

UNFUNDED MANDATES, REGULATORY BURDENS AND THE ROLE OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS

HEARING

BEFORE THE

SUBCOMMITTEE ON TECHNOLOGY, INFORMATION
POLICY, INTERGOVERNMENTAL RELATIONS AND
PROCUREMENT REFORM

OF THE

COMMITTEE ON OVERSIGHT
AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

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UNFUNDED MANDATES, REGULATORY BURDENS AND THE ROLE OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS

WEDNESDAY, MAY 25, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON TECHNOLOGY, INFORMATION POLICY,
INTERGOVERNMENTAL RELATIONS AND PROCUREMENT
REFORM,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2154, Rayburn House Office Building, Hon. James Lankford (chairman of the subcommittee) presiding.

Present: Representatives Lankford, Kelly, Chaffetz, Labrador, and Connolly.

Also present: Representatives Issa and Cummings.

Staff present: Sharon Casey, senior assistant clerk; Adam P. Fromm, director of Member liaison and floor operations; Ryan Little, manager of floor operations; Justin LoFranco, press assistant; Kristina M. Moore, senior counsel; Kristin L. Nelson, professional staff member; Laura L. Rush, deputy chief clerk; Becca Watkins, deputy press secretary; Peter Warren, policy director; Jeff Wease, deputy CIO; Ronald Allen, minority staff assistant; Krista Boyd, minority counsel; Jaron Bourke, minority director of administration; Lucinda Lessley, minority policy director; and Adam Miles, minority professional staff member.

Mr. LANKFORD. Good morning. The Unfunded Mandates, Regulatory Burdens and the Role of the Office of Information and Regulatory Affairs hearing will come to order this morning.

The Oversight Committee mission statement, we begin every single one of our meetings with it. We exist to secure two fundamental principles: first, Americans have the right to know that the money Washington takes from them is well spent; second, Americans deserve an efficient, effective government that works for them. Our duty on the Oversight and Government Reform Committee is to protect these rights.

Our solemn responsibility is to hold government accountable to taxpayers because taxpayers do have the right to know what they get from their government. We will work tirelessly in partnership with citizen watchdogs to deliver the facts to the American people and bring genuine reform to the Federal bureaucracy. This is the mission of the Oversight and Government Reform Committee.

Specifically, today we are dealing with the Unfunded Mandates Reform Act of 1995 [UMRA]. It was to set the Federal mandates on State, local, and tribal governments and the private sector by shedding light on the expected economic impact of pending statutes and regulations. Under UMRA, each agency is to assess the effect of each type of non-Federal entity regulatory actions it plans to take.

UMRA was to help inform Congress of the potential burden of laws and regulatory actions might impose so that those could be weighed against the potential benefits. But in the subcommittee's two prior hearings on UMRA, we heard from representatives of State and local governments and the private sector that UMRA is not identifying all of the unfunded mandates being imposed on them and it does not always capture the full cost of those mandates that it does identify.

In fact, in the past 10 years, only four rules have been classified as constituting unfunded mandates in State, local and tribal governments under UMRA. Further, only 13 of 66 major rules issued in 2010 were classified as unfunded mandates; only 1 of the 13 was identified as intergovernmental mandate.

I have two different slides I want to be able to show on that one. The first one deals with just the number of economically significant rules in the pipeline. You will see that has continued to grow over the years. And the second one gives us a snapshot of the major economically significant regulations from 2006 to 2010.

In the purple there, you will see those are regulations subject to UMRA review, that very small little part; the red there is major regulations reviewed by OIRA; and in the green there major regulations that have been issued as a whole. So obviously we have several that are slipping through the mix here, that are not being evaluated by UMRA.

While I appreciate President Obama's recognition of the burdens the Federal Government puts on State, local, and tribal governments in his Presidential Memorandum on Administrative Flexibility, Lower Costs and Better Results for State, Local, and Tribal Governments, this is not a substitute for legislation to ensure the burdens placed on the agenda, these are fully recognized and taken into account.

As the charts that we just looked at show, when you look at the number of major regulations in the pipeline and those reviewed by OIRA, you see a rising trend of major regulations from the Federal Government. This is one recent indication that the UMRA statute is failing to live up to its promise of reducing unfunded mandates.

