of the intended regulations and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." Do you support this formulation, or do you believe that it should be changed, and, if the latter, what changes do you believe would be desirable?

I would emphasize that any such requirement must be made subordinate to law. In terms of changing the formulation, the Director is in the process of producing recommendations for the President, and if confirmed, I would look forward to working with the Director and others to produce the best possible language.

35. In your 2002 book entitled *Risk and Reason*, you stated that agencies should be required to generally show that the benefits of agency action "justify" the costs, and if they wish to act without making that showing, agencies "should be required to show that the action is nonetheless reasonable, on the basis of a publicly articulated explanation."¹⁰ In an article that you co-authored in 2002, you proposed that, in case of regulatory action, the benefits should generally "exceed" costs, "based on best quantifiable estimates," and if the agency takes action despite the fact that "the quantifiable benefits do not exceed the quantifiable costs," the agency should owe an explanation why.¹¹ These two formulations are obviously somewhat different, in that the earlier one did not call on agencies to develop best quantifiable estimates or to justify taking action despite a finding that the benefits fail to "exceed" the costs. Does either of these formulations accurately reflect your current views about what you believe should be required of regulatory agencies? Please explain.

I would say, more plainly, that agencies may take qualitative as well as quantitative considerations into account, and I would specify that those qualitative considerations include a number of variables that cannot be easily reduced to monetary equivalents.

36. In your article entitled "A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost Benefit Analysis," you called for the adoption of an executive order that would "ensure that cost benefit analysis... will have a far larger role in the

¹⁰ Cass R. Sunstein, *Risk and Reason*, at page 112 (Cambridge Univ. Press. 2002).

¹¹ Hahn and Sunstein, "A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis." 150 U. Pa. Law Review 1489, 1495-1496 (2002).

federal government than it does now.”¹² Now, seven years after this article was published, do you still believe that cost-benefit analysis ought to have a far larger role in the federal government than it does? If so, in what respects? If confirmed as OIRA Administrator, will you advocate for the adoption of this type of executive order?

I believe that any form of cost-benefit analysis should be subordinate to the law. Subject to that qualification, I agree with that statement, on the ground that agencies should generally attempt to assess the consequences of their actions before they undertake those actions. In order to promote transparency and accountability, I support a humanized, inclusive form of cost-benefit analysis, as a means of identifying the human consequences of regulatory decisions.

37. In several statutes to control environmental pollution, unsafe workplace conditions, and potentially harmful consumer products, Congress determined that agencies should act to protect human health and safety and the environment regardless of whether the agency conducts a full analysis of costs and benefits showing the benefits justifying the costs. Some environmental statutes require that standards be established based on available technology, or on what is feasible, or on protection of public health with an adequate margin of safety; and some occupational safety and health statutes require that standards be established based on what is feasible, with the goal of achieving the highest degree of health and safety protection for the employee. What is your opinion of such statutes? Do you believe that such statutes should be amended to require that agencies must consider a full cost-benefit analysis in deciding what action to take?

I believe that in some contexts, bans on cost-benefit balancing are fully justified on pragmatic or moral grounds. In terms of statutory amendments to promote such balancing, it would be best to go on a statute-by-statute basis and to investigate the details.

38. In your article proposing a new Executive Order, you further stated:

“Some statutes explicitly require agencies to act even if the benefits fall short of the costs. There may also be cases in which an agency believes that it is worthwhile to proceed even though the quantifiable benefits do not exceed the quantifiable costs. Either way, we believe that accountability and transparency would be enhanced if the head of an agency were required to explain why a regulation is being adopted.”¹³

- a. If the head of an agency decides to regulate even though the costs exceed benefits in a cost-benefit analysis, and if the agency prepares an explanation for doing so, what do you believe is the standard by which the sufficiency of the explanation should be judged?

¹² *Id.* at 1542.

¹³ *Id.* at 1495-1496, 1542.

If the law requires the agency to go forward, that is enough. If the law does not require the agency to go forward and thus gives the agency discretion, I would favor a standard of reasonableness.

- b. Under this assumption, would it be proper for the OIRA Administrator to review the agency's explanation and determine whether it is sufficient? If so, and if OIRA determines that the agency's explanation is not sufficient, how should the disagreement between OIRA and the agency head be handled and resolved?

Under Executive Order 12866 and its predecessor, it would be proper. In terms of conflicts, Executive Order 12866 refers the matter to the Vice President.

- c. In the case of statutes that require agencies to act to protect human health and safety and the environment regardless of whether the agency conducts a cost-benefit analysis or the outcome of any such analysis, do you believe the agency should be required to conduct analysis beyond what the statute requires? Do you believe OIRA should ensure that such analysis is conducted to OIRA's satisfaction? Please explain.

Under Executive Order 12866, the agency is required to conduct that analysis, to the extent permitted by law. While Congress has the final word, I believe that accountability is promoted if the agency explores and reveals the consequences of what it proposes to do. I would not use the words "to OIRA's satisfaction," but under Executive Order 12866, certain requirements are in place.

- d. If the head of the regulatory agency determines that the statute requires regulatory action to protect health, safety, or the environment regardless of whether the agency conducts a cost-benefit analysis or the outcome of any such analysis, do you believe the Administrator of OIRA should defer to that determination by the agency head, or may the OIRA Administrator determine that this interpretation of the statute by the agency head is incorrect? If the latter, how do you believe such a disagreement should be resolved?

Statutory interpretation is in the first instance for the agency head, not for OIRA. Under Executive Order 12866, however, it is legitimate for OIRA to discuss questions of interpretation. In the case of a dispute, see answer to 38(b) above.

39. Do you believe agencies should be required to conduct cost-benefit analyses to support decisions *not* to regulate? Please explain.

I believe that this would be an unduly high burden. I do believe, however, that agencies should work to fill gaps in regulatory protection and that it is legitimate for OIRA to assist agencies to fill such gaps.

Quantification and monetization of costs and benefits

40. Cost-benefit analysis involves attempts to assign value to benefits, sometimes including those that may be hard to value because there is no market price (lives, illnesses, injuries, beautiful sunsets). The predominant approach is to determine what people are “willing to pay” for such benefits. What is your opinion of this “willingness-to-pay” approach, in terms of its strengths and weaknesses? What other approaches do you believe should be used?

I think the willingness to pay approach provides useful information, especially when people are asked to pay for the benefits of the goods they receive. But the willingness to pay measure has important limitations. For example: (A) Sometimes it is not possible to come up with reliable willingness to pay figures, because we do not have relevant data. (B) Sometimes people lack relevant information (about, for example, safety risks), and hence the willingness to pay figures are unreliable. (C) Sometimes willingness to pay does not really capture the value of the relevant goods (such as nondiscrimination). When willingness to pay does not work, a democratic judgment may be the best alternative.

41. What costs and benefits do you believe cannot or should not be monetized or even quantified, and how do you believe those costs and benefits should be addressed and accounted for by agencies? Please provide representative examples.

Sometimes science cannot provide us with sufficient information for quantification. And some goods cannot easily be monetized; consider the “benefits” of providing freedom from racial discrimination and reasonable accommodation to disabled people. In these circumstances, agencies should do the best they can to provide numbers, and to compare the goods at stake, but they should not be required to rely on monetary equivalents.

42. You have expressed concern that “it is possible that in practice, quantitative cost-benefit analysis will have excessive influence on government decisions, drowning out ‘soft variables;’” but you concluded: “The risk that cost-benefit analysis will drown out relevant variables is not a reason to abandon the analysis, but to take steps to ensure against any such effect.”¹⁴

- a. What are some of the “soft variables” that you believe are most important?

Distributional equity; freedom; freedom from discrimination; aesthetic variables; fairness.

- b. What steps would you intend to take as OIRA Administrator to ensure that these and other “soft variables” are not drowned out by the use of quantifiable cost-benefit analysis?

¹⁴ *Id.* at 1499-1450.

To the extent permitted by law, I would seek to ensure that these are included in the analysis and taken into account.

43. You have written that, in measuring the benefits of life-saving regulation, saving the life of someone with a long life-expectancy should receive more credit than saving the life of someone with a short life expectancy. You have stated your belief: "Other things being equal, a program that protects young people seems far better than one that protects old people, because it delivers greater benefits."¹⁵ In 2003, OMB stopped supporting use of methodology that discounted the value of saving the lives of the elderly, which had been based on discredited studies.¹⁶ Congress also passed legislation in 2003 forbidding use of the "senior death discount" methodology.

- a. What is your current view on whether life-saving protective regulation should be evaluated in terms that give less credit to saving the life of an older person than to saving the life of a younger person?

I certainly do not believe that an older person is worth less than a younger person. Some economists and philosophers believe that it is appropriate to consider the number of "life years" saved by regulation. Any judgment on that question must be made consistently with law.

- b. Do you believe that it is appropriate for different agencies, in construing and implementing statutes with different goals and purposes, to employ different approaches to whether to take account of life expectancy in calculating the benefits of life-saving regulations? Or should a uniform approach be applied by all agencies implementing all regulatory statutes? Please explain.

If statutes have different terms, purposes, and requirements, then different approaches are legitimate.

- c. What do you plan to do, if confirmed as OIRA Administrator, with respect to whether and how agencies should take account of the age of the people whose lives are saved by regulations?

I have no plans on that subject.

- d. Some have argued that it is inequitable and unseemly to credit a regulation less because the beneficiaries of the regulation are old, and that this approach denies the intrinsic value of individual lives. Do you agree or disagree with these arguments, and, if you disagree, how do you respond to them?

¹⁵ Sunstein, "Lives, Life-Years, and Willingness to Pay," 104 *Colum. L. Rev.* 205, 20 (2004).

¹⁶ Studies had purported to show that seniors evidenced a lower "willingness to pay" for mortality reductions than the young. New research indicated that, in the words of one researcher, "Life as you get older is more precious." Cindy Skrzycki, "Under Fire, EPA Drops the 'Senior Death Discount'" *Wash. Post*, May 13, 2003, page E01.

