

The Costs and Benefits Of Cass Sunstein

Obama's longtime friend is poised to oversee federal rulemaking, leaving many liberals concerned

BY REBECCA ADAMS

LAST WEEK BROUGHT much cheer to liberals who anticipate a more aggressive regulatory posture from the new administration than its predecessor.

President Obama signed an executive order that revoked changes to the regulatory review process that President George W. Bush instituted two years ago. The Bush order required federal agencies to submit more types of regulatory policies for review by the White House Office of Management and Budget before they could be published, and it granted OMB's political appointees increased authority to get proposed rules rewritten. In addition to suspending those changes, Obama asked OMB to produce the basis for a new rule-making order within 100 days.

That's the good news for liberals seeking a buffer between regulatory decisions and political prerogatives. On more fundamental questions of regulatory philosophy, however, liberals remain skittish about Cass R. Sunstein, Obama's nominee to head OMB's influential Office of Information and Regulatory Affairs.

Sunstein, the president's former University of Chicago Law School colleague, has written extensively on federal policy making and endorsed some Bush-branded regulatory initiatives — the most controversial of which is the use of cost-benefit analyses to evaluate proposed government rules.

Trying to balance government protections for the public with the costs those safeguards entail has limited usefulness, say some advocates of increased regulation, because it's too difficult to quantify all benefits. But the process was elevated under the term of John D. Graham, OIRA administrator from 2001 to 2006. Graham's critics say he used that tool and others to roll back regulatory initiatives that were deemed harmful to affected busi-



NEW RULEMAKER IN TOWN: Sunstein has liberal critics worried.

nesses. Now liberal activists are worried that policies produced under the regulatory review process of the Bush years might remain substantively intact.

"I'm concerned about his ideas," said Rena I. Steinzor, president of the Center for Progressive Reform and a professor at the University of Maryland School of Law. "Industry is thrilled with this nomination," she said. "Their pleasure is disturbing."

Thanks to his friendship with Obama and his academic standing, Sunstein brings con-

siderable clout to the OIRA post, and observers expect he will make his imprint quickly felt. "My prediction is that Cass will be one of the most powerful OIRA heads," said Richard L. Revesz, dean of the New York University School of Law, who has urged regulators to account for the ethical impact of failing to protect future generations and whether rules are needed to protect certain groups, such as the disadvantaged, from risks.

Regulatory activists are anxious about what Sunstein will do with his power because his office has the authority to kill rules or force agencies to rewrite them. And he clearly parts company with several prominent Obama appointees in the White House and in the agencies his office will oversee.

One well-known detractor of the cost-benefit approach he favors is Lisa Heinzerling, senior counsel to EPA Administrator Lisa P. Jackson on climate change issues and the preferred candidate of many liberals for the OIRA post. Heinzerling was an author of the legal brief that persuaded the Supreme Court in 2007 to order the EPA to decide whether to regulate greenhouse gases. And she has jostled with Sunstein in academic writings for years over how much regulatory weight should be given to cost-benefit calculations.

Likewise, many expect Sunstein to lock horns with Carol M. Browner, the former Clinton EPA head named by Obama to a new White House post of energy "czar," overseeing climate and energy policies across a range of agencies. Browner, too, tends to stress risk reduction over cost issues.

"Just stay tuned and watch for the nuclear explosion when Carol Browner and Cass have lunch for the first time because they come out of such different camps," said Peter Van Doren, a senior fellow at the Cato Institute, a libertarian think tank. Van Doren edits the institute's

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quarterly magazine *Regulation*, which has published some of Sunstein's writings.

On big issues, officials typically coordinate with the White House to ensure they are pursuing policies in concert with the president's priorities. But OIRA administrators also traditionally have discretion to flesh out details with agency heads, especially on lower-profile rules.

OIRA's wonky handiwork can also be a very powerful tool in a modern president's political arsenal, since it occurs beyond the often harsh scrutiny of congressional debate. While Obama enjoys strong Democratic majorities in both chambers of Congress, he is also likely to institute some significant policies via rulemaking rather than forcing tough congressional votes. What's more, OIRA will be quite busy in the months ahead conducting regulatory reviews of Bush policies that Obama wants to reverse and resolving unfinished regulatory business bequeathed by the Bush White House — in environmental affairs, most notably.

Sunstein is prolific, with more than 450 academic publications and books to his name. His views don't skew clearly in any single ideological direction; he advocates for greater aid to the poor, for example, but via indirect mechanisms such as tax credits. Some of his work seems intentionally provocative — for example, he published an article last year in the *Virginia Law Review* called "Is OSHA Unconstitutional?"