It is time to look at closing some of UMRA's loopholes, exemptions, and exceptions that this subcommittee has heard about from its previous two hearings on unfunded mandates. We need to examine whether cost estimates under UMRA are being accurately reflected. UMRA only captures direct costs or expenditures, not the total effects on the economy, as required under Executive Order 12866. UMRA thresholds are based on adjustments for inflation. It is my understanding that is not the case for Executive Order 12866. UMRA also does not take into account the need to prepare for an unfunded mandate by a local government or private business.

During the first UMRA hearing in February, the subcommittee heard testimony from the Government Accountability Office, local government representatives, and the former OIRA Administrator, Susan Dudley. Ms. Dudley, who served as the OIRA Administrator from 2007 to 2009, provided expertise and insight into the process by which the Federal Government imposes unfunded mandates on non-Federal parties. She also described widely recognized flaws that exist within the current UMRA statute and suggested multiple remedies and potential legislative solutions to address the concerns addressed by many affected parties.

At the subcommittee's second hearing on UMRA in March, the subcommittee heard from witnesses representing State governments and the private sector. During the hearing, the subcommittee heard from the chief economist of the Small Business Entrepreneur Council regarding how unfunded mandates and regulations continually stifle private sector growth and economic expansion.

I am glad to see that President Obama shares the same concerns that Mr. Keating articulated to the subcommittee at our March hearing. I welcome his Executive Order 13563 and the public statements on regulations. Indeed, the President has stated that sometimes rules have just gotten out of balance, placing unreasonable burdens on businesses, burdens that have stifled innovation and have had a chilling effect on growth and jobs.

Further, President Obama made it crystal clear to the American people in a Presidential Memorandum that my administration is firmly committed to eliminating excessive and unjustified burdens on small businesses, and to ensure that regulations are designed with careful consideration of their effects, including their cumulative effects on small businesses.

In light of this backdrop, it seems very appropriate that we look at reforming UMRA, not only in the context of State, local and tribal governments, but also with the private sector as well. Many regulations that are on tap will not be covered by UMRA in its current form or, for that matter, in Executive Order 12866.

For example, the U.S. Chamber of Commerce estimates the Dodd-Frank Wall Street Reform Act and Consumer Protection Act, signed into law by the President, contains 259 unmandated rulemakings, 188 suggested rulemakings, 63 reports, and 59 studies. Most of these rules, those not issued by the Treasury Department, will be issued through independent regulatory agencies such as the SEC, Commodities Future Trading Commission, FDIC, Federal Reserve, and the newly created CFPB, which are exempt from the requirements of UMRA, as well as Executive Orders 12866 and 13563. All these new rulemakings create potential for the issuance of more unchecked, unfunded mandates.

Indeed, in light of the Presidents' recent statements, it is curious that a recent report by George Washington University Regulatory Studies Center and the Weidenbaum Center at Washington University in St. Louis finds that a number of staff employed on regulatory matters within the Federal Government is on schedule to grow at a rate of about 10,000 new regulatory employees per year in 2011 and 2012. The number of full-time regulatory employees is expected to reach an all-time high of 291,676 in 2012. The authors

of the report, which include former OIRA Administrator Susan Dudley, believe this data offers useful information on the composition and evolution of Federal regulation over the past 52 years and serves as a barometer of future regulatory activity.

I have stated before, and will state again with this hearing, like other hearings, this is not an attack on the current administration. Many of the issues we will deal with today did not originate during this administration, and the solutions we propose will extend well beyond this administration. It is essential that we look at the bigger picture and the long-term effects of our Federal involvement in State, local, and tribal governments and private business operations. But it is also essential that each agency is evaluated on their results, not just their rhetoric.

Today's hearing is designed to be another teachable moment to discover the facts to assist us in developing solutions. It is the role and responsibility of this subcommittee and Congress as a whole to ensure this administration is regulating in the best interest of the American people. I am here to make certain in this modern regulatory environment the Federal Government does not overstep its clearly defined constitutional boundaries and well-intentioned bureaucrats don't impose their preferences on State, local, and tribal governments and private industry. It is my hope that we can also discern issues that must be addressed in a legislative solution to our unfunded mandates.

