RECENT DEVELOPMENTS

REGULATORY REVIEW IN THE OBAMA ADMINISTRATION: COST–BENEFIT ANALYSIS FOR EVERYONE

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INTRODUCTION

With the election of President Barack Obama, Office of Management and Budget (OMB) watchers have anxiously awaited his take on the regulatory review process and the controversial tool of cost–benefit analysis. A glimpse into President Obama's mind-set came quickly. Ten days into the new Administration, President Obama tasked his Director of OMB with producing, within 100 days, recommendations for a new executive order on regulatory review.[1] The President asked for suggestions regarding some of the most contentious aspects of regulatory review during the George W. Bush Administration—the relationship of the Office of

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1. Regulatory Review: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 5,977 (Feb. 3, 2009).

Information and Regulatory Affairs (OIRA) with executive agencies and the role of cost–benefit analysis. That directive, combined with the President's request for suggestions regarding "the role of distributional considerations, fairness, and concern for the interests of future generations,"[2] led some industry representatives to fear the worst—that cost–benefit analysis would end and that the era of bureaucratic dominance, at least partially thwarted by President Reagan's institution of mandatory regulatory review and cost–benefit analysis, would return. Within thirty days of the President's memorandum, OMB, citing the "unusually high level of public interest" and "the evident importance and fundamental nature of the relevant issues" invited "public comments on the principles and procedures governing regulatory review."[3] However, now a year into the new Administration, no new executive order on regulatory review has been issued.

The next clue as to the Administration's regulatory review philosophy came with the nomination of Cass Sunstein to head OIRA.[4] Recognized as a preeminent scholar on bureaucracy and the law,[5] Sunstein has long favored presidential regulatory review and cost–benefit analysis of regulations.[6] It was now some environmentalists' and legal scholars' turn to fear the worst—that cost–benefit analysis is here to stay and that pro-industry politics will continue to dominate bureaucracy.[7] The Senate Homeland Security and Governmental Affairs Committee voted to affirm Sunstein's nomination on May 20, 2009.[8] However, two Senators, alarmed by Sunstein's support of "animal rights," placed holds on his nomination.[9]

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2. *Id.*

3. Federal Regulatory Review, 74 Fed. Reg. 8,819 (Feb. 26, 2009).

4. Press Release, Office of the Press Sec'y, White House, President Obama Announces Another Key OMB Post (Apr. 20, 2009), http://www.whitehouse.gov/the_press_office/President-Obama-Announces-Another-Key-OMB-Post.

5. Cass Sunstein was the Karl N. Llewellyn Distinguished Service Professor of Jurisprudence and the Felix Frankfurter Professor of Law at Harvard Law School. He has authored over thirty books and numerous articles on bureaucracy and cost–benefit analysis. *Id.*

6. *See, e.g.*, CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 128–30 (1997) (detailing the pros and cons of cost–benefit analysis and urging greater use of cost–benefit analysis).

7. *See* Greg Burns, *Left Frets over Regulatory Czar*, CHI. TRIB., Jan. 23, 2009, at 23 (discussing Sunstein's statements regarding deregulation and cost–benefit analysis and noting that "[t]o some, Obama's BFF [best friend forever] looks like a conservative in progressive garb").

8. 155 CONG. REC. S5699 (daily ed. May 20, 2009).

9. Senator Saxby Chambliss (R-Ga.) placed the first hold on the Sunstein nomination. *See* Alexander Bolton, *Chambliss Blocks Regulatory Pick over Animal Lawsuits*, HILL, June 28, 2009, http://thehill.com/leading-the-news/chambliss-blocks-regulatory-nominee-over-animal-lawsuits-2009-06-28.html. Senator Chambliss removed the hold, but a second hold was placed on the nomination by Senator John Cornyn (R-Tex.) on July 22, 2009.

Senate Majority Leader Harry Reid filed for cloture,[10] which was successfully invoked by a 63–35 vote.[11] Sunstein's nomination was confirmed by a vote of 57–40 on September 10, 2009.[12]

Another interesting development regarding the continued survival of cost–benefit analysis came in the *Entergy Corp. v. Riverkeeper, Inc.* decision on April 1, 2009,[13] when the Supreme Court overturned a Second Circuit Court of Appeals decision,[14] which held that § 326(b) of the Clean Water Act[15] did not allow the Environmental Protection Agency (EPA) to base performance standards on cost–benefit analysis.[16] That opinion was written by Obama Supreme Court nominee and now Associate Justice Sonia Sotomayor.[17] While not receiving the attention of some of her other opinions during her nomination proceedings, Justice Sotomayor's decision in *Riverkeeper* should be examined to provide regulatory practitioners insight as to her views on the authority of regulatory agencies to base decisions on cost–benefit analysis.

This Recent Development reports on the likely future of regulatory review and cost–benefit analysis under the Obama Administration. Section I describes the evolution of the presidential regulatory review process.

See Kelley Beaucar Vlahos, *Obama Regulatory Czar's Confirmation Held Up by Hunting Rights Proponent*, FOXNEWS.COM, July 22, 2009, http://www.foxnews.com/politics/2009/07/21/obama-regulatory-czars-confirmation-held-hunting-rights-proponent/. Sunstein has mused in his writings about the possibility of humans representing animals in court to assert rights under state animal-protection statutes. *See* Cass R. Sunstein, *Can Animals Sue?*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 252 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004). At his confirmation hearing, Sunstein assured Senator Susan Collins (R-Me.) that as Administrator of the Office of Information and Regulatory Affairs (OIRA), he would have no role to play in such matters. *See* Video: Hearing to Consider the Nomination of Cass R. Sunstein to Be Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget Before the S. Comm. on Homeland Security and Governmental Affairs (May 12, 2009), http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&HearingID=bd4574c9-9ca1-4f5c-9f0e-3618ee203a20 [hereinafter Hearing Video].

10. 155 CONG. REC. S9095–96 (daily ed. Aug. 7, 2009); Press Release, Senate Comm. on Homeland Sec. and Governmental Affairs, Lieberman, Collins Hail Senate Confirmation of Four Nominees (Aug. 7, 2009), http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.MajorityNews&ContentRecord_id=f664841c-5056-8059-76da-b7133b9a633b. Under the cloture (closure of debate) rule, a nomination or other matter can be brought to a vote, despite a hold or filibuster, if sixty members vote in favor of cloture. *See* ROGER H. DAVIDSON, WALTER J. OLESZEK & FRANCES E. LEE, CONGRESS AND ITS MEMBERS 182 (12th ed. 2010).