I believe that lives have intrinsic value and that it is wrong to think that an old person is worth less because that person is old. Economists and philosophers disagree, however, about whether it is legitimate for regulators to consider “life-years saved” as a relevant factor as well as “lives saved.”

44. A decision to discount the value of future benefits can very significantly reduce the estimated benefits of certain regulations, like many environmental regulations, that prevent long-term ecological harm and long-latency diseases like cancer.

- a. What are your views about whether and when to discount the benefits of environmental, health, and safety regulation, and what discount rate to use?

The standard view, reflected in longstanding OMB guidance and among economists and policymakers, is that \$100 today is worth more than \$100 in ten years, and the standard view is that it is appropriate for policymakers to apply some kind of discount rate to benefits to be enjoyed in the future. I do not disagree with that view. I do not have a firm view on the appropriate discount rate.

- b. How would you apply discounting to regulations that protect future generations?

This is an exceedingly complex issue, on which a great deal has been written; it is clear that future generations should not be ignored. I would want to explore the question in some detail and in relation to specific proposals and policies before offering an answer.

- c. Do you believe that it is appropriate for different agencies, in construing and implementing statutes with different goals and purposes, to employ different approaches to whether and how to discount the value of future benefits? Or should a uniform approach be applied by all agencies implementing all regulatory statutes? Please explain.

If statutes have different terms, purposes, and requirements, then different approaches are legitimate. Congressional instructions are crucial.

- d. What do you plan to do, if confirmed as OIRA Administrator, with respect to whether and how agencies should discount the future benefits of regulations that protect health, safety, or the environment?

I have no particular plans. I believe that it would be appropriate for me, if confirmed, to work with Congress and the agencies to ensure that future benefits are properly considered sound judgments.

45. In the event that any of the methodologies described above, or any other cost-benefit methodology, may not legally be taken into consideration in evaluating a draft regulation,

what do you believe are the advantages and disadvantages of nonetheless conducting the analysis and making the assessment publicly available?

One disadvantage is the time and effort spent on producing the analysis. An advantage is political accountability and transparency: If a regulation would impose high costs and have low benefits, both public officials and private citizens should be informed.

C. Agency Burden and Resources

46. You have recognized that the imposition of analytic requirements on regulatory agencies can sometimes go too far, overburdening the agency and paralyzing its efforts to do its job. For example, you wrote: "Sometimes benefit-cost analysis produces 'paralysis by analysis'; sometimes benefit-cost analysis fails cost-benefit analysis."¹⁷

- a. How would you as OIRA Administrator seek to protect regulatory agencies against excessive obligations to perform regulatory analysis, which can lead to paralysis?

I would support a "rule of reason" approach with respect to analytical requirements. Such requirements can be excessive. I would also work hard to ensure that OIRA does not produce undue delay with respect to needed regulations.

- b. In your writings, you have indicated a desire to require more cost-benefit analysis and other analysis and planning activities by regulatory agencies. Are there procedural or analytical requirements in the regulatory process that you would consider removing, so that agencies can develop and promulgate regulations in a timelier manner than they can now?

I believe that undue delay is a serious problem, but at this point, I have no particular plans for removing such requirements; I would be eager to work with Congress and the Director on that question.

47. How can OIRA assure that any new analytic and scientific expectations on agencies' rulemaking will add value without contributing to the paralysis of the rulemaking process?

I would favor a careful review of that question, and if appropriate, corrective steps on the part of Congress, OMB, and agencies themselves. Any analytic and scientific requirements must be carefully studied to ensure that they are actually valuable and not unjustifiably burdensome.

¹⁷ Sunstein, "Economists as Judges' Friends" AEI-Brookings Joint Center, Policy Matters 00-12 (August 2000) online at: <http://www.reg-markets.org/policy/page.php?id=54>.

D. Innovative Regulatory Tools

48. You have written, in connection with Federal Reserve Board regulations implementing the Truth in Lending Act: "Improved transparency, rather than draconian regulation, is the best response to the current situation. However, the Fed can substantially improve its proposal by requiring credit issuers to disclose relevant information electronically in a standardized, machine-readable format. In one simple stroke, new disclosure requirements would dramatically improve the current situation."¹⁸ Indeed, the title of this article consisted of the assertion that "Disclosure Is the Best Kind of Credit Regulation."

- a. To what extent and in what contexts do you believe information disclosure may be a substitute for more traditional regulatory approaches? Generally, if the choice is between direct regulation and regulation by information disclosure, under what circumstances would the latter be preferable?

Sometimes we do not want to ban products, but we do want people to know of the risks they run when using them. In the context of less-than-healthy foods, disclosure is best. In the context of tobacco smoking, I believe that information disclosure is far preferable to legal bans. If bans would be too intrusive on freedom, disclosure would be better.

- b. If a statute requires an agency to promulgate regulations to protect the public or to mitigate some existing harm, do you believe the imposition of information disclosure requirements could satisfy the statutory requirement?

It depends on the text of the statute and on whether a disclosure requirement fits with the statutory mandate.

- c. As Administrator of OIRA, will you seek to foster the use of information disclosure requirements in appropriate circumstances as a substitute for more traditional regulatory approaches? If so, how will you go about seeking to cause these concepts to be applied by regulatory agencies in appropriate situations?

Any use of disclosure requirements must be consistent with law, and such requirements can be supplements to, rather than substitutes for, traditional regulation. Decisions on this count are, in the first instance, for agencies, not for OIRA.

49. As you note often in your writings, lack of sufficient information can contribute to market failures that must be corrected – often through some form of regulation. One means of generating more accurate information is through collaborative means such as "prediction markets" – in which information is aggregated by giving people the chance to bet on future events. You have called the results of such markets "stunningly accurate."¹⁹

¹⁸ Richard Thaler and Cass Sunstein, "Disclosure Is the Best Kind of Credit Regulation," *Wall Street Journal*, (August 13, 2008).

¹⁹ Sunstein, "A Brave New Wikiworld," *Washington Post* (February 24, 2007).

In 2003, following a public outcry, the Department of Defense shut down the Policy Analysis Market program, which created a prediction market for Middle East developments.²⁰ As OIRA Administrator, would you encourage the use of these types of prediction markets to help generate more accurate information that could lead to more efficient regulation? If so, how would you avoid the kinds of difficulties that the Defense Department confronted in 2003?

Prediction markets have promise in some contexts, but they have also raised many legitimate questions. If Congress and the relevant agencies believe that prediction markets would be useful, I would be happy to work with them to explore the possibilities.

50. In your book *Nudge*,²¹ you offer an outline of what you term “libertarian paternalism.” You note that where individuals are given a choice, “choice architecture and its effects cannot be avoided, and so the short answer is an obvious one . . . offer nudges that are most likely to help and least likely to inflict harm. A slightly longer answer is that people will need nudges for decisions that are difficult and rare, for which they do not get prompt feedback, and when they have trouble translating aspects of a situation into terms they can easily understand.”²²
- a. As Administrator of OIRA, will you seek to foster the application of this philosophy to regulations that involve choice architecture?
- If and only if the law permits, I would explore approaches that maintain freedom of choice and impose low costs, while also producing significant benefits for the American people.
- b. If so, how will you go about seeking to cause these concepts of libertarian paternalism to be applied by regulatory agencies in appropriate situations?
- I have no plans in this regard, but I also recognize the benefits of transparency, and I would hope to work with both Congress and agencies to see how low-cost approaches might produce large benefits.
- c. If confirmed, do you plan to develop a process by which agencies can identify regulations that create situations in which people may need and benefit from “nudges”? Do you expect that such a process be formalized by inclusion in a revised Executive Order 12866?

²⁰ See Robert Looney, “DARPA’s Policy Analysis Market for Intelligence: Outside the Box or Off the Wall?”, *Strategic Insights*, Vol. II, Issue 9 (Sept. 2003) online at: <http://www.ccc.nps.navy.mil/si/sept03/terrorism.asp>.

²¹ Thaler and Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2008).

²² *Id.* at page 72.

I have no such plans. The Director of OMB is now considering public comments as he develops recommendations toward a new Executive Order on Federal regulation; I do not have a particular view on the question whether any such process should be formalized.

51. One of the greatest challenges in addressing environmental health and safety risks is deciding how to proceed in the face of scientific and other uncertainty about the causes or nature of those risks. One approach, sometimes referred to as the "precautionary principle," holds that, where there is a risk that some action or policy may cause severe or irreversible harm to the public or the environment, it is better to intervene to protect the public from the harm notwithstanding the uncertainty. You have criticized the precautionary principle, arguing that it is not a helpful guide to decisionmaking.²³

- a. Would you please explain your understanding of the precautionary principle and why you believe it is unhelpful?

There are many versions of the precautionary principle. On one understanding, the principle forbids people from creating risks, even if those risks are uncertain and speculative. On that understanding, the principle is unhelpful because it forbids the very steps that it requires; precautions themselves create risks, at least if they are expensive. Expensive regulations impose risks of their own.

- b. What principles do you believe should be applied, in lieu of the precautionary principle, to guide government decisionmaking when there is reason to be concerned that a human activity risks causing severe or irreversible harm, but when uncertainty remains about the nature and extent of the risk?

I have defended narrower and more modest versions of the precautionary principle, taking costs into account but also creating margins of safety to guard against irreversible or catastrophic harm.

- c. Many major health, safety, and environmental laws impose limits and controls on toxic chemicals and pollutants and other potentially harmful agents and activities, without waiting for scientific research and risk assessment to fully characterize the nature and extent of the risks. Likewise, programs for regulation of drugs and pesticides frequently place the burden on the manufacturer to lower the range of scientific uncertainty as a precondition for marketing the product. Does your criticism of the precautionary principle imply criticism of such existing laws for protecting health, safety, and environmental laws?