I would like to now recognize the distinguished ranking member, Mr. Cummings, for an opening statement.

[The prepared statement of Hon. James Lankford follows:]

- The purpose of the Unfunded Mandates Reform Act of 1995 – or UMRA -- was to limit federal mandates on state, local and tribal governments and the private sector by shedding light on the expected economic impact of pending statutes and regulations. Under UMRA, each agency is to assess the effect on each type of non-federal entity of regulatory actions it plans to take.
- UMRA was to help inform Congress of the potential burden laws and regulatory actions might impose, so that those could be weighed against the potential benefits.
- But, In this subcommittee's two prior hearings on UMRA, we heard from representatives of state and local governments, and the private sector that UMRA is not identifying all of the unfunded mandates being imposed on them. And it does not always capture the full cost of the mandates it does identify.
- In fact, in the past 10 years, only 4 rules have been classified as constituting unfunded mandates on state, local, and/or tribal governments, under UMRA.
- Further, only 13 of 66 major rules issued in 2010 were classified as unfunded mandates. Only 1 of the 13 was identified as an intergovernmental mandate.
- While I appreciate President Obama's recognition of the burdens that the federal government puts on state, local, and tribal governments in his Presidential Memorandum on "Administrative Flexibility, Lower Costs, and Better Results for State, Local, and Tribal Governments," this is not a substitute for legislation to ensure the burdens placed on these entities are fully recognized and taken into account.
- As the charts show, when you look at the number of major regulations issued, major regulations in the pipeline, or major regulations reviewed by OIRA, you see a rising trend of major regulations from the Federal government.
- This is one recent indication that the UMRA statute is failing to live up to its promise of reducing unfunded mandates.
- It's time to look at closing some of UMRA's loopholes, exemptions and exceptions that this Subcommittee heard about during its first two hearings on unfunded mandates.

- And we need to examine whether cost estimates under UMRA are being accurately reflected.
- UMRA only captures direct costs or expenditures, not the total effects on the economy, as is required under Executive Order 12866.
- URMA thresholds are based on adjustments for inflation, but it is my understanding that is not the case for Executive Order 12866.
- UMRA also does not take into account the time needed to prepare for an unfunded mandate by a local government or private business.
- During the first UMRA hearing in February, the Subcommittee heard testimony from the Government Accountability Office, local government representatives and the former OIRA Administrator, Susan Dudley.
- Ms. Dudley, who served as the OIRA Administrator from 2007 to 2009, provided expertise and insight into the process by which the federal government imposes unfunded mandates upon nonfederal parties. She also described widely recognized flaws that exist with the current UMRA statute, and suggested multiple remedies and potential legislative solutions to address the concerns shared by many affected parties.
- At the Subcommittee's second hearing on UMRA in March, the Subcommittee heard from witnesses representing state governments and the private sector. During the hearing, the Subcommittee heard from the Chief Economist at the Small Business & Entrepreneurship Council regarding how unfunded mandates and regulations continually stifle private sector growth and economic expansion.
- I am glad to see that it appears President Obama shares the same concerns that Mr. Keating articulated to the Subcommittee at our March hearing. I welcome his Executive Order 13563 and his public statements on regulations.
- Indeed, the President has stated, "Sometimes [rules] have gotten out of balance, placing unreasonable burdens on business—burdens that have stifled innovation and have had a chilling effect on growth and jobs."

- Further, President Obama made it crystal clear to the American people in a Presidential Memoranda, that “My Administration is firmly committed to eliminating excessive and unjustified burdens on small businesses, and to ensuring that regulations are designed with careful consideration of their effects, including their cumulative effects, on small businesses.”
- In light of this back drop, it seems very appropriate that we would look at reforming UMRA, not only in the context of the state, local and tribal governments, but with the private sector as well.
- Many regulations are on tap that will not be covered under UMRA in its current form, or for that matter Executive Order 12866.
- For example, the U.S. Chamber of Commerce estimates that the Dodd-Frank Wall Street Reform and Consumer Protection Act, signed into law by the President, contains 259 mandated rulemakings, 188 suggested rulemakings, 63 reports, and 59 studies.
- Most of these rules – those not issued by the Treasury Department – will be issued through independent regulatory agencies (i.e. SEC, Commodity Futures Trading Commission, FDIC, Federal Reserve, and the newly created CFPB), which are exempt from the requirements of UMRA, as well as Executive Orders 12866 and 13563.
- All of these new rulemakings create potential for the issuance of more unchecked unfunded mandates.
- Indeed, in light of the President’s recent statements, it is curious that a recent report by the George Washington University Regulatory Studies Center and the Weidenbaum Center at Washington University in St. Louis finds that the number of staff employed on regulatory matters within the federal government is on schedule to grow at a rate of about 10,000 new regulatory employees per year in 2011 and 2012.
- The number of full time regulatory employees is expected to reach an all-time high of 291,676 in 2012.
- The authors of the report, which include former OIRA Administrator Susan