11. 155 CONG. REC. S9172–73 (daily ed. Sept. 9, 2009).

12. 155 CONG. REC. S9233 (daily ed. Sept. 10, 2009).

13. 129 S. Ct. 1498 (2009).

14. Riverkeeper, Inc. v. EPA, 475 F.3d 83, 98–99 (2d Cir. 2007).

15. 33 U.S.C. § 1326(b) (2006).

16. *See Entergy Corp.*, 129 S. Ct. at 1510 (holding that the EPA impermissibly relied on cost–benefit analysis in setting national performance review standards).

17. *See* Charlie Savage, *Sotomayor, After a Pair of Oaths, Officially Joins the Nation's Highest Court*, N.Y. TIMES, Aug. 9, 2009, at A12.

Section II examines the efforts to construct a new Obama regulatory review executive order, including the views of the man President Obama has chosen to be his regulatory czar and those of the woman he has chosen to be his first Supreme Court nominee. In light of these indicators, this Recent Development concludes that presidential regulatory review and cost–benefit analysis will continue to play a major role in the Obama Administration, as it has under every president since Ronald Reagan. However, detractors of cost–benefit analysis need not presume that this practice will inevitably favor industry or that environmental and humanitarian concerns will not be sufficiently considered. Nor should industry representatives presume that some reforms to the current procedures will inevitably lead to runaway regulatory costs and irrational bureaucratic decisionmaking. The record suggests that the Obama Administration will take a pragmatic approach to regulation that will allow for political accountability and be reflective of the true value of regulation to society—in other words, cost–benefit analysis for everyone.[18]

I. THE EVOLUTION OF PRESIDENTIAL REGULATORY REVIEW

For much of the history of federal regulatory agencies, it was believed that regulation should be insulated from political influence.[19] Scholars and politicians alike argued that agency experts should be allowed to base decisions on technical, objective data, unimpeded by "irrelevant" political considerations.[20] But this "technocratic theory" of regulation has been described as "gravely flawed."[21] The decisions that agency personnel face every day are inherently political. Therefore, bureaucrats, who have no electoral accountability but can be motivated by promotions, turf building, and maintenance of the status quo, are making decisions that rightfully belong to political representatives.[22] Political accountability, under this

18. *See* Cass R. Sunstein, *Is Cost–Benefit Analysis for Everyone?*, 53 ADMIN. L. REV. 299, 299–300 (2001) (noting that recent presidential administrations have moved toward making cost–benefit analysis the basis for all decisions).

19. *See* Terry M. Moe, *The Politicized Presidency*, *in* THE NEW DIRECTION IN AMERICAN POLITICS, 235–39 (John E. Chubb & Paul Peterson eds., 1985) (discussing arguments against presidential regulatory review based on the perceived value of bureaucratic "neutral competence"); *see also* Richard W. Waterman, Amelia Rouse & Robert Wright, *The Venues of Influence: A New Theory of Political Control of the Bureaucracy*, 8 J. PUB. ADMIN. RES. & THEORY 13, 14 (1998) (noting the persistence of the neutral competence theory through the 1970s); Herbert Kaufman, *Emerging Conflicts in the Doctrines of Public Administration*, 50 AM. POL. SCI. REV. 1057, 1060–62 (1956) (providing a history of the role of neutral competence in public administration theory).

20. *See* Lloyd N. Cutler, *The Case for Presidential Intervention in Regulatory Rulemaking by the Executive Branch*, 56 TUL. L. REV. 830, 833–34 (1982) (noting the presumption that administrative policymaking is "a wholly empirical process").

21. *Id*. at 835.

22. *See* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND

view, must be brought into the process.

But introducing political accountability into the bureaucratic process introduces immediate conflict between the President and Congress as to the appropriate source of that political accountability.[23] What to the White House may seem like reasonable efforts to centralize, coordinate, and oversee agency action may be interpreted by Congress as inappropriate attempts to thwart statutorily mandated programs.

Presidents Nixon, Ford, and Carter all made some early attempts at controlling bureaucracy.[24] But a sea change occurred in 1981, when President Ronald Reagan issued Executive Order 12,291[25] and introduced the first mandatory review procedure for agency rulemaking. That executive order required all executive agencies to submit regulations to OIRA for review. The order required OIRA to review those regulations under a cost–benefit analysis, determine the extent to which the regulations accomplished the Administration's goals, and it prohibited agencies from publishing regulations without OIRA's approval.[26] These requirements set off policy and constitutional debates on the appropriate roles and constitutional powers of Congress and the President in the rulemaking process, a political firestorm over the value and impact of regulation on the public and industry, and accusations of procedural subterfuge.[27]

Despite this initial controversy, every president since Reagan has

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WHY THEY DO IT, at ix–x (1989) (stating that bureaucrats are eclipsing the power of elected officers and making decisions that maximize their "utility").

23. *See* Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J., 451, 451–52 (1979) (discussing the appropriate role of the President in regulatory decisionmaking by federal agencies).

24. President Nixon instituted a procedure under which OMB, with White House staff in attendance, would preside over meetings to resolve disagreements about regulations issued by the then newly established Environmental Protection Agency (EPA). *Id*. at 464–65. Critics referred to Nixon's OMB as "The Office of Meddling and Bumbling," a reference to OMB's growing tendency to interfere "in the internal management processes of departments and agencies." LARRY BERMAN, THE OFFICE OF MANAGEMENT AND BUDGET AND THE PRESIDENCY, 1921–1979, at ix (1979). President Ford issued executive orders requiring "inflation impact analysis" for specified agencies and rulemakings. CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 62 (1994). President Carter's Executive Order 12,044, entitled "Improving Government Regulations," established a regulatory council to coordinate the rulemaking activities of federal agencies. Exec. Order No. 12,044, 3 C.F.R. 152 (1979).

25. Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

26. *Id*.