It can certainly be appropriate to impose regulations even when there is uncertainty, so the answer is: Not necessarily.

²³ E.g., Sunstein, *Laws of Fear: Beyond the Precautionary Principle*, Cambridge U. Press, 2005; Sunstein, "Throwing Precaution to the Wind: Why the 'Safe' Choice Can Be Dangerous," *Boston Globe*, *Boston.com* (July 13, 2008).

52. In what ways do you believe the principles of cost-benefit analysis and risk-regulation in the face of scientific uncertainty can guide us in developing appropriate responses to the threat of climate change? What role do you believe you would have, if confirmed as OIRA Administrator, in the development of national climate-change policy, and what approaches to the problem would you advocate?

In terms of climate change regulation, we should try to learn both the costs and the benefits of proposed regulations (acknowledging the existence of uncertainty). I believe that cost-benefit analysis is a tool, designed to provide information, and that any such analysis should take account of uncertainty. In developing national climate-change policy, the Administrator of OIRA plays at best a modest role; Congress sets the policy and within the boundaries of the law, the OIRA Administrator coordinates interagency review and reviews proposed and final regulations. I would favor regulations that are at once effective and cost-effective – and that are compatible with economic growth.

53. OIRA Administrators have acknowledged that the same level of analytical rigor has not been expected for evaluation of regulatory activity associated with homeland security and disaster response as for regulation to protect public health, safety, and the environment.

- a. Do you believe this difference in rigor is justified?

Rigor is always justified, though of course we lack information in some domains; I would not want to say that more rigor is justified in one area than in another.

- b. Do you believe the level of analytical rigor for homeland security and disaster-response regulation should be raised?

I have not studied this area in detail, but I would favor a great deal of rigor in order to ensure that Americans are being protected against serious risks.

- c. How should the Department of Homeland Security evaluate the benefits and costs of homeland security regulations? Do you believe OMB should offer more guidance on this matter?

This is an important and difficult issue that deserves detailed study. I would not want to offer an answer before undertaking that study.

- d. How would you balance or reconcile the needs for secrecy regarding some homeland security regulations with the need to provide public justification of the burdens associated with those regulations?

Transparency is important, and sometimes national security does require secrecy; I would defer to Congress and the President about the need for secrecy.

E. Federalism

54. In 1991, you wrote that “the centralization of policy in national bureaucracies diminishes the prospects for local decisionmaking in the private or public sector. Local decisions inculcate a sense of responsibility in citizens and encourage participation far more effectively than centralization. The current system unnecessarily sacrifices the values of federalism” and you characterize this as a failure “from the standpoint of democracy.”²⁴ Does this reflect your views about the federal regulatory system as it exists today?

In some respects, yes, but much depends on the area in question. In some areas, effective regulation requires a degree of centralization. At the same time, I believe that federalism and local decisionmaking are important values.

55. What is your opinion of E.O. 13132 (on the subject of Federalism) and its implementation?

I have not studied the question of implementation in any detail, but I am a strong believer in federalism, and if confirmed, I would take seriously agency compliance with Executive Order 13132.

56. Do you believe that regulatory agencies should determine for themselves the criteria by which they decide when a draft rule does not have “significant federalism implications,” thereby avoiding the need for a federalism analysis, or should certain government-wide benchmarks be established that all agencies would apply in making this decision?

I do not have a considered view on this question.

57. What role do you believe the OIRA Administrator should play in promoting federalism?

First, the OIRA Administrator should be careful to consult with state and local officials, to ensure consideration of their views on regulatory questions. Second, the OIRA Administrator should work with agencies to ensure that regulations are developed in a way that respects the federal system and the prerogatives of the states.

58. The Unfunded Mandates Reform Act of 1995 defines a mandate as any provision in legislation, statute, or regulation that would impose an enforceable duty on state, local, or tribal governments or the private sector, or that would reduce or eliminate the amount of funding authorized to cover the costs of existing mandates. Some state and local officials view unfunded mandates more expansively. For example, provisions that establish a condition of grant in aid, reduce current funds available, or extend or expand existing or expiring mandates may be considered unfunded mandates.²⁵ Do you believe that the

²⁴ Sunstein, “Administrative Substance,” *Duke Law Journal* 626 (June 1991).

²⁵ See, eg., National Conference of State Legislatures at <http://www.ncsl.org/standcomm/scbudg/manmon.htm>

current definition of “unfunded mandate” in federal law is adequate, or should it be expanded to more closely reflect this latter viewpoint?

I would want to study this question more carefully, with reference to existing practice, before making a judgment on that question.

F. E-Government

59. Regarding information technology policy, how do you understand the respective roles of OIRA and the Office of E-Government and Information Technology, and the newly appointed Chief Technology Officer? How should they effectively coordinate their efforts to encourage agencies to use information technology to accomplish their mission? What is the unique contribution each makes to OMB’s mission?

With respect to OMB’s general mission, several statutes are relevant, including the Paperwork Reduction Act, the Clinger-Cohen Act, the Federal Information Security Management Act, the Privacy Act, and the E-Government Act. Within OMB, OIRA has special responsibility, by statute, for the Paperwork Reduction Act. OIRA and the Office of E-Government coordinate their activities closely to implement all of these statutes in accordance with congressional instructions. The CTO focuses on national technology policy. If confirmed, I would coordinate with the Office of E-Government, as well as coordinating matters of information technology policy with the newly appointed CTO.

60. The E-Government Act of 2002 requires federal agencies to establish electronic dockets so that agency rulemaking can be publicly accessible over the Internet. This provision was implemented with the E-Rulemaking initiative, which faced agency resistance and funding difficulties when first established. Recently the American Bar Association (ABA) published a report on E-Rulemaking that stated: “A number of significant structural and policy issues must be addressed before the full potential of federal e-rulemaking can be realized.”

- a. Do you believe that the E-Rulemaking initiative has been effective?

I am strongly committed to transparency and to uses of the Internet to promote accountability. The E-Rulemaking initiative, from what I understand, is intended to help the public to search, view, and comment on all federal rulemaking from one site, Regulations.gov. I am aware that many people believe that the initiative has not been entirely successful. If confirmed, I look forward to exploring ways to increase the transparency of the regulatory process, and to see how new technologies might be used in an effort to improve the rulemaking process, with special attention to notice-and-comment. I am especially interested in seeing how agencies can obtain access to dispersed information that can be found within the private sector, and learn how that information might be tapped in order to improve rulemaking.

- b. Do you agree with the recommendations of the ABA Committee?

I have not studied the ABA Committee Report with sufficient care to have a firm opinion. If confirmed, I look forward to reviewing the recommendations in greater detail.

- c. If confirmed, would you recommend changes to the regulations.gov website and the electronic rulemaking process over all? If so, what would you recommend?

I tend to believe that Regulations.gov is a good start but that changes can be made to improve simplicity, clarity, and ease of access.

- d. Some of your writings have looked at how the Internet has changed the way people collaborate and share information. Based on your work, do you think there are additional ways in which electronic rulemaking should be reformed to benefit from new tools to allow better collaboration?

Yes. I believe that a great deal can and should be done to obtain the widely dispersed information held by members of the public and to bring that information to bear on regulation. In particular, I believe that the government should solicit people's views on proposed rules to see how they might be improved and to give clear notice of what is being developed.

61. Under the Paperwork Reduction Act, the Electronic amendments to the Freedom of Information Act, the E-Government Act, and current OMB circulars, there is a general policy that supports disseminating government information and encourages use of the Internet for dissemination purposes. The other approach to making information accessible is for the public to request records from agencies through the Freedom of Information Act. What criteria should be applied in deciding when it is better for government to be more proactive in its dissemination of information to the public or when to release information only in response to specific requests, such as under the Freedom of Information Act?

The President has called for a presumption in favor of disclosure. I support that presumption and believe that information should be disclosed proactively, not merely in response to specific requests. For this reason, I also support Attorney General Holder's suggestion that agencies should make discretionary releases of records.

G. Management of Information and Technology Resources

62. What is your understanding of OIRA's responsibilities for IT management, as set forth in 44 U.S.C. 3504(h), and of the extent to which OIRA has fulfilled this mandate; and what are your plans for ensuring that it would be fulfilled under your direction?

My understanding is that OMB establishes policies for and oversees agencies' investments in information technology through the capital planning and investment control process established by the Clinger-Cohen Act of 1996. My understanding is also

that OMB continuously reviews and updates policies as necessary. I have only started to study OIRA's performance and hence I have no plans at present.

63. What are your plans for maximizing the resources and skills of OIRA personnel to oversee agency IT investment plans and analyses?

I have not yet formed an opinion on this issue. I look forward to working with the Director to explore possible options to ensure that OIRA's staffing needs continue to be adequate for its many responsibilities.

64. What are your views on the importance of IT and enterprise architectures?

I believe that both of these are exceedingly important in order to promote efficiency, reduce costs, ensure transparency, and generally to make government work better.

65. What are your views on the role of the National Institute of Standards and Technology (NIST) in establishing standards and guidelines for federal IT functions and OIRA's oversight of that role?

I understand that OMB works closely with NIST on a variety of issues regarding establishing standards and guidance, and I welcome views from this Committee on how to strengthen this role.

66. The budget Exhibit 300 has evolved significantly over the past few years to become a significant source of information on each major information technology project. However, it is not clear what OMB has done to validate the information being provided. What would you do at OMB to ensure that the information is accurate?

I am continuing to learn about this topic and hence do not have a firm view. If confirmed, I would work closely with the Administrator for Electronic Government and Information Technology, OMB's Resource Management Offices, the agencies, and the CIO Council to help improve agency employees' understanding of their Information Resource Management (IRM) responsibilities.

67. What are your views on the use of the budget process to improve information technology management? What other incentives does OMB have at its disposal to encourage good management practices? How would you enhance coordination between OIRA and the Resource Management Offices in order to improve the adoption of OMB policies and guidance across government?