Dudley, believe this data “offers useful information on the composition and evolution of federal regulation over the last 52 years, and serve as a barometer of future regulatory activity.”

- I have stated before and will state again, this hearing, like our other hearings, is not an attack on the current Administration. Many of the issues we will deal with today did not originate during this Administration and the solutions we propose will extend well beyond this Administration. It is essential that we look at the bigger picture and the long term effects of our federal involvement in state, local and tribal governments and private business operation. But, it is also essential that each agency is evaluated on their results, not just their rhetoric.

- Today’s hearing is designed to be another teachable moment to discover the facts and to assist us in developing solutions.

- It is the role and responsibility of this Subcommittee and Congress as a whole, to ensure this Administration is regulating in the best interest of the American people.

- I am here to make certain that in this modern regulatory environment, the federal government does not overstep its clearly defined Constitutional boundaries and well intentioned bureaucrats don’t impose their preferences on state, local and tribal governments, and private industry. It is my hope that we could also discern issues that must be addressed in a legislative solution to our unfunded mandates.

Mr. CUMMINGS. Thank you very much, Mr. Chairman. I want to thank you and our ranking member, Mr. Connolly, for this hearing.

This is the third hearing this subcommittee has held on the Unfunded Mandates Reform Act. Having heard from State, local, and tribal officials at previous hearings, I am grateful that Mr. Sunstein is here today to provide us with the administration's perspective on this important issue.

The original purpose of UMRA, which was passed in 1995, was to make Congress more accountable when imposing new Federal mandates on State, local, and tribal governments. As a former member of the Maryland House of Delegates, I am sensitive to the budgetary pressures facing State and local governments. It is important for Congress and agencies to carefully evaluate and balance the potential impact before imposing new requirements on small governments.

However, this is also the fourth hearing in which this subcommittee has stressed only the burdens imposed by regulations. There is a common assumption in the titles and the focus of these hearings that regulations are burdensome and hinder economic recovery. Yet we know that regulations are necessary to protect the health, welfare, and safety of the American public, of our constituents, by the way. As Mr. Sunstein has often stated, we also know that some regulations create jobs.

As I have said in the past, I fully support a comprehensive review of regulations to ensure that they are effective and efficient. That must be a very balanced review. But a review cannot be one-sided. It is important that we base any review on the facts rather than the rhetoric. Here are the facts:

In 2011, the Office of Information and Regulatory Affairs estimates that the annual benefits of major Federal regulations issued between 2000 and 2010 are between \$136 billion and \$651 billion. In contrast, the estimated annual costs are between \$44 billion and \$62 billion. In other words, the economic benefits of regulations are up to 10 times the costs.

This conclusion is not limited to the Obama administration. In 2008, the Bush administration estimated that the annual benefits of regulations issued between 1997 and 2007 ranged from \$122 billion to \$656 billion, while the estimated annual costs range was from \$46 billion to \$54 billion.

According to both the Obama and Bush administrations, the benefits of these regulations greatly outweigh the costs.

In the context of UMRA, the reality is that State and local governments are often the direct beneficiaries of Federal regulation. We must ensure that industry addresses the costs they impose on society in the form of pollution, effective or deceptive products, and unsafe workplaces, again, to protect the American people, our constituents. This can and does save local governments from significant expenses they otherwise would have to bear themselves to protect the health and well-being of their citizens.