27. *See* Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1062–63 (1986) (discussing the friction between the President and Congress due to the new regulatory review process); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1076, 1083 (1986) (exploring criticisms of the new review process and noting that the new executive order did not solve the ongoing tension between agency review requirements and presidential accountability).

adopted mandatory centralized review procedures. President George H.W. Bush continued the practice under Executive Order 12,291 and attempted to push the centralized review process further by setting up a council that would assist OIRA in determining ways in which rules could be crafted to better suit the preferences of the Administration.[28] President Clinton adopted his own centralized regulatory review process, issuing Executive Order 12,866.[29] While he instituted some changes to address criticisms faced by Presidents Reagan and Bush regarding OIRA's secrecy, President Clinton maintained the centralized review process and its requirement that agencies obtain OIRA approval before publication of rules.[30] President George W. Bush continued to operate under Clinton's executive order. During that Administration, OIRA was harshly criticized by public interest organizations, particularly environmental groups, who accused President Bush of using the review process to benefit industry and undermine congressional mandates.[31]

The history of regulatory review and cost–benefit analysis reveals that presidents view the federal bureaucracy as an entity over which they must gain a measure of control if they are to achieve the goals that they hope will help to ensure the policies and legacies they desire. What started with sporadic attempts to control agency policy grew into a systematic procedural mandate by President Reagan, an accepted institutional role for the presidency by the Clinton era, and a renewed battleground for influence during the George W. Bush Administration. With this legacy, we look to the future of regulatory review and cost–benefit analysis in the Obama Administration.

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28. Robert J. Duffy, *Divided Government and Institutional Combat: The Case of the Quayle Council on Competitiveness*, 28 POLITY 379, 383–84 (1996) (stating that the first Bush Administration undertook "the most ambitious effort to consolidate regulatory authority in the White House").

29. Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

30. *See* SHELLEY LYNNE TOMKIN, INSIDE OMB: POLITICS AND PROCESS IN THE PRESIDENT'S BUDGET OFFICE 256–57 (1998) (detailing how Executive Order 12,866 "retained centralized regulatory review responsibilities").

31. *See, e.g.*, ROBERT PERKS & GREGORY WETSTONE, NATURAL RES. DEF. COUNCIL, REWRITING THE RULES, YEAR-END REPORT 2002: THE BUSH ADMINISTRATION'S ASSAULT ON THE ENVIRONMENT, at v (2003) ("John Graham [OIRA Director] has routinely rejected agency actions that are fully consistent with environmental laws but do not adequately reflect his industry orientation and conservative ideology."); *see also* Douglas Jehl, *On Environmental Rules, Bush Sees a Balance, Critics a Threat*, N.Y. TIMES, Feb. 23, 2003, at A1; Dana Milbank, *Bush Averts Showdown with Congress: Senate Committee to Be Given Access to Documents on Environmental Policy*, WASH. POST, July 28, 2001, at A4.

II. THE OBAMA ADMINISTRATION AND REGULATORY REVIEW

A. President Obama's New Executive Order

President Obama's memorandum directing OMB to provide recommendations for a new executive order on regulatory review seemed to take into account every major criticism leveled against OIRA and the use of cost–benefit analysis in the last twenty-eight years. The President directed OMB to offer suggestions regarding "the relationship between OIRA and the agencies," and to

> provide guidance on disclosure and transparency; encourage public participation in agency regulatory processes; offer suggestions on the role of cost–benefit analysis; address the role of distributional considerations, fairness, and concern for the interests of future generations; identify methods of ensuring that regulatory review does not produce undue delay; clarify the role of the behavioral sciences in formulating regulatory policy; and identify the best tools for achieving public goals through the regulatory process.[32]

President Obama further directed OMB to act "in consultation with representatives of regulatory agencies, as appropriate, to produce within 100 days a set of recommendations for a new Executive Order on Federal regulatory review."[33]

Public comment was not sought until twenty-seven days later, on February 26, 2009.[34] The comments and attendance logs of meetings with representatives of government agencies and private groups are posted at the RegInfo.gov website.[35] The early postings reveal that the Administration sought out the views of certain individuals before inviting public comment.[36] A number of the comments "thank" an OMB staff member for contacting them, via e-mail, to seek their views.[37] Such private solicitation

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32. Regulatory Review: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 5,977 (Feb. 3, 2009).

33. *Id.*

34. *See* Federal Regulatory Review, 74 Fed. Reg. 8,819 (Feb. 26, 2009) (soliciting comments to assist OMB in improving "the process and principles governing regulation").

35. RegInfo.gov, Public Comments on OMB Recommendations for a New Executive Order on Regulatory Review, http://www.reginfo.gov/public/jsp/EO/fedRegReview/publicComments.jsp (last visited Jan. 20, 2010). RegInfo.gov is a website produced by the OMB and General Services Administration (GSA).

36. *See, e.g.*, Letter from Eric A. Posner, Kirkland & Ellis Professor of Law, Univ. of Chicago, to Jessica Hertz, Office of Mgmt. & Budget (Feb. 10, 2009), http://www.reginfo.gov/public/jsp/EO/fedRegReview/Eric_Posner.pdf [hereinafter Posner Letter]. The letter indicates that Hertz invited Posner's views via e-mail on February 5, 2009.

37. *See, e.g.*, Letter from Peter Strauss to Jessica Hertz, Office of Mgmt. & Budget (posted Mar. 4, 2009), http://www.reginfo.gov/public/jsp/EO/fedRegReview/Strauss_Comments.pdf; Letter from Susan Rose-Ackerman, Henry R. Luce Professor of Jurisprudence, Yale Law Sch., to Jessica Hertz, Office of Mgmt. & Budget (Mar. 5, 2009),

of views might be troubling if this were an agency rulemaking, which would be governed by ex parte rules forbidding some private contacts.[38] However, as OMB noted in its request for public comment, "Executive Orders are not subject to notice and comment procedures, and as a general rule, public comment is not formally sought before they are issued."[39] It appears that the Administration sought advice from leading scholars but did not seek comments from representatives of regulated industries.[40]

There are 183 postings at the RegInfo.gov site regarding a new executive order on regulatory review.[41] The postings do not include comments from the heads of federal executive departments and agencies to whom the initial memorandum was addressed.[42] Nine submissions are from academic sources who were personally invited to offer suggestions on the new executive order.[43] Eight postings indicate meetings between OMB and various groups and provide the names of attendees at these meetings.[44] While the groups represent a diverse array of interests, these diverse groups never actually met together in person.[45] For example, representatives of

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http://www.reginfo.gov/public/jsp/EO/fedRegReview/susan_rose-ackerman.pdf.

