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The Choices Facing Cass Sunstein: CPR Member Scholars Point to Trouble Ahead for ‘Regulatory Czar’

Washington, DC ---- President Obama’s apparent choice of Professor Cass Sunstein to direct OMB’s Office of Information and Regulatory Affairs (OIRA) – the so-called “regulatory czar” – likely means that the Administration will embrace many of the mechanisms by which the Bush Administration delayed, weakened and scuttled vitally needed regulations protecting health, safety and the environment, according to a new report from the Center for Progressive Reform.

The CPR Member Scholars who co-authored the report, are, like Sunstein, professors of law with expertise in regulation. Over the years, they have engaged Sunstein in lengthy debates over his strong support for cost-benefit analysis, a controversial method of assessing proposed regulations. Cost-benefit analysis has a long history of being used as a tool to stymie health, safety and environmental regulation, never more so than during the Bush years. In addition, the CPR Member Scholars take issue with Sunstein’s support for centralizing review of regulations in OIRA, because centralization over the years has “allow[ed] a small group of economists in OIRA to displace the expertise of agency personnel on a wide variety of complex regulatory issues, ranging from air pollution to workplace safety.”

“Cass Sunstein is a progressive on many issues and is well-respected for his scholarship,” said CPR President Rena Steinzor, one of the report’s co-authors. “But the cost-benefit positions he embraces, his concern that the Occupational Safety and Health Administration may be unconstitutional, and his idea that we should avoid curbing our contribution to climate change by giving money to the developing world are extreme, in the opposite direction. But the hard truth is that he’s a committed advocate of the very methods that the Bush Administration and some of its predecessors have used to bottle up much-needed regulatory protections for health, safety and the environment. The record on cost-benefit is clear: it has repeatedly failed to assess fairly the benefits of proposed regulations, while consistently overstating the costs. It has become a tool for bottling up needed protections. That’s exactly why many anti-regulatory advocates support it.”

The report raises several key issues on which Sunstein and the Member Scholars disagree, warning that, once Sunstein is confirmed, the issues will likely be the source of future controversy. They include Sunstein’s:

- Support for cost-benefit analysis as a primary tool for assessing regulations, despite its imprecision and the ease with which it is manipulated to achieve preferred policy outcomes;
- Support for such cost-benefit approaches as the widely condemned “senior discount” method for undervaluing the lives of seniors in cost-benefit analyses, an approach even the Bush Administration was forced to disown;
- Rejection of the “precautionary principle” as a basis for regulating, thus ensuring that dangerous pollutants and products will be given the “benefit of the doubt,” rather than well-grounded concerns about health and safety;
- Support for the centralization of authority over regulatory decisions in the White House – OIRA in particular, even though Congress delegated the exercise of expert judgment to the regulatory agencies, not to OIRA’s staff economists in the White House; and
- Stated suggestion that the Occupational Safety and Health Administration might be unconstitutional.

“Unless he turns over a new leaf, or unless President Obama keeps a careful eye on OIRA,” Steinzor said, “we fear that Cass Sunstein’s reliance on cost-benefit analysis will create a regulatory fiefdom in the White House that will deal with needed regulations in very much the same way that the Bush Administration did. We desperately need change in this area, so we hope that if he is confirmed, Professor Sunstein moderates his past-stated views on these issues. In any event, we look forward to working with him in the years to come.”

Reinvigorating Protection of Health, Safety, and the Environment: The Choices Facing Cass Sunstein is available at www.progressivereform.org/SunsteinOIRA.cfm. Co-authors of the report are CPR Member Scholars John Applegate (Indiana University–Bloomington), Thomas McGarity (University of Texas), Sidney Shapiro (Wake Forest University), Amy Sinden (Temple University), Rena Steinzor (University of Maryland), Robert R.M. Verchick (Loyola University–New Orleans), and CPR Policy Analyst James Goodwin.

The Center for Progressive Reform neither endorses nor opposes nominations for Executive Branch appointments. CPR’s report on its Member Scholars’ disagreements with Professor Sunstein is intended to raise issues that will bear on the Obama Administration’s success in reinvigorating critical health, safety, and environmental regulations.

The Center for Progressive Reform is a nonprofit research and educational organization whose network of scholars across the nation is dedicated to protecting health, safety, and the environment through analysis and commentary. For more information, contact Matthew Freeman at 202.747.0698 ex. 2 or at mfreeman@progressivereform.org. Visit CPR on the web at www.progressivereform.org.

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