OMB and the agencies together evaluate resources to improve information technology management as part of the annual process for developing the President's Budget. OMB also oversees programs by reviewing regulations and information collections for new and existing programs. If confirmed, I would continue to coordinate between OIRA and the other statutory offices.

68. How do you believe you and the E-Government Administrator should work with the federal Chief Information Officers (CIO) Council? What do you see as the primary role of the agency Chief Information Officers created by the Clinger-Cohen Act?

This is not an issue that I have studied in detail, but if confirmed, I would work with the E-Government Administrator to coordinate OMB's oversight of the Chief Information Officers through the CIO Council and other Councils, as necessary. In my view, the fundamental role of the agency CIO is to manage the portfolio of information resources at each agency, with the goal of improving government performance.

69. What are your views on the adequacy of the information resources management (IRM) approach currently used to manage government information activities?

My understanding is that, since the enactment of the E-Government Act of 2002, OMB has reviewed and modified as necessary policies for information resource management, including government information activities. In terms of the adequacy of the current approach, I would want to study the topic in more detail before commenting.

70. What are the major IRM challenges facing OIRA specifically and the Federal government more generally?

While OMB is responsible for many things, I understand that it has three primary areas of focus with respect to IRM: the security of information systems and the data managed in them; the privacy of the data managed by systems; and the overall process used to ensure investments in technology are properly planned and executed by the agencies. My current view is that these areas of focus create an inherent tension with related policy objectives, such as information dissemination, transparency, and the security of sensitive data or the privacy of personally identifiable information, and that this tension presents an IRM challenge both for OIRA and the Federal government.

71. How would you describe the relation among the various IRM functions assigned to OIRA and the manner in which you would apportion resources for these functions?

I am aware that OMB has a number of IRM responsibilities under the Paperwork Reduction Act (PRA) and the E-Government Act. I have not yet formed an opinion on how OMB has apportioned resources to meet these responsibilities, so I have no views on whether or what changes would be appropriate. If confirmed, I would welcome the opportunity to explore options with Congress and the Director.

72. What are your views on the roles and responsibilities of agency CIOs? Do you believe that CIOs are fulfilling their responsibilities under the Paperwork Reduction Act?

Various statutes, including the Paperwork Reduction Act, help define the roles and responsibilities of agency CIOs. Agency CIOs are the senior officials responsible for managing information resources and information technology within each agency with the

goal of creating a more results-oriented, efficient, and citizen-centered government. I do not yet have a view about the performance of CIOs in meeting their PRA responsibilities. If confirmed, I would look forward to reviewing this matter carefully.

73. What is your understanding of OIRA's records management function as set forth in 44 U.S.C. § 3504(f), the extent to which OIRA has fulfilled this mandate, and your plans for ensuring that it would be fulfilled under your direction?

A robust records management program is a necessary condition for government transparency, because it ensures adequate and proper documentation of agency activities as well as access to records, regardless of form or medium. My understanding is that OIRA fulfils its statutory mandate through its Executive Order review of records management regulations issued by the National Archives and Records Administration (NARA). OIRA also provides advice and guidance to NARA on the effective implementation of records management programs. At the present time, I have no plans for changing this role, although I look forward to working with the Director to explore possible options and improvements.

74. The federal government is faced with more complicated goals that require improved management and integration of information assets within agencies. What guidance do you believe OIRA should provide to agencies regarding the integration of information processes such as information collection, records management, and information dissemination?

I believe that, pursuant to the PRA, OIRA has played an important oversight role in encouraging agencies to adopt a "lifecycle" approach to managing information. I tend to support this overall approach and believe that OIRA should continue to review agency information resources management programs and determine whether any additional policies or guidance are necessary.

H. Paperwork Reduction

75. What are your views on the major purposes of the Paperwork Reduction Act (PRA)?

As its name suggests, the PRA is meant to reduce paperwork – by reducing burdens imposed by government reporting requirements on the private sector, improving the quality and usefulness of the information that the federal government collects, and improving the management of agency information resource activities. I strongly support each of those goals, especially in the current era, in which paperwork burdens can be overwhelming.

76. What are your views on the adequacy of policies and guidance issued by OMB to implement the PRA, and is there a need to revise them?

I have not yet formed an opinion on the adequacy of OMB's guidance and policies implementing the PRA, so I have no view on whether it is necessary to revise them. If confirmed, I would look forward to conducting a careful review of the matter.

77. Under the PRA, OIRA determines whether agency information collection activities are "necessary for the proper performance of the functions of the agency, including whether the information will have practical utility." What are your views on the meaning of these terms and the manner in which OIRA should perform this paperwork clearance function?

I understand these terms to be an acknowledgement that government agencies need information to serve the American public -- but that it is also necessary to minimize reporting burdens by collecting only information that has "practical utility," meaning actual rather than merely hypothetical usefulness.

78. Currently, OIRA reviews about 3,000 agency information collection requests each year. As a result, and given its other responsibilities, OIRA cannot give most of these requests significant time or attention. Should OIRA's reviews of these requests be focused on those over a certain size-threshold, in the same way that OIRA's regulatory reviews are focused on "significant" rules by Executive Order 12866?"

My understanding is that OIRA does give information collection requests sufficient time and attention, but I would want to investigate that issue carefully.

79. What are your views on the role of calculating information collection burdens and relating those burden calculations to an assessment of the proper performance of agency functions?

Accurately calculating information collection burdens is exceedingly important, because accuracy allows OMB, Congress, and the public to monitor agencies' efforts to reduce reporting burdens. Only by measuring burden can agencies and OIRA be held accountable for changes in burdens and their performance in achieving the PRA's goals. To assess the balance between the reporting burdens imposed by agencies and the practical utility of the information they collect and use, it is essential that agencies do their best to estimate the time burdens and out-of-pocket costs borne by the public when complying with agency information collection requests.

80. What is your understanding of the areas of federal government information collection activities that pose the greatest burdens on the public and what might OIRA do to address burden reduction in those areas?

I have not studied this issue in depth and so my understanding is tentative. I am informed that the Internal Revenue Service (IRS) is responsible for a disproportionate share of the paperwork burden imposed by the Federal government. If confirmed, I would look forward to working with the IRS and other agencies to reduce existing paperwork burdens.

81. What are your views on activities, other than form-by-form review of information collection proposals, which might be undertaken by OIRA to eliminate duplicative information collection activities among agencies, and otherwise improve coordination among agencies with regard to common or overlapping information collections?

I do not yet have any specific views on how to address duplicative or otherwise redundant information collections, but I am greatly concerned with that issue and would look forward to improving the current situation.

82. The Obama Administration has promised to use the Internet in unprecedented ways to encourage citizen participation in policy-making. In 1980, out of concern that information requests from the federal government were imposing a costly burden on businesses and information, Congress passed the Paperwork Reduction Act, which among other provisions placed restrictions on government information collections. Do you believe that the Paperwork Reduction Act will need to be amended in order to accomplish the Administration's goals?

I support the Obama Administration's goal of using the Internet to make government more transparent to and engaged with citizens; I have long been interested in this topic. But I have not yet formed any views on possible changes to the PRA. If confirmed, I would look forward to working with Congress to advance the PRA's important goals, which I view as fully consistent with the Administration's vision of public involvement in the work of government.

83. What are your views on improving the ability of the public to comment on proposed information collections?

I believe in simplicity, outreach, and transparency, and so I would begin by increasing all of these.

84. OIRA has been criticized for using its paperwork clearance process to control substantive agency decision-making. What are your views on the line between OIRA's management authority under the PRA and the authority of agencies to carry out their substantive missions?

As a general matter, I believe government agencies benefit greatly when they solicit input from the public, and I am aware that the PRA provides for a meaningful public notice and comment process. If confirmed, I would look forward to working with Congress, agencies, and other stakeholders to explore options for creating new opportunities for public input. The simplest method is more effective use of the Internet.

85. To what extent do you believe the PRA, and OIRA's implementation of it, strike an appropriate balance between the benefits to the public and the burdens on the public that flow from data collection by federal agencies, and to what extent should the PRA or OIRA's implementation be changed?

I believe that OIRA's role is a limited one. OIRA should work with agencies to strike the proper balance between meeting their statutory and programmatic needs for information and minimizing reporting burdens imposed on the public. The PRA should not be used as the basis for preventing agencies from collecting from the public the information they need in order to carry out their substantive missions. At the same time, agencies should not require, or ask, the public (individuals, businesses, organizations, State and local governments, and others) to respond to federal paperwork requirements that are unnecessary, duplicative, or unduly burdensome.

86. Among the PRA provisions, aimed at helping to achieve the goals of minimizing burden while maximizing utility, is the requirement for CIO review and certification of information collections. In testimony before the Congress, GAO identified 12 case studies at four agencies in which CIOs certified collections proposed by program offices despite missing or inadequate support (GAO-06-974T). How would you improve the guidance that OMB provides to agencies, in order to improve the information collection process and minimize burden to the public?

I have not yet studied this issue in sufficient detail to have an answer. My understanding is that, when OMB reviews and approves an agency's information collection request (ICR), it takes into account the certification and the information provided in the ICR Supporting Statement, as well as information obtained through conversations and meetings with agencies. If confirmed, I would assess OMB's process reviewing agency information collection requests, and consider options to improve it, including any that Congress may have.

I. Privacy, Information Security, and Disclosure

87. What are your views on the role of OIRA in addressing privacy concerns?

OIRA has an important role to play in privacy policy, with particular reference to the Privacy Act. This role has largely focused on coordinating a government-wide approach to privacy to promote consistency and equity.

88. Specifically, what is your understanding of OIRA's responsibilities for privacy, confidentiality, security, disclosure, and sharing of information, as set forth in 44 U.S.C. 3504(g), and of the extent to which OIRA has fulfilled this mandate; and what are your plans for ensuring that it would be fulfilled under your direction?