38. *See* Administrative Procedure Act, 5 U.S.C. § 557 (2006) (limiting the involvement of interested parties outside an agency in the rulemaking process)*;* Kenneth Culp Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 932, 941–42 (1980) (noting that administrative rulemaking is superior to judicial policymaking because agencies are better equipped to develop facts relevant to lawmaking).

39. Federal Regulatory Review, 74 Fed. Reg. 8,819 (Feb. 26, 2009).

40. OMB Watch, a well-known watchdog organization that advocates transparency and disfavors presidential influence over agency action, suggested that OMB seek public comment. OMB Watch seemingly was writing in response to the President's published memorandum and not at the special invitation of the Administration. *See* Responding to President Obama's Call for Recommendations to Improve Regulatory Review (Feb. 18, 2009), http://www.reginfo.gov/public/jsp/EO/fedRegReview/OMB_Watch.pdf. The Center for Progressive Reform (CPR) submitted comments stating that the Center was "aware that you [OMB] have invited some people with expertise in the area to give you comments on the not-yet-drafted Order." Letter from Rena Steinzor, President, Ctr. for Progressive Reform, to Peter Orszag, Dir., Office of Mgmt. & Budget (Feb. 20, 2009), http://www.reginfo.gov/public/jsp/EO/fedRegReview/PreliminaryCommentsonNewEO-Orszag.pdf.

41. *See* RegInfo.gov, *supra* note 35.

42. Two postings indicate meetings with officials from federal agencies: the EPA and the Small Business Administration. *See id.*

43. Three additional comment letters from academics were dated before the public was invited to comment; however, they do not indicate that they were personally invited to comment. Additional comment letters from academics are dated after the opening of the public comment period. *See id.*

44. These postings do not provide any information as to the topics discussed or the views of those in attendance. *See id.*

45. Groups meeting with OMB include (1) the "Public Interest Group Committee," which met with OMB twice and included professors such as David Vladeck of Georgetown University and David Michaels of George Washington University, environmental groups such as National Resources Defense Council and Earthjustice, and watchdog organizations such as OMB Watch and Public Citizen; (2) the "Business Group," which included the Chamber of Commerce and National Association of Manufacturers; (3) the National League

business interests met with OMB separately from representatives of public interest groups, and both met separately from labor organization representatives. As such, no debate of competing ideas and interests would have been included at the meetings.[46] Predictably, the comments from business interests emphasized the extent to which it is difficult to capture the true costs of regulation,[47] while the environmental and other public interest groups emphasized the difficulty in quantifying benefits.[48] Overall, commenters from across the spectrum emphasized the importance of transparency.[49]

Those indicating that they had been invited to comment are well-published academics from top-tier institutions. Several championed cost–benefit analysis and centralized review.[50] For example, one of these scholars, Eric A. Posner, noted that cost–benefit analysis "helps ensure that the executive branch devotes its scarce resources to correcting the worst problems at least cost."[51] The rest of those indicating that they had been invited to comment had harsh critiques of the application of centralized review and cost–benefit analysis by previous administrations. However,

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of Cities; (4) the "Labor Group," which included the AFL–CIO and United Auto Workers; (5) "Environmental Groups," which included the Environmental Defense Fund and Sierra Club; (6) the Small Business Administration; and (7) the EPA. *See id.*

46. Other sources of written comments include state officials, members of Congress, and private citizens. *See id.*

47. *See, e.g.*, Letter from William L. Kovacs, Vice President, Env't, Tech. & Regulatory Affairs, Chamber of Commerce of the United States of America, to Mabel Echols, Office of Mgmt. & Budget (Mar. 16, 2009), http://www.reginfo.gov/public/jsp/EO/fedRegReview/Chamber_of_Commerce_of_the_US_comments.pdf (noting that federal agencies calculate costs and benefits through use of *ex ante* studies which are "an inadequate form of economic modeling because they do not present the public with a reasonable and true account of the costs of regulatory impacts").

48. *See, e.g.*, Letter from Wesley Warren, Dir. of Programs, Natural Res. Def. Council, to Kevin Neyland, Acting Adm'r, Office of Info. & Regulatory Affairs (March 30, 2009) ("One of the most troubling aspects of cost–benefit analysis is not simply its tendency to misstate costs and benefits, but to systematically overstate the costs while understating the benefits.").

49. *See, e.g.*, Letter from Kirsten Stade, Program Manager, Integrity in Sci., and Ilene Ringel Heller, Senior Staff Attorney, Ctr. for Sci. in the Pub. Interest, to Mabel Echols, Records Mgmt. Ctr., Office of Info. & Regulatory Affairs (Mar. 19, 2009) ("[W]e believe the transparency provisions already contained in E.O. 12866 are of the utmost importance and should be strengthened."); Letter from Cindy L. Squires, Chief Counsel for Pub. Affairs and Dir. of Regulatory Affairs, Nat'l Marine Mfrs. Ass'n, to Peter Orszag, Dir., Office of Mgmt. & Budget (Mar. 16, 2009) ("Voluntary consensus standards that are developed and adopted through an open and transparent process can provide enormous efficiencies for agencies, industry and society and should be encouraged.").

50. The most supportive comments of cost–benefit analysis and strong centralized authority for OIRA were received separately from Eric Posner and Adrian Vermeule. *See* Posner Letter, *supra* note 36; Letter from Adrian Vermeule, John H. Watson, Jr. Professor of Law, Harvard Law Sch., to Jessica Hertz, Office of Mgmt. & Budget (Mar. 5, 2009), http://www.reginfo.gov/public/jsp/EO/fedRegReview/adrian_vermeule.pdf.