Administrator Sunstein, I look forward to your testimony today and I look forward to hearing more about your office's role in the regulatory process, its role in ensuring that Federal agencies are conducting a balanced review of existing regulations and Executive Order 13563, and your efforts to improve the cost-benefit analysis.

Finally, Mr. Chairman, I hope we can and I agree with you this must be a bipartisan effort. We must leave our political hats at the door. So I hope that we can take a fair and balanced view of regulations and that we can all work together to identify ways to help create jobs and support the work of the State and local governments, while making sure that Americans are able to live and work in safe and healthy communities.

I have often said, when I look at the worker and people that these regulations often protect, I respect those people who get up early in the morning and go to their jobs, looking forward to coming home to their families. I do not want a situation where we disregard important regulation or try to do away with important regulations that are needed to protect them. I want them to come home to their families and I do not want them to be shipped home to their families in a coffin. And I will say that over and over again because I have seen it so many times.

So I look forward to the testimony, and with that I yield back, and I want to thank the chairman for his courtesy.

Mr. LANKFORD. Absolutely. Thank you, Mr. Cummings, who is the ranking member of the full OGR Committee.

Now I would like to recognize Mr. Connolly, who is the ranking member of our subcommittee.

Mr. CONNOLLY. Thank you. Thank you, Mr. Chairman.

Welcome, Mr. Sunstein.

I appreciate, Mr. Chairman, your continued interest in this subject and I also hope we will have some subcommittee hearings in Technology and Procurement at some point in the near future, issues very dear to my home district.

For this hearing, it is appropriate we are hearing from the Director of the Office of Information and Regulatory Affairs, the arm of OMB which was used to propose agency regulations. During the previous administration, OIRA intervened to block proposed regulations of greenhouse gas pollution under the Clean Air Act amendment. The consequences of failing to prevent global warming could be severe.

Recently, the Director of the Climate Analysis Section of the National Center for Atmospheric Research stated given that global warming is unequivocal, the null hypothesis should be that all weather events are affected by global warming. According to the global insurance company Munich Re, the only plausible explanation for the rise in weather-related catastrophes is in fact climate change.

Unprecedented tornadoes killed hundreds of Americans recently in Missouri, Alabama, and my home State of Virginia, and I will include for the record a recent Washington Post article discussing the connection between climate change and extreme weather. Extreme drought rivaling even the dust bowl is threatening viability in agriculture in the southwest. The acidity of the ocean has increased 30 percent due to higher atmospheric carbon concentrations, threatening coastal cities from Florida to Australia. Sea levels are rising in the Atlantic and Chesapeake Bay, threatening critical infrastructure, including National Airport and Norfolk Naval Base.

As recent extreme weather has demonstrated, the devastation of climate change can reach biblical proportions. Meanwhile, oppo-

nents of regulation ignore both the benefits of regulation and the cost of failing to regulate when regulation is necessary. Empirical data repeatedly and consistently suggests that the benefits of Federal regulations outweigh the costs by considerable margins. The ranking member of the full committee just went through some of those statistics, but other examples exist as well.

For example, the vehicle efficiency standards enacted in the Clean Air Act will save consumers \$3,000 per vehicle by improving the average vehicle's efficiency by 30 percent. In aggregate, OMB says this regulation will produce \$12.4 billion in benefits for consumers for only \$3.7 billion in costs, a 4 to 1 ratio.

As this subcommittee contemplates changes to UMRA, we must also include an estimate of the benefits of new regulations to the private sector, as well as States and local governments. Based on the data, many of these regulations create significant private sector savings, and we should understand those so we do not delay meritorious regulations in the manner that the previous Bush administration blocked regulation, for example, of greenhouse emissions.

In addition to understanding the benefits, as well as the costs, of regulations, we need to do a better job understanding that new costs could be imposed, unfunded mandates could be imposed on State and local governments by curtailing Medicare, Medicaid, and Social Security, as some have suggested. For example, under the Ryan budget plan, passed on a strict party line vote, Federal Medicaid payments would be cut by 35 to 49 percent, or \$771 billion, over the next 10 years, putting enormous stress on States, localities, and families.