I am aware that aware that the PRA requires OMB to provide guidance and oversight to agencies in a number of ways – through program reviews, regulatory reviews, and the budget process. I am also aware that OMB regularly engages in formal and informal communications, both written and oral, with agency Chief Information Officers, Chief Privacy/Senior Agency privacy officials and agency program officials. I have not studied OIRA's performance in any detail to date and hence have no plans for change at present.

Obviously, this issue is a high priority and I look forward to hearing any relevant ideas for reform.

89. The E-Government Act of 2002 requires agencies to conduct privacy impact assessments (PIAs) whenever they develop or buy new information technology systems and whenever they initiate new collections of personal information. How would you ensure that agencies comply with this mandate? How would you ensure that PIAs are promptly made available to the public, as required by the E-Government Act?

My understanding is that OMB requires agencies to post publicly, in a central location on their websites, their privacy impact assessments (PIAs) required under the E-Government Act. OMB monitors agency compliance through the budget process and by ensuring agency regulations cite the proper PIA. At present, I have no plans to change this process. With respect to the last question, I would place a high premium on transparency through simple, clear disclosure. If confirmed, I would welcome the Committee's suggestions for better transparency of this process.

90. What are your views on the extent of OIRA's formal authority and practical ability to foster compliance with the Freedom of Information Act (FOIA), the Privacy Act, the Federal Information Security Management Act of 2002 (FISMA), and related information management laws?

This Administration cares deeply about transparency and the management of information. My understanding is that OMB is responsible for a number of policies relating to information resource management, information access and dissemination, security, privacy, and records management. If confirmed, I would work to ensure that adequate resources are devoted to the various requirements under each of the relevant Acts. With regard to FOIA, I would expect to work closely with the Department of Justice to ensure timely disclosure.

91. The Privacy Act was passed in 1974 and has not since been substantially amended. What, if any, provisions of the Act or OMB's Privacy Act guidance do you believe need to be updated to reflect changes in the way the federal government collects, stores, and uses personal information over the past three decades?

Privacy protection warrants careful consideration, and I am well aware of the Committee's leadership role and strong interest in this issue. I have not, however, considered in detail the protections afforded by the Privacy Act, so I am not in a position to offer specific views on their adequacy. If confirmed, I would review the Act and its implementation, and would welcome the opportunity to work with this Committee on possible improvements.

92. Given technological advances that make it easy to mine databases for personal information, aggregate that information, and make it widely available to government personnel, what are your views on whether the Privacy Act's provisions remain adequate to protect the privacy rights of Americans?

I have not studied this issue in any depth and would look forward to working with Congress to providing a constructive answer.

93. President Clinton appointed a Chief Counselor for Privacy at OMB (and within OIRA) during his second term; however, that position was eliminated at the outset of the Bush Administration. In fact, since January 2001, there has not been any senior federal official devoted to privacy issues notwithstanding a growing set of challenges posed by technological and policy developments and a growing cadre of privacy officers within key government agencies. Do you believe that OMB should restore the position of Chief Counselor for Privacy? What other organizational, resource or other changes are required to address what is widely considered a leadership vacuum on privacy issues at the government-wide level?

While I believe that protection of privacy is exceedingly important and that the executive branch must work hard to protect privacy interests, I have not yet formed an opinion on the need to appoint a Chief Counselor for Privacy, or whether other organizational or staffing changes would be warranted.

94. Agencies' annual reports, submitted to OMB in response to FISMA, reveal a wide range of IT security weaknesses among agencies. These reports also show that while some agencies have improved their performance, others continue to do poorly. What obstacles inhibit agencies from implementing effective security? What are your views on the role of OIRA in helping improve the security of federal information, and what steps do you see OIRA taking to aid agencies in fixing the security problems that they describe in their FISMA reports?

Securing federal information is a continuing challenge, with new and increasingly sophisticated threats. OMB has developed policies to assist agencies in managing their risk in a cost-effective way. I have not yet considered specific steps that OIRA might take to assist agencies address security risks, but if confirmed, I would review the matter and would welcome input from Congress.

95. What actions do you see OMB taking to improve information sharing across the agencies, especially in the area of critical infrastructure protection and information security?

In my writings, I have described many of the benefits of information sharing. It is exceedingly important to ensure that security problems do not arise because important agencies lack information that other agencies have. At this stage, I do not have any specific proposals. If confirmed, I would study the issue and would welcome the views of this Committee on options to make improvements in this area.

J. Information Dissemination

96. What is your understanding of OIRA's information dissemination function as set forth in 44 U.S.C. § 3504(d), the extent to which OIRA has fulfilled this mandate, and your plans for ensuring that it would be fulfilled under your direction?

I am aware that OIRA has important responsibilities in the area of information dissemination, but I have not yet formed an opinion about OIRA's performance. If confirmed, my plans would include reviewing OIRA's information dissemination activities, with the goal of promoting open government.

97. What steps would you take at OIRA to develop improved guidance for insuring the "quality, objectivity, utility, and integrity" of information disseminated by federal agencies?

It is my understanding that OIRA oversees implementation of the government-wide Information Quality Guidelines and that each agency has its own Information Quality Guidelines. If confirmed, I would work closely with the agencies to seek their input as we work together to explore opportunities to improve the existing guidance.

98. What are your views on the need to develop policies beyond those provide in 44 U.S.C. §§ 3504(d) and 3506(d) to govern federal agency information dissemination decisions?

Before I suggest any new policies governing information dissemination by agencies, I would need to review OIRA's current policies and guidance to agencies. If confirmed, I would conduct such a review, and would welcome input from Congress on possible options to make improvements.

99. What are your views on steps OIRA can take to improve public access to government information, whether through traditional dissemination functions or through more advanced information access and disclosure means?

The Administration takes public access to government information very seriously – as indicated by the President's open government initiative – and I believe that innovative technologies and practices will contribute to greater information dissemination. If confirmed, I plan to work with the federal CIO and CTO to assist agencies in using existing and emerging means of information dissemination. I would also welcome the Committee's thoughts on this issue.

K. Records Management

100. OIRA's records management function as set forth in 44 U.S.C. 3504(f), requires the OIRA administrator to provide advice to the Archivist and the Administrator of the General Services Administration on "information resources management policies, principles, standards, and guidelines established under this subchapter," review agency

compliance, and “oversee the application of records management policies, principles, standards, and guidelines, including requirements for archiving information maintained in electronic format, in the planning and design of information systems.”

- a. To what extent do you believe that OIRA has fulfilled this mandate?

I have not studied OIRA’s past performance in a way that would permit an informed answer. If confirmed, I would expect to undertake a careful review.

- b. If confirmed, how would you address these responsibilities?

If confirmed, I would continue to work with the Archivist to provide advice and assistance in developing policies. I recognize that we live in a changing business environment where non-paper based electronic records play an increasingly prominent role in ensuring that agencies adequately document their activities for historical and accountability purposes.

- c. What are your views on the management of e-mail records, website records, as well as other records created using new technologies?

My understanding is that agencies implement records management policies – with the assistance of guidance provided by OMB and NARA – to provide adequate and proper documentation of agency activities, regardless of form and medium. Electronic records, whether from e-mail, websites, or other applications, are still records that are subject to the same stringent regulations and policies governing agency management of federal records. If confirmed, I would welcome the Committee’s views on the government’s records management policies and practices.

IV. Relations with Congress

101. Do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted committee of the Congress if you are confirmed?

Yes.

102. Do you agree without reservation to reply to any reasonable request for information from any duly constituted committee of the Congress if you are confirmed?

Yes.

V. Assistance

103. Are these answers your own? Have you consulted with OPM or any interested parties? If so, please indicate which entities.

These answers are my own. I consulted with OMB staff in developing some of them.

AFFIDAVIT

I, Cass R. Sunstein, being duly sworn, hereby state that I have read and signed the foregoing Statement on Pre-hearing Questions and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.



Cass R. Sunstein

Subscribed and sworn before me this 4th day of May, 2009.



Notary Public

Commission Expires: Aug. 14, 2009



United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

April 23, 2009

The Honorable Joseph I. Lieberman
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, DC 20510-6250

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Cass R. Sunstein, who has been nominated by President Obama for the position of Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget.

We have reviewed the report and have also obtained advice from the agency concerning any possible conflict in light of its functions and the nominee's proposed duties. Also enclosed is an ethics agreement outlining the actions that the nominee will undertake to avoid conflicts of interest. Unless a date for compliance is indicated in the ethics agreement, the nominee must fully comply within three months of confirmation with any action specified in the ethics agreement.

Based thereon, we believe that this nominee is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert I. Cusick".

Robert I. Cusick
Director

Enclosures

REDACTED

**Senator Claire McCaskill
Additional Questions for the Record
Nomination Hearing of Cass Sunstein
May 12, 2009**

1. Most of the attention paid to OIRA in recent years has been related to its role in promulgating regulations. The “I” in OIRA – Information – seems to have largely disappeared.

The federal government now maintains a number of databases relating to government contracting, including: the Federal Procurement Data System; the Past Performance Information Retrieval System; the Excluded Parties List System; the Central Contractor Registration; and the Online Representations and Certification Application. Federal auditors and investigators have concluded that all of these databases have significant problems, many of which relate to the quality and reliability of data. And because the databases are inadequate, contracting officers frequently fail to use them and/or do not lend appropriate weight to the information contained therein, thus removing an important safeguard from the contracting process.

In addition, the databases are so archaic and impenetrable that even the ones that are supposed to be public – like FPDS – are impossible to use. These databases, which are supposed to improve the government’s transparency about government contracts, can seem like one more way that we’re trying to hide information from the taxpayers.

What are you going to do to improve:

- a. The quality of the data; and
- b. The accessibility of this information to government officials and the public?