Sunstein's latest book, which draws from the increasingly popular discipline of behavioral economics, is titled: "Nudge: Improving Decisions About Health, Wealth, and Happiness." In it, he argues that people in power can shepherd the public toward preferred outcomes without having to resort to top-down mandates. Instead, he says, policy should aim for favored results as the most attractive in a range of options.

"Some groups claim he's not progressive enough because he believes in economics," said Kip Viscusi, an economist at Vanderbilt University who devised a measure for valuing a life that has been widely employed in regulatory analysis — and widely derided by liberals. "The fact that people think he's willing to look at costs and benefits to determine what most advances society's interest is exactly what you'd want that person to do based on the job," Viscusi said. "The groups are not criticizing Sunstein, but the position itself."

A MANDATE FOR REVIEW

The question of Sunstein's allegiances is especially charged for the liberal advocates of in-

CASS R. SUNSTEIN

Born: September 21, 1954

Family: Married Samantha Power, his second wife, in 2008; one child, Ellyn, with first wife, Lisa Ruddick

Education: A.B., Harvard College, 1975; J.D., Harvard Law School, 1978

Career: Clerk for Massachusetts Supreme Court Justice Benjamin Kaplan, 1978-79, and for Supreme Court Justice Thurgood Marshall, 1979-80; attorney-adviser in the Justice Department's Office of Legal Counsel, 1980-81; professor at the University of Chicago Law School from 1981 to 2008 and in the university's Department of Political Science beginning in 1983; visiting professor at Columbia Law School in 1986 and at Harvard Law School in 1987; returned to Harvard Law in 2008; nominated for OIRA administrator by President Obama in January 2009.

creased regulation, because Obama has clearly signaled that he regards OIRA's mandate as a work in progress. When Obama called for a new approach to regulatory review, he used words that suggested more than cosmetic tweaks. Revoking the earlier Bush process restored the regulatory regime handed down from President Bill Clinton — which Obama also intends to review.

In a memo to the heads of Cabinet-level agencies, Obama said that since the Clinton policy was created in 1993, much has been learned about when regulations are justified and what works. In his directive to OMB, Obama singled out issues that he wants examined, including how OIRA interacts with agencies it oversees, ways to speed up the process of writing regulations, and the role of cost-benefit analysis and behavioral sciences, two areas of Sunstein's expertise.

The president wants "a process that bases decisions on solid information and analysis of what's in the best interests of the country," said OMB spokesman Tom Gavin. But by stressing cost-benefit analysis as a key part of the process, Sunstein could end up echoing some of Graham's agenda for OIRA.

Sunstein and Graham became friendly years ago when Graham directed the Harvard Center for Risk Analysis. Graham, who has spoken with Sunstein since the election and calls him "fabulous," predicts Sunstein will play a major role in consumer issues, particularly in policies affecting food, drug safety, auto safety and housing. Graham anticipates

that Sunstein may push for more disclosure on many issues — as he's advocated in "Nudge" and elsewhere — rather than strict regulatory mandates and will review how the United States' regulatory regime matches up with European policy.

SIZING UP REGULATORY BURDENS

Sunstein has said that agencies may regulate even when costs are higher than benefits, but he also often notes regulation's burden. In 2004, for example, he published a critique in the *New Republic* of a book coauthored by Heinzerling, "Priceless: On Knowing the Price of Everything and the Value of Nothing," which savaged her view that "better safe than sorry" is the best guiding principle in environmental regulation. Sunstein called that principle "worse than unhelpful; it is utterly incoherent."

Keeping some medicines off the market because of their safety risks might prevent some deaths, but lead to others, Sunstein wrote in his review of "Priceless." Likewise, he has suggested that banning genetically modified food might prevent some unknown risk, but introduce other risks by limiting the food supply. More-fuel-efficient cars might lead to vehicles that are lighter and less safe than gas-guzzlers, he wrote — or else make cars so costly that more people would hang onto older models.

Advocates such as Heinzerling "do not sufficiently appreciate the risk that expensive regulation will actually hurt real people," Sunstein wrote. "Most of the time environmental questions do not involve evildoers or sins. They involve complex questions about how to control risks that stem both from nature and from mostly beneficial products, such as automobiles, cell phones, household appliances, and electricity," he wrote.

Sunstein's allies suggest that he will bring a pragmatic, hard-nosed outlook to an Obama White House that will be struggling with how best to make good on pledges to transcend former partisan rancor and institute real-world solutions to urgent policy questions. Sunstein knows "you have to understand the consequences between difficult choices," said Revesz. "He'll be focused on making the choice that maximizes social welfare as opposed to some ideological predisposition." ■

FOR FURTHER READING: *Regulatory policy*, *CQ Weekly*, p. 24; *Obama nominations*, p. 214; *regulation in a global economy*, 2008 *CQ Weekly*, p. 1472; *Bush regulatory agenda*, 2007 *CQ Weekly*, p. 450.