51. *See* Posner Letter, *supra* note 36.

none of those invited to comment called for abandoning the process, but rather they suggested reforms.[52] For example, while one scholar asserted that cost–benefit analysis and centralized review has, in practice, resulted in an antiregulatory bias and has provided "opportunities for undue presidential influence at the expense of agency expertise; and fail[ed] to take adequate account of the benefits of regulation or distributional concerns,"[53] she also called centralized review an "important mechanism to ensure presidential awareness and oversight of agency actions."[54] Some suggested reforms included requiring agencies to "quantify distributive impacts,"[55] achieving better coordination among agencies,[56] and using "prompt letters" to encourage agencies to move more quickly.[57]

The fact that the Obama Administration turned to academics, not industry, in seeking advice on regulatory review contrasts sharply with President George W. Bush's Administration, which was much more likely to invite the views of industry leaders regarding regulatory decisions.[58] The academics chosen also provide an interesting insight. Each of these professors is well published in the area of bureaucracy and their opinions are well-known among regulatory scholars. No professor advocates an

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52. Dr. Frank Ackerman is a scholar at the Stockholm Environment Institute-US Center at Tufts University and is strongly opposed to cost–benefit analysis. He submitted a comment that advocated ending the process and adopting his preferred alternatives, but he did not indicate whether he had been invited to comment. *See* Frank Ackerman, Stockholm Env't Inst.-US Ctr., Tufts Univ., Comments on the Role of Cost–Benefit Analysis in Regulatory Review (Feb. 24, 2009), http://www.reginfo.gov/public/jsp/EO/fedRegReview/Dr_Frank_Ackerman.pdf (arguing that conventional cost–benefit analysis "errs in its final stage of converting non-monetary information into pseudo-prices" and offering two "better" methods for regulatory evaluation); *see also* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 35, 40 (2004) (noting that there are built-in biases to cost–benefit analysis and that its methodology "disfavors protection of goods that, like health and environmental protection, are priceless").

53. *See* Letter from Gillian Metzger, Professor of Law, Columbia Univ. Law Sch., to Jessica Hertz, Office of Mgmt. & Budget (Feb. 10, 2009), http://www.reginfo.gov/public/jsp/EO/fedRegReview/OMB_Metzger.pdf.

54. *Id.*

55. Letter from Matthew D. Adler, Leon Meltzer Professor, Univ. of Pa. Law Sch. & James S. Carpentier, Visiting Professor, Columbia Univ. Law Sch., to Jessica Hertz, Office of Mgmt. & Budget (Feb. 16, 2009), http://www.reginfo.gov/public/jsp/EO/fedRegReview/Adler12866suggestions.pdf.

56. Letter from Jacob E. Gersen, Assistant Professor of Law, Univ. of Chi. Law Sch., & Anne Joseph O'Connell, Univ. of Cal. Berkley Sch. of Law, to Jessica Hertz, Office of Mgmt. & Budget (posted Feb. 27, 2009), http://www.reginfo.gov/public/jsp/EO/fedRegReview/Anne_Joseph_OConnell.pdf.

57. *Id.*

58. *See, e.g.*, Michael Abramowitz & Steven Mufson, *Papers Detail Industry's Role in Cheney's Energy Report*, WASH. POST, July 18, 2007, at A1 (describing former Vice President Cheney's efforts to meet with various interest groups, "most of them from energy-producing industries" as part of a task force to draft new national energy policy under the Bush Administration in 2001).

extreme position—either that cost–benefit analysis should be the determinative factor alone, or at the other end of the spectrum, that cost–benefit analysis be abandoned. The choice of advisors indicates that the Obama Administration will favor centralized regulatory review and a "mend it, don't end it" approach to cost–benefit analysis—a view that is shared by the Obama nominee to lead regulatory review, Cass Sunstein.[59]

B. President Obama's Nominee to Lead Regulatory Review

Certainly the most direct evidence of President Obama's plans for regulatory review is his appointment of Cass Sunstein to head OIRA. Sunstein has consistently favored presidential regulatory review and cost–benefit analysis of regulations. As a young lawyer,[60] Sunstein was in the Office of Legal Counsel during the drafting of the original mandate for presidential regulatory review, President Reagan's Executive Order 12,291.[61] Having served as a professor at both the University of Chicago Law School and Harvard Law School, Professor Sunstein's views are well documented in his many books and articles on bureaucracy and law.[62] He has staunchly defended cost–benefit analysis and urged rationality in regulation. Business interests initially called Sunstein "the most you can hope for" in a Democratic appointee to head OIRA.[63] All of this caused concern among some liberal interest groups and scholars.[64]

To the Senate Homeland Security and Governmental Affairs Committee, Professor Sunstein characterized himself as a pragmatist who would not be governed by ideological motives in making decisions regarding regulatory review.[65] His scholarship supports this assessment. As explained by

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59. *See* Cass R. Sunstein, *Your Money or Your Life*, NEW REPUBLIC, Mar. 15, 2004, at 29, *available at* http://www.tnr.com/story (reviewing and critiquing Frank Ackerman and Lisa Heinzerling's view that cost–benefit analysis should be abandoned).

60. Curriculum Vitae, Cass R. Sunstein, http://home.uchicago.edu/~csunstei/cv.html (last visited Jan. 20, 2010).

61. Cass Sunstein was an Attorney–Advisor in the Office of Legal Counsel, U.S. Department of Justice, in 1980–1981 when the Office drafted Executive Order 12,291 for President Reagan's signature on February 17, 1981. *See id.*; *see also* Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

62. *See, e.g.*, SUNSTEIN, *supra* note 6.

63. John D. McKinnon, *Businesses Encouraged by Nominee for Regulatory Czar*, WALL ST. J., May 13, 2009, at A4, *available at* http://online.wsj.com/article/SB124216908634512665.html (quoting William Kovacs, Vice President for Regulatory Affairs, U.S. Chamber of Commerce).

64. *See* Burns, *supra* note 7 ("Leaders of the orthodox left had been hoping for an appointee who would roll back [the] Bush legacy with a vengeance. Instead, they got Sunstein . . . .").