I am strongly committed to the “I” in OIRA. If confirmed, I would take a series of steps, including review of existing guidance from OIRA, to ensure that relevant data are transparent, accessible, and of the highest possible quality. With respect to government contracts in particular, I am aware of the requirements of the Federal Funding and Accountability Act (Public Law 109-282). If confirmed, I would be prepared to work with the Director of OMB, the Office of Federal Procurement Policy, and the Office of Federal Financial Management to improve the accessibility and quality of federal procurement information (and also grant information). In addition, on March 4, 2009, the President directed the Director of OMB, in collaboration with other officials, to develop government-wide guidance (among other things) “to govern the appropriate use and oversight of all contract types.” Consistent with that direction and with your question, I would be prepared to work with the Director to ensure that the proper safeguards are put in place.

RICHARD J. DURBIN
ILLINOIS
COMMITTEE ON APPROPRIATIONS
COMMITTEE ON THE JUDICIARY
COMMITTEE ON RULES
AND ADMINISTRATION
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May 12, 2009

The Honorable Joseph Lieberman
Chairman
Senate Committee
On Homeland Security and
Governmental Affairs
340 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Susan Collins
Ranking Member
Senate Committee
On Homeland Security and
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350 Dirksen Senate Office Building
Washington, DC 20510

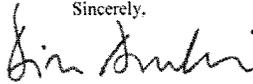
Dear Chairman Lieberman and Senator Collins:

I want to thank the Committee for holding today's hearing and to make formal my support for Cass Sunstein as nominee for Administrator of the Office of Management and Budget's Office of Information and Regulatory Affairs. Cass Sunstein is a well-respected legal scholar, who has taken insightful approaches to analyzing public policy and often proposed innovative ways to protect public welfare, the environment, and worker safety.

Most recently, Mr. Sunstein served as the Felix Frankfurter Professor of Law (2008 - 2009) at Harvard Law School where his research spanned administrative and constitutional law, behavioral economics, environmental law, and labor law. Prior to that he spent 27 years as a faculty member at the University of Chicago Law School, in my home state of Illinois. He has served as an attorney-advisor in the Office of Legal Counsel in the United States Department of Justice and as a law clerk for U.S. Supreme Court Justice Thurgood Marshall and Justice Benjamin Kaplan of the Supreme Judicial Court of Massachusetts.

Mr. Sunstein's professional record indicates that he would use his knowledge and experience to develop and implement smart, objective federal policies and regulations. The Office of Information and Regulatory Affairs is the gateway for all major federal regulatory proposals that protect public health and the environment. The Administrator should have a demonstrated record of impartiality and openness. Cass Sunstein's commitment to transparent, objective analysis has convinced me that he would use his wide expertise to lead this office in a way that serves all Americans. I hope you can move to confirm him for this position as quickly as possible.

Sincerely,



Richard J. Durbin

FARM ANIMAL WELFARE COALITION

Washington, DC

May 14, 2009

The Honorable Joseph Lieberman
Chair
Committee on Homeland Security & Governmental Affairs
U.S. Senate
340 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Lieberman:

We, as a coalition of U.S. animal agriculture and the industries which serve farmers and ranchers, write to express concern with some published views held by Cass R. Sunstein, Esq., President Obama's nominee to head the Office of Management & Budget's (OMB) Office of Information & Regulatory Affairs (OIRA).

We understand academic writings and intellectual discourse should not translate into nor inform federal regulatory oversight decision, but we ask you to seek clarification from Mr. Sunstein as to his views on the "rights" of animals, the legal standing of animals in U.S. courts and his belief U.S. farm animal husbandry should be subject to "extensive regulation" as an extension of those beliefs.

U.S. animal agriculture has long done political and social battle with the animal rights movement, a movement seeking to restrict or end the use of scientifically proven, government sanctioned technologies responsibly used by America's farmers and ranchers. The demands of the animal rights movement are generally short-sighted, belie their "understanding" of modern farm animal husbandry and have significant negative consequences to the availability, safety and cost of food, and work against the wellbeing of the animals in our care.

We cite three examples of Mr. Sunstein's writings to underscore our concerns, as reported by Jonathan Stein in *Mother Jones* magazine and independently confirmed:

"In a 2002 working paper Sunstein authored at the University of Chicago, he wrote, "[T]here should be extensive regulation of the use of animals in entertainment, scientific experiments, and agriculture." In a 2004 book that he coedited and contributed to, *Animal Rights: Current Debates and New Directions*, he wrote, "Animals should be permitted to bring suit, with human beings as their representatives. Any animals that are entitled to bring suit would be represented by (human) counsel, who would owe guardian-like obligations and make decisions, subject to those obligations, on their clients' behalf." And during a 2007 panel discussion at Harvard on animal rights, Sunstein said hunting for "sport and fun"—not for food—should be "against the law" and that greyhound racing, cosmetic testing on animals, and the eating of meat raised in inhumane conditions ought to be eliminated. He also said at the panel that the current treatment of livestock and other animals should be considered "a form of unconscionable barbarity not the same as, but in many ways morally akin to, slavery and mass extermination of human beings."

The 2002 paper referenced above -- "*The Rights of Animals: A Very Short Primer*," (Public Law & Legal Theory Working Group Paper No. 30) published through The Law School of the University of Chicago -- Mr. Sunstein states:

"But my position has radical implications of its own. It strongly suggests, for example, that there should be extensive regulation of the use of animals in entertainment, scientific experiments, and agriculture. It also suggests that there is a strong argument, in principle, for bans on many current uses of animals. In my view, those uses might well be seen, one hundred years hence, to be a form of unconscionable barbarity. In this respect, I suggest that Bentham and Mill were not wrong to offer an analogy between current uses of animals and human slavery."

Such beliefs are unsettling to America's food producers, and we seek clarification of his views on the regulation of animal husbandry in the U.S. outside the push and pull of competing political philosophies. During his May 12 confirmation hearing before the Senate Committee on Homeland Security & Government Oversight, Sen. Susan Collins asked Mr. Sunstein whether he wished to limit recreational hunting by regulation. Mr. Sunstein said he had no such plans. We seek the same assurances as it pertains to any prospective regulation of farm animal husbandry in the U.S.

President Obama has repeatedly pledged regulatory decisions will be guided by "transparency, science and the rule of law." We seek such transparency and appreciate your assistance in securing a formal response from Mr. Sunstein to these concerns.

That you for consideration of our views. If you have any questions, please contact any of the groups listed below, or Steve Kopperud, coalition coordinator, at 202-776-0071 or skopperud@poldir.com.

Sincerely,

**American Farm Bureau Federation
American Feed Industry Association
American Veal Association
Livestock Marketing Association
National Milk Producers Federation
National Pork Producers Council
National Renderers Association
United Egg Association
United Egg Producers**



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The Heritage Foundation

R. Neal Wilkins, Ph.D.
Texas A & M University

April 20, 2009

Senator Susan Collins
State of Maine
413 Dirksen Senate Office
Washington, DC 20510

Dear Senator Collins,

I understand Professor Cass Sunstein is being considered for OMB's Office of Information and Regulatory Affairs. Given my long standing interest in and writing on regulation and policy analysis, I greatly appreciate Cass' innovative efforts to improve market coordination and competition. I am highly supportive and look forward to his confirmation.

I appreciate his approach (although I'm jealous of Cass having coined the term, "libertarian paternalism") and creativity. Cass is too honest and smart to be cowed by conventional thinking and intellectual fads. Friends at the University of Chicago speak so highly of him that I've invited him to several of FREE's conferences for federal judges.

I'm confident that many other policy analysts will support his nomination. However, as a Life Member of The National Rifle Association, a rancher who enjoys shooting, and a dedicated sportsman, I hope you will take special note of my approval.

Thanks for your consideration.

Sincerely,

John Baden, Ph.D.
Chairman

Kathryn S. Fuller
3718 Morrison Street NW
Washington, DC 20015

April 26, 2009

Dear Senators Collins and Lieberman:

I write in enthusiastic support of Cass Sunstein, President Obama's nominee to head the Office of Information and Regulatory Affairs within the Office of Management and Budget.

Cass and I met almost 30 years ago when we overlapped as attorneys in the Department of Justice's Office of Legal Counsel. Cass has since become a deservedly renowned Constitutional lawyer, scholar, and writer. I know him also, however, as a thoughtful and committed supporter of nature conservation and environmental protection.

After leaving the Justice Department, I worked with the World Wildlife Fund for over two decades, the last 16 years as President and CEO. Cass and I kept in regular touch during that time and I always valued his advice enormously.

Since stepping down as President of WWF in 2005, I have remained engaged with WWF as an advisory council member and serve also on a number of boards engaged with environmental issues, among them Resources for the Future in the nongovernmental organization community, the Summit and Ford Foundations (serving as Chair of the latter), and Alcoa, Inc.

I can say without reservation, drawing on my experience in the environmental field and my personal knowledge of Cass, that the United States Government would be most fortunate to have someone of Cass' character and caliber heading OIRA.

Sincerely,

Kathryn S. Fuller

Ambassador C. Boyden Gray
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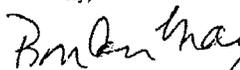
April 20, 2009

Dear Senators Licherman and Collins:

I am writing to express my strong admiration and support for Cass Sunstein, who has been nominated to be Administrator of OIRA in the Office of Management and Budget.

I have worked with Cass in various capacities since 1981, when he was in the Office of Legal Counsel at DOJ and helped draft the first Executive Order on regulation (EO 12291, later revised as EO 12866). He is of the two or three leading authorities on both U.S. Administrative Law and environmental policy—a superb qualification at this particular time. He is also a charter member of a small bipartisan group of regulatory experts who have provided what has been essentially consistent advice on administrative law for the development of regulatory policy for nearly 30 years, through Democratic and Republican administrations (for example, witnessing Justice Breyer's swearing in of John Graham as OIRA head in the first term of Bush 41). He should be quickly confirmed.