Medicaid primarily benefits children of poor parents, seniors in nursing homes, and disabled individuals. To illustrate how important Medicaid is to seniors in nursing homes, consider these examples from my district in Northern Virginia. Renaissance Gardens at Greenspring has 148 seniors, all of whom receive Medicaid. Fairfax Nursing Center has 200 residents, 134 of whom receive Medicaid; Leewood Health Center has 132 residents, 91 of whom receive Medicaid; the Iliff Nursing and Rehabilitation Center has 132 residents, 91 of whom receive Medicaid.

Based on data from the American Communities Survey, approximately 13½ percent of my constituents totally receive Medicaid. That is 132,000 residents of Fairfax and Prince William Counties alone.

The cruelty and political toxicity of Chairman Ryan's proposed privatization of Medicare has received a great deal of attention in the press, but the evisceration of Medicaid would have a similar negative effect on individuals, and especially unfunded mandates in State and local governments. If the Federal Government cuts Medicaid by 35 to 49 percent, who is going to foot the bill for nursing home costs? Do our colleagues propose to put seniors out on the street or do they expect local and State governments to pick up the tab and raise taxes to cover those costs?

Ultimately, slashing Medicaid is a shell game in which the House majority would shift costs to the States and localities and the families of America. The cruel proposal would create an unfunded mandate and, more troubling, return America to the era of the poor farm.

I think we need to look at that aspect of this subject as well, Mr. Chairman, and with that I yield back.
[The prepared statement of Hon. Gerald E. Connolly follows:]

Statement of Congressman Gerald E. Connolly

Subcommittee on Technology, Procurement, and Intergovernmental Relations

May 25th, 2011

Chairman Lankford, I appreciate your continued interest, though I hope we can also have some subcommittee hearings on technology and procurement issues at some point in the near future. For this hearing, it is appropriate we are hearing from the Director of the Office of Information and Regulatory Affairs (OIRA), the arm of OMB which reviews proposed agency regulations.

During the previous administration OIRA intervened to block proposed regulation of greenhouse gas pollution under the Clean Air Act. The consequences of failing to prevent global warming could be severe. The director of the Climate Analysis Section of the National Center for Atmospheric Research recently stated, "Given that global warming is unequivocal, the null hypothesis should be that all weather events are affected by global warming." According to the global insurance company Munich Re, "the only plausible explanation for the rise in weather-related catastrophes is climate change." Unprecedented tornadoes have killed hundreds of Americans in Missouri, Alabama, and Virginia, and I will include for the record a recent *Washington Post* article discussing the connection between climate change and extreme weather. Extreme drought, rivaling even the Dust Bowl drought, is threatening the viability of agriculture in Texas and Oklahoma. The acidity of the ocean has increased 30% due to higher atmospheric carbon concentrations, threatening coastal reefs from Florida to Australia. Sea levels are rising in the Atlantic and Chesapeake Bay, threatening critical infrastructure including National Airport and the Norfolk Naval Base. As recent extreme weather has demonstrated, the devastation of climate change can reach biblical proportions as a result of delayed or insufficient regulation. Meanwhile, opponents of regulation ignore both the benefits of regulation and the cost of failing to regulate where regulation is necessary.

Empirical data repeatedly and consistently suggests that the benefits of federal regulations generally far exceed the costs. The Office of Management and Budget noted that major federal regulations issued between 2000 and 2010 cost between \$44 and \$62 billion and produced \$136 to \$651 billion in benefits and cost savings. For example, the vehicle efficiency standards enacted under the Clean Air Act will save consumers \$3,000 per vehicle by improving the average vehicle's efficiency by 30%. In aggregate, OMB says this regulation will produce \$12.4 billion in benefits for only \$3.7 billion in costs, a 4-1 benefit to cost ratio, which has the added benefits of cleaner air and a more competitive domestic auto industry. As this subcommittee contemplates changes to UMRA, we must include an estimate of the benefits of new regulations, to the private sector as well as state and local governments. Based on the data, many of these regulations create significant private sector savings and we should understand those so we do not delay meritorious regulations in the manner that the Bush Administration OIRA blocked regulation of greenhouse gas pollution.

In addition to understanding the benefits as well as the costs of regulation, we need to do a better job understanding new costs that could be imposed on state and local governments by curtailing Medicare, Medicaid, or Social Security, as some Republicans have suggested. Under the Ryan budget passed by on a strict party line vote in the House, federal Medicaid payments would be cut by 35% to 49%, or \$771 billion, over the next ten years, putting enormous stress on states, localities, and families. Medicaid primarily benefits children of poor parents, seniors in nursing homes, and disabled individuals.