65. *See generally* U.S. Senate Comm. on Homeland Sec. and Governmental Affairs, Pre-hearing Questionnaire for the Nomination of Cass R. Sunstein to Be Administrator of the Office of Information and Regulatory Affairs,

Professor Sunstein, critics of cost–benefit analysis "do not sufficiently appreciate the risk that expensive regulation will actually hurt real people"[66] and that "[t]he costs of regulation are often borne not only by 'employers,' but also by consumers, whose prices increase, and by workers, who might find fewer and less remunerative jobs."[67] Sunstein feels that "[s]ince this is so, it is especially important to learn how much regulation costs and how much we're getting for it."[68] These are hardly words of war against industry. At the same time, Sunstein recognizes that regulators have not always been sufficiently reflective regarding the benefits of regulation, particularly in the area of human health benefits, and that regulators "should take account of all the potential benefits."[69] This pragmatic approach serves to reduce the burdens of inefficient regulations, while ensuring that justified regulations go forward.

Sunstein recognizes that cost–benefit analysis is not without its flaws. However, he has vigorously defended cost–benefit analysis against the leading alternatives: pollution prevention, the precautionary principle, and sustainable development.[70]

Sunstein dismisses "pollution prevention" in the absence of cost–benefit analysis as idealistic. The theory of pollution prevention seeks to prevent pollution from ever occurring in the first place. But Sunstein feels that the costs of this approach "dwarf the benefits."[71] To adhere to a true pollution-prevention policy, the government would need to eliminate production of cars, coal, and most industrial activity. As Sunstein explains, the pollution-prevention model leads to "ludicrous" results.[72]

He similarly dismisses "the precautionary principle" as "paralyzing."[73] Under this theory, regulators would seek to ensure that "impacts are reduced or prevented even before the threshold of risks is reached."[74] This

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http://www.ombwatch.org/files/regs/PDFs/Sunstein_questions.pdf [hereinafter Pre-hearing Questionnaire]. *See also* Press Release, OMB Watch, OMB Watch Statement on Cass Sunstein Confirmation Hearing (May 13, 2009), http://www.ombwatch.org/print/9989 (emphasizing that in his written responses and at his confirmation hearing, Sunstein promised to follow statutory direction and presidential policies and noted "the importance of the law in guiding both agencies' decisions and OIRA's review").

66. *See* Sunstein, *supra* note 59, at 30.

67. *Id.*

68. *Id*.

69. *Id*. at 29.

70. *See* Sunstein, *supra* note 18, at 304 (asserting that the argument for cost–benefit analysis is "strengthened by comparing it" against the alternatives).

71. *See id.* ("Sometimes pollution prevention might even cause health problems, if it leads to unsafe substitutes.").

72. *Id.*

73. *Id*. at 305 (arguing that the principle stands as an obstacle to regulation and nonregulation and to everything in between).

74. *See* Lothar Gündling, *The Status in International Law of the Principle of*

principle "requires action even if risks are not yet certain but only probable, or, even less, not excluded."[75] As Sunstein notes, this alternative would prevent regulation and nonregulation, as both action and inaction could result in some risks.[76]

As for "sustainable development," Sunstein explains that while this alternative champions a worthy goal, its inherent ambiguity provides little guidance in making regulatory choices. Sustainable development occurs "on a scale that does not exceed the carrying capacity of the biosphere."[77] Sunstein applauds the extent to which proponents of sustainable development bring attention to "the future consequences of current actions."[78] This goal works in the easy cases—if an activity will knowingly end the possibility of decent life on the planet, then that action should not be taken. But regulators face more complicated and nuanced decisions. If a regulatory action would increase sustainability but cause suffering in terms of costs, he would question the action's desirability.[79] Sustainability, Sunstein explains, is not at odds with cost–benefit analysis.[80] For Sunstein, cost–benefit analysis provides meaningful guidance to regulators who must decide how much should be done today to achieve the long-term goal of sustainability.[81]

Sunstein has addressed the criticisms against cost–benefit analysis. Most often, critics point to the fact that costs tend to be easier to quantify than benefits, such as improved human health or a cleaner environment, leading to a bias against regulatory action. Dr. Frank Ackerman of the Stockholm Environment Institute-US Center at Tufts University[82] and Liza Heinzerling,[83] a law professor at Georgetown, have called cost–benefit analysis "morally obtuse."[84] They claim that cost–benefit analysis inevitably favors powerful industry and leads to deregulation. They prefer

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Precautionary Action, 5 INT'L J. ESTUARINE & COASTAL L. 23, 26 (1990) (positing the precautionary principle as a more stringent form of preventive policy because it is "more than repair of damage or prevention of risks").

75. *Id.*

76. Sunstein, *supra* note 18, at 305.

77. *Id*. (quoting ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 1182 (3d ed. 2000)).

78. *See* Sunstein, *supra* note 18, at 305.

79. *Id* at 306.

80. *Id*.

81. *Id.* at 305–06.

82. Dr. Ackerman included these points in the comment he submitted regarding a new executive order on regulatory review. *See* Ackerman, *supra* note 52.

83. Liza Heinzerling has been appointed by Environmental Protection Agency (EPA) Administrator Lisa Jackson to be her chief advisor on climate change. *See* Posting of Dan Farber to Legal Planet, http://environmentallaw.wordpress.com/2009/01/26/lisa-heinzerling-to-epa (Jan. 26, 2009). This should make for interesting contacts between OIRA and EPA.

84. *See* Sunstein, *supra* note 59, at 27.

the precautionary principle, which they call a more "holistic evaluation"[85] that "ensure[s] fairness in the treatment of the current and future generations."[86] Sunstein argues that Professors Ackerman and Heinzerling suffer from an "anachronistic"[87] view of the regulatory world. In all instances, they view regulation as the means necessary to prevent "evildoers" from hurting people.[88] The reality is, Sunstein argues, that most environmental questions do not involve evildoers but "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."[89] Cost–benefit analysis allows for regulation that can address the costs and risks of such products, while recognizing their value to society. The potential shortcomings of cost–benefit analysis identified by critics like Ackerman and Heinzerling can be addressed methodologically, according to Sunstein.[90] Good cost–benefit analysis should, and can, take into account qualitative as well as quantitative consequences. The "numbers" do not replace full inquiry but rather are an informative part of the inquiry.[91] As Sunstein explained in his confirmation hearing, cost–benefit analysis need not be an "arithmetic straight jacket."[92]

The evidence indicates that Professor Sunstein will lead an OIRA that continues to adhere to cost–benefit principles where possible.[93] At the same time, it will not be a rigid application of that principle, but rather a "humanized"[94] application that respects the value of hard-to-quantify benefits.