Sincerely,


C. Boyden Gray

04/20/2009 4:09PM

The Honorable Joseph I. Lieberman, Chairman
 The Honorable Susan Collins, Ranking Member
 Senate Homeland Security and Governmental Affairs Committee
 706 Hart Office Building
 Washington, DC 20510

April 21, 2009

Dear Senators Lieberman and Collins:

We are professors at Harvard Law School and former colleagues of Cass Sunstein, President Obama's nominee to be the Administrator of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget. We write in enthusiastic support of Sunstein's nomination.

We know Sunstein and his work well. As you no doubt know, Sunstein is the preeminent public law scholar of his generation. He has so many groundbreaking contributions to so many fields of law and public policy that they are difficult to summarize. But perhaps most relevant to his nomination is Sunstein's work over three decades, in government and in the academy, on the core issue that he would have responsibility for in OIRA: Executive review of agency action. Sunstein has written numerous books and articles on this topic, and is widely viewed as the nation's premier expert in this field.

It is not just Sunstein's expertise in this area that leads us to support his nomination. Equally important are the qualities of mind that he will bring to the job. Sunstein is a man of enormous intellectual honesty and integrity. In his approach to administrative law, Sunstein is an empirically-minded pragmatist who follows the facts wherever they lead him and uses cost-benefit analysis and other administrative law tools to improve human lives, without regard to ideology. He also has common sense and sound judgment, important qualities in the difficult OIRA job.

We cannot imagine a person more qualified to lead OIRA. The nation would be very fortunate to have Sunstein in this position, and we urge you to confirm him.

Yours Sincerely,

Charles Fried
 Beneficial Professor of Law
 Harvard Law School

Jack Goldsmith
 Henry L. Shattuck Professor of Law
 Harvard Law School

John F. Manning
 Bruce Bromley Professor of Law
 Harvard Law School

Adrian Vermeule
 John H. Watson, Jr. Professor of Law
 Harvard Law School

(titles for purpose of identification only)

04/21/2009 1:30PM



**THE HUMANE SOCIETY
OF THE UNITED STATES**

April 21, 2009

**The Honorable Joseph Lieberman, Chair
Senate Committee on Homeland Security and Government Affairs
340 Dirksen Senate Office Building
Washington, DC 20510**

Dear Chairman Lieberman,

On behalf of the more than 11 million supporters of The Humane Society of the United States (HSUS), I write to communicate our enthusiasm about the Obama Administration's nomination of Cass Sunstein as Administrator of the Office of Information and Regulatory Affairs (OIRA). Professor Sunstein is an outstanding choice for this position, and we would urge you and your colleagues to support his confirmation.

From our perspective as the nation's largest animal protection organization, the OIRA Administrator plays an indispensable role in policy-making. There are few statutes that do not involve rule-making obligations and the implementation of regulations. The fact that responsibility for animal welfare cuts across numerous federal agencies makes the centralized review of draft regulations within OIRA/OMB especially important to rational and effective policy-making in this area.

Cass Sunstein's serious and nuanced treatment of animal welfare as a policy issue in his scholarship and public speaking is an encouraging sign to those of us who have been frustrated by the failure of federal agencies to act swiftly and fairly to implement the will of Congress in relation to animal welfare concerns. During the last decade we have witnessed a tremendous rise in congressional legislation enacted to protect animals. Some of our federal agencies, however, lag behind in their actions to adopt, strengthen, and enforce regulations consistent with such enactments.

More than two decades after the Dole-Brown amendments to the 1985 Farm Bill, for example, we have yet to see meaningful progress in implementation of standards for the psychological well-being of primates by the USDA. More than ten years after the publication of regulations concerning swim-with-the-dolphin programs, these programs remain completely unregulated. Enforcement of the immediate ban on importation of puppies from foreign puppy mills, as required under the 2008 Farm Bill, also has yet to begin. These are but a few examples of regulatory delay or failure.

In the spirit of Mr. Emanuel's January 20, 2009 memo concerning regulatory review, we also note that there were several regulations rushed through in the final days of the previous administration that we believe the new administration should reconsider, including the EPA's rule exempting Confined Animal Feeding Operations (CAFOs or factory farms) from federal reporting requirements on toxic emissions, and the Interior Department's decision to continue the Bush Administration's efforts to strip wolves of all ESA protections.

Celebrating Animals, Confronting Cruelty

2100 L Street, NW Washington, DC 20037 t 202.452.1100 f 202.778.6132 humanesociety.org

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Executive Vice President
Public & Political Protection

We believe that Mr. Sunstein is uniquely qualified to address problems of this kind, not only because of his intellect but because it is clear that he can appreciate animal welfare as an independent concern, and understand its numerous points of convergence with issues of human health, environmental protection, and public safety, among others.

We are particularly impressed with Professor Sunstein's ideas concerning information disclosure as a regulatory tool. In a number of areas of our concern, most notably that of animals raised for food, the simple act of providing consumers with relevant labeling information at the point of purchase would fortify both market processes and democratic processes, without mandating changes in production practices by the regulated industries.

With a new administration in office, and a new Congress at work, we at HSUS look forward to working with you and your colleagues, and with OIRA, OMB, and many federal agencies, to ensure meaningful animal protection in all of the arenas where federal jurisdiction applies.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "Wayne Pacelle". The signature is written in a cursive, flowing style.

Wayne Pacelle
President & CEO



New York University
A private university in the public service

School of Law

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Richard L. Revesz
Dean and Lawrence King Professor of Law

May 6, 2009

Senator Joseph I. Lieberman
Senator Susan M. Collins
Senate Homeland Security and Governmental Affairs Committee
706 Hart Office Building
Washington, DC 20510

Dear Senators Lieberman and Collins:

We write to express our strong support for President Barack Obama's nomination of Professor Cass Sunstein to the position of Administrator of the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget.

Professor Sunstein has built an extraordinarily successful career as a legal academic—first at the University of Chicago Law School and later at Harvard Law School. Over the course of that career, he has made important contributions in areas as varied as environmental law, judicial decisionmaking, and behavioral economics. For decades, he has dedicated himself to improving our understanding of the law and public policy not as an abstract intellectual exercise, but in order to improve the ability of government to positively affect people's lives.

An area of special emphasis for Professor Sunstein has been executive review of administrative agencies. He has published dozens of articles and several books on this topic, and is widely recognized as the leading scholar in this field. His writings show a strong commitment to balanced review that is biased neither in favor nor against regulation. Sunstein has used his place within the legal academy to argue for better administrative decisionmaking, taking a pragmatic and humane approach to regulation that is not burdened by ideological predispositions.

For some, OIRA—and its use of cost-benefit analysis to evaluate proposed regulations—is fundamentally opposed to strong environmental, public health, and safety regulation. Professor Sunstein, in his writings and commitment to rational regulation, has rejected this false proposition. Sunstein has indicated many times that he believes in the importance of a robust regulatory state, but he also acknowledges that regulations can be more or less efficient at achieving their goals. Throughout his career, he has strived to improve the quality of regulation.

Professor Sunstein is also an individual of extraordinary integrity, honesty, and regard for the public good. In his tireless work ethic, fair-mindedness, and dedication to and respect for the American people, Professor Sunstein will make a public servant of the highest caliber. His twin goals will be to advance the President's agenda and to improve the quality of public administration. We urge the Senate to move quickly to confirm his nomination.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard L. Revesz". The signature is fluid and cursive, with the first name being the most prominent.

Richard L. Revesz
Dean and Lawrence King Professor of Law
New York University School of Law

Additional signatories attached

cc: Members of the Senate Homeland Security and Governmental Affairs Committee

Additional Signatories Supporting the Nomination of Cass Sunstein as Administrator of OIRA:

Note: The views expressed in this letter are the personal views of the signers. Titles and institutional affiliations are shown for identification purposes only.

Matthew D. Adler
Leon Meltzer Professor, University of Pennsylvania Law School
James S. Carpentier Visiting Professor, Columbia Law School

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UCLA School of Law

Rachel E. Barkow
Professor of Law
New York University School of Law

Max H. Bazerman
Straus Professor
Harvard Business School

Lee C. Bollinger
President
Columbia University

Lisa Schultz Bressman
FedEx Research Professor of Law
Co-Director, Regulatory Program
Vanderbilt Law School

Paul Brest
President, William and Flora Hewlett Foundation
Dean Emeritus, Stanford Law School

Cary Coglianese
Associate Dean for Academic Affairs
Edward B. Shils Professor of Law
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Director, Penn Program on Regulation
University of Pennsylvania Law School

Steven P. Croley
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Maureen L. Cropper
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Frank Cross
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Vice Dean and Professor of Law
Director, Floersheimer Center for Constitutional Democracy
Benjamin N. Cardozo School of Law, Yeshiva University

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Samuel Issacharoff
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Acting Dean and James S. Reid, Jr., Professor of Law
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University of Pennsylvania Law School

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Yale Law School

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George Washington University Law School

Cornelius M. Kerwin
President
American University

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Resources for the Future

Daniel R. Ortiz
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Sudler Family Professor of Constitutional Law
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Vanderbilt University Law School

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Betts Professor of Law
Columbia Law School

Kathleen M. Sullivan
Stanley Morrison Professor of Law and Former Dean
Stanford Law School

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Institute for Policy Integrity
New York University School of Law

Senator Joseph I. Lieberman
Senator Susan M. Collins
Senate Homeland Security and Governmental Affairs Committee
706 Hart Office Building
Washington, DC 20510

May 6, 2009

Re: Nomination of Cass Sunstein as Administrator of OIRA

Dear Senators Lieberman and Collins:

I write to express my strong support for the nomination of Cass Sunstein for the position of Administrator of the Office of Information and Regulatory Affairs (OIRA). Given his extraordinary credentials, and the significant issues that require this Administration's immediate attention, I urge the Senate to move quickly to confirm his nomination.