To illustrate how important Medicaid is to seniors in nursing homes, consider these examples from Northern Virginia: Renaissance Gardens at Greenspring has 148 seniors, all of whom receive Medicaid. The Fairfax Nursing Center has 200 residents, 134 of whom receive Medicaid. The Leewood Health Center has 132 residents, 91 of whom receive Medicaid. The Iliff Nursing and Rehabilitation Center has 121 residents, 110 of whom receive Medicaid. Based on data from the American Community Survey, approximately 13.5% of my constituents receive Medicaid, some 102,000 residents of Fairfax and Prince William counties. The cruelty and political toxicity of Chairman Ryan's proposal to privatize Medicare has received a great deal of attention in the press, but the evisceration of Medicaid would have a similar negative impact on individuals, states, and local governments. If the federal government cuts Medicaid by 35-49%, who is going to foot the bill for nursing home costs? Do our Republican colleagues propose to put seniors out on the street, or do they expect local and state governments to pick up the tab and raise taxes to cover the costs? Ultimately, slashing Medicaid is a shell game in which the House majority would shift costs to the states, localities, and families of America. This cruel proposal would create a new unfunded mandate and, more troubling, return America to the era of the poor farm.

In summary, Chairman Lankford, I look forward to a robust discussion about mandates, including regulations on the private sector. The data clearly suggests that this discussion must account for the benefits of regulation, not just the costs. In addition, we need to understand how radical changes to Medicare, Medicaid, and Social Security could create new unfunded mandates for states and local governments while impoverishing seniors in a manner not seen since the Gilded Age.

For the record:

A link between climate change and Joplin tornadoes? Never!

Washington Post, May 24, 2011
by Bill McKibben

Caution: It is vitally important not to make connections. When you see pictures of rubble like this week's shots from Joplin, Mo., you should not wonder: Is this somehow related to the tornado outbreak three weeks ago in Tuscaloosa, Ala., or the enormous outbreak a couple of weeks before that (which, together, comprised the most active April for tornadoes in U.S. history). No, that doesn't mean a thing.

It is far better to think of these as isolated, unpredictable, discrete events. It is not advisable to try to connect them in your mind with, say, the fires burning across Texas — fires that have burned more of

America at this point this year than any wildfires have in previous years. Texas, and adjoining parts of Oklahoma and New Mexico, are drier than they've ever been — the drought is worse than that of the Dust Bowl. But do not wonder if they're somehow connected.

If you did wonder, you see, you would also have to wonder about whether this year's record snowfalls and rainfalls across the Midwest — resulting in record flooding along the Mississippi — could somehow be related. And then you might find your thoughts wandering to, oh, global warming, and to the fact that climatologists have been predicting for years that as we flood the atmosphere with carbon we will also start both drying and flooding the planet, since warm air holds more water vapor than cold air.

It's far smarter to repeat to yourself the comforting mantra that no single weather event can ever be directly tied to climate change. There have been tornadoes before, and floods — that's the important thing. Just be careful to make sure you don't let yourself wonder why all these record-breaking events are happening in such proximity — that is, why there have been unprecedented megafloods in Australia, New Zealand and Pakistan in the past year. Why it's just now that the Arctic has melted for the first time in thousands of years. No, better to focus on the immediate casualties, watch the videotape from the store cameras as the shelves are blown over. Look at the news anchorman standing in his waders in the rising river as the water approaches his chest.

Because if you asked yourself what it meant that the Amazon has just come through its second hundred-year drought in the past five years, or that the pine forests across the western part of this continent have been obliterated by a beetle in the past decade — well, you might have to ask other questions. Such as: Should President Obama really just have opened a huge swath of Wyoming to new coal mining? Should Secretary of State Hillary Clinton sign a permit this summer allowing a huge new pipeline to carry oil from the tar sands of Alberta? You might also have to ask yourself: Do we have a bigger problem than \$4-a-gallon gasoline?