C. President Obama's First Nominee to the Supreme Court

The nomination of Sonia Sotomayor to the Supreme Court led to close examination of her judicial record and controversy over some of her Second Circuit Court of Appeals opinions.[95] Most of the critical attention

85. *See* ACKERMAN & HEINZERLING, *supra* note 52, at 210–16.
86. *See* Sunstein, *supra* note 59, at 27.
87. *Id*. at 30.
88. *Id*. at 27.
89. *Id*. at 30.
90. *See* Sunstein, s*upra* note 18, at 303.
91. *Id.* at 314.
92. Pre-hearing Questionnaire, *supra* note 65, at 5.
93. At his confirmation hearing, Senator Susan Collins (R-Me.) asked Cass Sunstein whether he had been advising OIRA on the new Executive Order on regulatory review. Professor Sunstein indicated that he had provided his thoughts to OMB Director Peter Orszag. *See* Hearing Video, *supra* note 9.
94. *See* Pre-hearing Questionnaire, s*upra* note 65, at 14.
95. Robert Barnes & Eli Saslow, *Bias Case Looms Large for Nominee: Ruling on Firefighters' Lawsuit Raises Questions About Sotomayor's Philosophy*, WASH. POST, May 31, 2009, at A1 (noting that although Judge Sotomayor heard thousands of cases while on

went to her decision in the "reverse discrimination" case involving white firefighters in New Haven, Connecticut, recently overturned by the Supreme Court.[96] Going virtually unnoticed was Judge Sotomayor's opinion in *Riverkeeper, Inc. v. EPA*,[97] which held that an agency may not engage in cost–benefit analysis when promulgating regulations pursuant to § 316(b) of the Clean Water Act[98] because Congress did not expressly authorize the agency to do so. This decision, too, was reversed and remanded by the Supreme Court.[99] While Sotomayor's analysis in that case has been rejected, it provides insight into how she, now a Supreme Court Justice, views the very tool long championed by President Obama's regulatory czar. The Obama appointees may be working at cross-purposes on the issue of cost–benefit analysis.[100]

Riverkeeper involved national performance standards and variances that apply to existing power plants with cooling systems that extract water from a water source.[101] The EPA engaged in cost–benefit analysis in determining these standards, intending to protect aquatic organisms from being harmed or killed by cooling water intake structures.[102] The regulations established a mortality rate baseline and required power plants to reduce the number of fish and shellfish killed by specified percentages under that baseline.[103] The EPA explained that it chose this approach because it achieved close to the same benefits as more restrictive regulations "at less cost with fewer implementation problems."[104] Environmental groups challenged this approach, claiming that the Clean Water Act provided no authority for such cost–benefit analysis.[105]

The three-judge Second Circuit panel agreed with the environmental groups, finding that "cost–benefit analysis is not . . . supported by the language or purpose of the statute."[106] According to then-Judge Sotomayor's opinion, because § 316(b) calls for the best technology available it is "technology-driven" and the "[s]tatute therefore precludes

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the federal bench, "the early debate over her judicial philosophy . . . comes down to one paragraph").

96. *See* Ricci v. DeStefano, 530 F.3d 88 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658 (2009).

97. 475 F.3d 83 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1498 (2009).

98. 33 U.S.C. § 1326(b) (2006).

99. Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498 (2009).

100. Sunstein has asserted, favorably, that "[a] set of 'cost–benefit default rules' is now in place in federal administrative law." Sunstein, s*upra* note 18, at 300.

101. National Pollutant Discharge Elimination System—Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, 69 Fed. Reg. 41,576 (July 9, 2004) (to be codified in scattered sections at 40 C.F.R.).

102. *Id.* at 41,605.

103. *Id.* at 41,599.

104. *Id.* at 41,606.

105. *See* Riverkeeper, Inc. v. EPA, 475 F.3d 83 (2d Cir. 2007).

106. *Id*. at 99.

cost–benefit analysis."[107]

The opinion did not exclude all consideration of cost. Judge Sotomayor explained that when crafting "technology-forcing" regulations, "EPA must . . . ascertain whether the industry as a whole can reasonably bear the cost of the adoption of the technology, [while] bearing in mind the aspirational and technology-forcing character"[108] of the statute. Once that determination has been made, the EPA may then consider other factors, including "cost-effectiveness"[109] and choose "a less expensive technology that achieves essentially the same results as the benchmark."[110] But Judge Sotomayor's opinion insists that cost–benefit analysis is not permitted because "[w]hen Congress has intended that an agency engage in cost–benefit analysis, it has clearly indicated such intent on the face of the statute."[111]

The Supreme Court rejected this approach in *Entergy Corp. v. Riverkeeper, Inc*.[112] The Court, in a decision authored by Justice Scalia—who, like Sunstein, is a former administrative law professor at the University of Chicago—held that nothing about the term "best technology available" necessarily precludes cost–benefit analysis.[113] The term "best technology available" could mean the choice that produces the *most* of some good, as interpreted by Judge Sotomayor, but it just as reasonably could mean the choice that most *efficiently* produces some good, explained Justice Scalia. The agency is therefore free to adopt either interpretation and to use cost–benefit analysis in determining the "best technology available."[114] Justice Scalia thus rejected the notion that agencies may engage in cost–benefit analysis only where Congress expressly authorizes its use. Justice Scalia posited that "if silence here implies prohibition,"[115] then the agency could consider nothing when drafting its standards, because "§ 1326(b) is silent . . . with respect to . . . all potentially relevant factors."[116] For Justice Scalia, the absurdity of this outcome illustrates the failure of the argument.