Sunstein, a professor at Harvard Law School, has a long history as a legal academic. He is broadly recognized as one of the leading intellectuals of his generation, and has written scores of articles and books on a staggering range of topics. His academic contributions demonstrate a keen intellectual curiosity, a willingness to depart with well-worn dogma, and a seemingly inexhaustible work ethic. Over the course of his career, he has approached a diversity of academic problems with open-mindedness and creativity, spurring debate that has greatly increased our understanding of many important legal and policy questions.

On the basis of some of the positions that Sunstein has advocated as an academic, some have concluded that his views on regulation are "decidedly conservative." This conclusion is incorrect.

As an initial matter, the exercise of scouring an academic's writings for clues about policy preferences is somewhat misguided. The purpose of an academic (when not teaching) is to contribute to scholarly dialogue, generating ideas that can form the basis of productive inquiry. The metric of success is not always "getting it right"—and it is certainly not ideological purity. In fairness, academic work should be judged against academic criteria such as originality, parsimony, and usefulness. According to these standards, there is no doubt that Sunstein's work is outstanding.

If his positions as an academic do shed light on his policy preferences, they tend to show that he does not fall neatly into traditional liberal or conservative categories. In his past writing, Sunstein has advocated for a strong regulatory state—a traditional liberal position. But he has also argued in favor of cost-benefit analysis—a position more typically favored by conservatives. In his writings, he is largely free of obvious ideological constraints, using tools from both conservative and liberal thinkers to approach questions from a new direction. If his thinking reveals an overall philosophical disposition, it is pragmatism—the valuing of ideas on the basis of how well they fulfill human needs. Rather than pursuing intellectual purity, Sunstein has collected ideas that help solve thorny problems.

Over the years, many legitimate concerns have been raised about both the process and substance of OIRA review. Under executive orders that have in place for nearly three decades—under both Republican and Democratic administrations—agencies are required, whenever permissible, to conduct cost-benefit analysis of major regulations. OIRA has been charged with implementing these orders, and in this capacity reviews all agency regulations before they are adopted. Critics have faulted OIRA for a lack of transparency, the imposition of unnecessary delay, and a number of methodological biases that tend to tilt cost-benefit analysis against strong regulation.

Many of the concerns raised about OIRA review are legitimate, and do in fact bias review against regulation. Given the failures of the regulatory state in recent years, reforms are clearly needed. However, it would be a mistake to conclude that recent failures are due to an overuse of cost-benefit analysis. In a report released late last year, *The Price of Neglect: The Hidden Environment and Public Health Costs of Bad Economics*, IPI documented many cases in which regulatory failures were due to underuse, or abuse, of economics. The correct lesson to learn from past mistakes is not that we used economics too much, but that we did not use it enough.

Sunstein, with his deep understanding of regulatory policy, is the right person to make these reforms. He well understands that in a democratic society, his role as a public servant is not to impose his own particular policy preferences, but to respect the will of the American public. His background on these issues gives him the insight and the knowledge to lead a productive discussion on OIRA reform, and select the policies that best accord with the desires of the public.

There are many important issues that OIRA will have to decide. These include the use of intergenerational discounting, adoption of mechanisms to achieve review of agency inaction, the treatment of deregulation, and distributional justice. On many of these, I have published views—some of which conflict with Sunstein's past writings. For example, in my book with Richard L. Revesz, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health*, we strenuously argue that discounting regulatory benefits for future generations is unfounded. In his past work, Sunstein has argued the opposite position.

However, these areas of disagreement are not troubling; in fact, they are to be actively encouraged in a robust pluralistic democracy. The most we can ask of public servants is that, once they take office, they put aside their personal preferences in favor of the public will. We cannot and should not ask them to have deferred to the will of the majority in all of their views throughout their life, a demand that would be disastrous for selecting the best individuals for positions of public office. Throughout his career Sunstein has shown an intense willingness to engage in discussion with a diversity of viewpoints and to revise his thinking in their light. He will no doubt carry that inclination to OIRA.

On the most important question Sunstein has remained consistent and consistently correct: that the only appropriate use of cost-benefit analysis is to improve regulation, not serve as a "thumb on the scale" against regulation. Early proponents of cost-benefit analysis often saw the tool as a means to slow down or roll-back environmental, public health, or safety protections. Sunstein has never advocated this view. Rather, he has seen regulatory review, and cost-benefit analysis, as a means to improve the quality of regulation, delivering greater

benefits for the American public at lower costs. This core understanding of the appropriate role of OIRA, and the role of regulation in general, has informed all of Sunstein's views on this topic.

Red Herrings

There are two other issues that have been raised that are worthy of only short rebuttal. First, Sunstein has come under criticism for a paper that he recently published arguing that actions of the Occupation Safety and Health Administration (OSHA) may be subject to constitutional challenge on the basis of the non-delegation doctrine. Sunstein was conducting a legal analysis of constitutional doctrine; he was not arguing that OSHA should not exist, or that workplace health and safety regulation was a bad idea. In fact, one would hope that his normative feelings about OSHA would not cloud his legal analysis of constitutional doctrine. Constitutional or unconstitutional are not synonyms for "good" and "bad." Reading his paper as an overall indictment of OSHA is a willful misinterpretation.

Second, some have raised objections to Sunstein's views on hunting and animal welfare. Sunstein has written in the past that he believes that animal have interests that should be protected, and has acknowledged that many current practices are detrimental to those interests. These views, while perhaps not exactly in accord with the mainstream, are perfectly legitimate. They also touch on fundamentally moral and ethical considerations that have nothing to do with the position of OIRA Administrator. Personal moral and ethical beliefs should not disqualify one from public service, just as personal religious beliefs do not. Opposition to Sunstein's nomination on the basis of these personal ethical beliefs indicates a fear that Sunstein would have both the desire and the power to impose those beliefs on others. There is no reason to believe he has the former, and he certainly would not have the latter.

I would be pleased to discuss any of these points in more detail.

Sincerely,



Michael A. Livermore
Executive Director

Former Administrators of the
Office of Information and Regulatory Affairs

April 21, 2009

The Honorable Joseph I. Lieberman, Chairman
Senate Committee on Homeland Security and Governmental Affairs
340 Senate Dirksen Office Building
Washington, DC 20510

The Honorable Susan M. Collins, Ranking Member
Senate Committee on Homeland Security and Governmental Affairs
340 Senate Dirksen Office Building
Washington, DC 20510

Dear Mr. Chairman and Mme. Ranking Member:

We former Administrators of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget are writing to support the nomination and expeditious confirmation of Professor Cass Sunstein as OIRA Administrator.

OIRA has helped Presidents, both Democratic and Republican, ensure that federal regulations are designed to provide the greatest value to the American people. Objective evaluation of regulatory benefits and costs and open, transparent, and responsive regulatory procedures are necessary to forestall policy mistakes and avoid undue influence of narrow interests.

Cass Sunstein is a widely respected scholar with a distinguished record of publications that demonstrates a pragmatic, non-ideological orientation to the field of regulation. He is a man of personal integrity, intellectual curiosity, creativity, valuable experience, demonstrated commitment, and genuine openness, who is eminently qualified to deal with the complex regulatory issues facing the country today.

We believe that OIRA provides a coordinating function that will be absolutely essential as President Obama and the Congress confront a range of difficult and complex regulatory problems. Cass Sunstein clearly has the requisite qualifications for the important job of OIRA Administrator at this critical time, and we urge you to act favorably on his nomination.

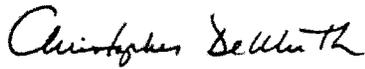
Sincerely,



James C. Miller III
(January 1981 – September 1981)



Sally Katzen
(June 1993 – February 1997)



Christopher C. DeMuth
(October 1981 – May 1984)



John T. Spotila
(July 1999 – December 2000)



Wendy Lee Gramm
(October 1985 – February 1988)



John D. Graham
(July 2001 – March 2006)



Susan E. Dudley
(April 2007 – January 2009)

Please note: Former Administrators Douglas H. Ginsburg (June 1984 – September 1985) and S. Jay Plager (February 1988 – November 1989) are now United States Circuit Judges. Canon 7 of the Code of Conduct for United States Judges provides that a "judge may not endorse...a candidate for public office."

STANFORD UNIVERSITY, STANFORD, CALIFORNIA 94305-6072

KENNETH J. ARROW
JOAN KENNEY PROFESSOR OF ECONOMICS, EMERITUS
AND PROFESSOR OF OPERATIONS RESEARCH, EMERITUS
DEPARTMENT OF ECONOMICS

PHONE: (650) 723-9165
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8 May 2009

Honorable Joseph Lieberman
Dear Senator Lieberman:

We write you in support of President Obama's nomination of Professor Cass Sunstein to Administrator of the Office of Information and Regulatory Affairs at OMB. Professor Sunstein is without a doubt superbly qualified for this important position. His extraordinary record of scholarly analyses of public policy in general -- and of regulation in particular - combines mastery of the relevant issues in law and economics, with appreciation of new understandings of] human behavior and a keen appreciation of the practical and political issues that arise in regulation. He is uniquely equipped to meet the challenges of regulations in areas ranging from environmental protection to financial regulation to consumer protection.

Sunstein has consistently defended a robust role for government in protecting health, safety and the environment, in those circumstances where private individuals lack the necessary knowledge. However, his commitment is not to a particular ideological or political position but to reason, good sense and a deep respect for both values and facts. He has sought a balanced approach that best protects the community while imposing as few restrictions as possible on individuals and on markets.

We know Professor Sunstein as a man of exceptional integrity, both intellectual and personal, applaud his willingness to suspend a stellar academic career to serve his country, and hope that he can soon begin to serve in a role that he is uniquely prepared to fill.

Sincerely,

George Akerlof, Kenneth J. Arrow, Gary Becker, James Heckman, Daniel Kahneman,
Robert Lucas, Eric Maskin, Daniel McFadden, Roger Myerson, Thomas Schelling,
Amartya K. Sen, William Sharpe, Robert M. Solow

The signatories are all recipients of the Nobel Memorial Prize in Economic Science