In light of the Supreme Court's reversal and remand of the Second Circuit's decision, cost–benefit analysis survives as a tool of general

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107. *Id*.
108. *Id*. at 100.
109. *Id*.
110. *Id.*
111. *Id.* at 99 (citing American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 510 (1981)).
112. Entergy Corp. v. Riverkeeper, Inc. 129 S. Ct. 1498 (2009).
113. *Id*. at 1506.
114. *Id.*
115. *Id*. at 1508.
116. *Id*.

applicability for regulatory agencies, absent congressional prohibition. This outcome would surely cheer Professor Sunstein. Of course, where Congress specifically forbids use of cost–benefit analysis, an agency is bound by that directive. In his written answers to questions from the Senate, Sunstein stated that "cost–benefit analysis should be subordinate to the law."[117]

Riverkeeper suggests that Justice Sotomayor and Professor Sunstein have sharply contrasting views of the value and meaning of cost–benefit analysis. Judging from her Second Circuit opinion in *Riverkeeper*, Justice Sotomayor presumes cost–benefit analysis to be the very "arithmetic straight jacket" that Professor Sunstein insists it is not.[118] In her view, cost–benefit analysis cannot be consistent with a determination of the best technology available because "best technology" and "best net benefits" are opposing concepts under her analysis.[119] If Justice Sotomayor's view were to prevail, agencies would be allowed to engage in cost–benefit analysis only when specifically authorized by Congress.[120] By contrast, Professor Sunstein believes "there should be a firm rule in favor of engaging in CBA [cost–benefit analysis], and a presumption in favor of making CBA the basis for decision."[121] Professor Sunstein considers there to be "[a] set of 'cost–benefit default rules' . . . in place in federal administrative law."[122] In this instance, the Obama appointee to lead regulatory review holds views closer to those of Justice Scalia than to the views of Justice Sotomayor,

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117. *See* Pre-hearing Questionnaire, *supra* note 65, at 14.

118. Sunstein has stated that cost–benefit analysis should be "a tool meant to inform decisions" and should be based on sound science and economics. *Id.* at 5. Then-Judge Sotomayor, by contrast, stated that because under the statute in question "facilities must adopt the *best* technology available . . . cost–benefit analysis cannot be justified." Riverkeeper, Inc. v. EPA, 475 F.3d 83, 98–99 (2d Cir. 2007). This statement indicates that to her cost–benefit analysis inherently precludes finding the *best* technology available.

119. *Riverkeeper*, 475 F.3d at 98.

120. During the confirmation hearings, Senator Arlen Specter (D-Pa.) asked Judge Sotomayor a question about *Riverkeeper*. Senator Specter, noting that the case would have implications for "matters now being considered by Congress on climate control and global warming," asked the nominee, "Can we expect you to stand by your interpretation of the Clean Water Act when, if confirmed, you get to the Supreme Court and can make that kind of a judgment because you're not bound by precedent?" Then-Judge Sotomayor replied, "Well, I am bound by precedent to the extent that all precedent is entitled to . . . respect under the doctrine of stare decisis. And to the extent that the Supreme Court has addressed this issue of cost–benefit and its permissibility under the Clean Water Act, that's the holding I would apply to any new case that came and the framework [is] the framework I would employ to new cases." Transcript, *Sotomayor Confirmation Hearings, Day 4*, N.Y. TIMES, July 16, 2009, http://www.nytimes.com/2009/07/16/us/politics/16confirm-text.html?pagewanted=all#specter.

121. *See* Sunstein, *supra* note 18, at 300. However, Sunstein, as discussed, believes reliance on cost–benefit analysis must be subordinate to law. *See* Pre-hearing Questionnaire, *supra* note 65, at 14.

122. *See* Sunstein, *supra* note 18, at 300.

President Obama's first appointee to the Supreme Court.[123]

CONCLUSION

This review reveals that centralized regulatory review and cost–benefit analysis are here to stay during the Obama Administration.[124] While a source of concern for some,[125] presidential influence has benefits both for notions of democratic accountability and the administration of public policy. As the only democratically elected official with a national constituency, the President has the opportunity to bring a uniquely useful role to the bureaucratic process. Regulatory review allows the President to bring a unique perspective and positive contributions to the regulatory process. As long as OIRA, the President's agent, is working to implement the preferences of the duly elected President, then democracy continues to be served in an even more effective manner. This process, provided that it respects Congress's important constitutional role and the statutory requirements of public participation, can help safeguard regulated entities and the general public from the deleterious effects of ineffective regulation while still providing the public a meaningful role in determining regulatory policy.

With the appointment of Professor Sunstein, the President has selected a regulatory reviewer who has eloquently explained the virtues of cost–benefit analysis. He argues that costs matter and rejects an "end it, don't mend it"[126] approach to address criticisms of its application in the past. As practiced by the Obama Administration, Sunstein asserts, cost–benefit analysis will take account of qualitative as well as quantitative considerations, save lives as well as money, and increase governmental transparency. In short, he believes, "we will do a lot better, morally as well as practically, with it than without it."[127]

President Obama's actions and choices thus far signal an energetic

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123. Interestingly, during her confirmation proceedings, Justice Sotomayor revealed a preference for cost–benefit analysis in making her own decisions. When asked whether she would make use of the "cert pool," in which all of the Justices' clerks (except the clerks for Justices Stevens and Alito) draft joint memoranda recommending which cases should be granted certiorari, the nominee replied that "Senator, my approach would probably be similar to Justice Alito which is, experience the process . . . consider its costs and benefits; and then decide whether to try the alternative or not, and figure out what I think works best in terms of the functioning of my chambers and the court." Transcript, *supra* note 120.

124. At a debate during the 2008 presidential campaign, Cass Sunstein asserted of then-candidate Barack Obama, "He's a fan of cost–benefit analysis." *See* Burns, *supra* note 7.

125. *See, e.g.*, Sidney A. Shapiro & Christopher H. Schroeder, *Beyond Cost–Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENVTL. L. REV. 433, 435 (2008) (describing cost–benefit analysis as "unnecessary and irrelevant" and lacking "sufficient accuracy").

126. *See* Sunstein, *supra* note 59, at 29.

127. *Id.* at 30.

approach to controlling bureaucracy and minimizing the deleterious effects of poorly conceived regulation. His selection of Cass Sunstein should encourage those across the political spectrum who favor a rational and analytical approach to regulatory choices, rather than choices based on ideological motivations or unattainable ideals. Perhaps Professor Sunstein's most important task as he moves from academia to politics will be to educate citizens, interest groups, and officials throughout government on cost–benefit analysis *properly understood.*