Better to join with the U.S. House of Representatives, which voted 240 to 184 this spring to defeat a resolution saying simply that "climate change is occurring, is caused largely by human activities, and poses significant risks for public health and welfare." Propose your own physics; ignore physics altogether. Just don't start asking yourself whether there might be some relation among last year's failed grain harvest from the Russian heat wave, and Queensland's failed grain harvest from its record flood, and France's and Germany's current drought-related crop failures, and the death of the winter wheat crop in Texas, and the inability of Midwestern farmers to get corn planted in their sodden fields. Surely the record food prices are just freak outliers, not signs of anything systemic.

It's very important to stay calm. If you got upset about any of this, you might forget how important it is not to disrupt the record profits of our fossil fuel companies. If worst ever did come to worst, it's reassuring to remember what the U.S. Chamber of Commerce told the Environmental Protection Agency in a recent filing: that there's no need to worry because "populations can acclimatize to warmer climates via a range of behavioral, physiological, and technological adaptations." I'm pretty sure that's what residents are telling themselves in Joplin today.

Mr. LANKFORD. Thank you, Mr. Connolly.

All Members will have 7 days to submit opening statements and other extraneous materials for the record.

We will now recognize our panel. We have one witness today, the Honorable Cass Sunstein. He is the Administrator of the Office of Information and Regulatory Affairs from the Office of Management and Budget. Glad to be able to have you here today.

Pursuant to committee rules, we do swear in all witnesses before they testify, so if you would please rise and raise your right hand. Thank you, sir.

[Witness sworn.]

Mr. LANKFORD. Let the record reflect the witness answered in the affirmative.

You may be seated. Thank you. In order to allow time for discussion, I am going to ask you to be able to limit your opening statement. We have already discussed it would be around 6 minutes long or so, and that is very appropriate. We are honored to be able to receive your statement as part of the record at this moment. Thank you.

STATEMENT OF CASS R. SUNSTEIN, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET

Mr. SUNSTEIN. Thank you, Mr. Chairman. I will try to beat the 6-minute constraint, because I am eager to hear your questions and concerns.

I am very grateful to be here. This is a timely hearing on a crucially important topic. As the opening remarks suggest, a central goal of UMRA is to minimize burdens on State, local, and tribal governments and also on the private sector, and to make sure that those burdens are imposed only after informed and careful consideration.

What I will be emphasizing here is the very close relationship between the goals of UMRA and the goals of the Presidential Memorandum on Administrative Flexibility from February and the goals of the Executive order on regulation and regulatory review from this past January.

As you are aware, Title II of UMRA, our principle focus here, imposes reporting and consultation requirements with respect to certain rules imposing mandates that may result in the annual expenditure of \$100 million or more on State, local, and tribal governments or on the private sector, all of those. These reporting requirements involve, among other things, a careful assessment of costs and benefits, as well as an accounting of various potential effects on the economy.

In these respects UMRA, from 1995, has a clear relationship to President Reagan's Executive Order 12291 from the early 1980's. The Office of Management and Budget, where I am privileged to work, is directed to provide annual reports to Congress on new regulations covered by UMRA, so there is an important information on reporting rule that my office has.

Insofar as the statute is designed to require analysis of the effects of rules in advance, and to try to reduce burdens and costs, it has clear connection with Executive Order 12866 from the Clin-

ton administration, which has long governed the process of regulatory review. More recently, President Obama has issued Executive Order 13563, which reaffirms the requirements of 12866 and also contains a number of revisions that bear directly on the goals of UMRA. I would like to give particular attention to four of those provisions from this January to underline their relationship with UMRA.

First, the new Executive order specifically directs regulations to be based on the open exchange of information and perspectives among State, local, and tribal officials, and the public as a whole. With this direction, what the Executive order is trying to do is to ensure consultation in advance with those who are likely to be affected by regulation.

Second, the Executive order, the new one, requires that before even issuing a Notice of Proposed Rulemaking, before anything appears in the Federal Register, the agencies are supposed to seek the views who are likely to be affected, including those who are potentially subject to the relevant rulemaking. What this means is that the President has required, with clarity beyond that we have seen from any previous president, advanced consultation with those who are potentially burdened by rules.

Third, the Executive order takes new steps to require burden reduction and minimization of costs. Agencies are directed to select the least burdensome approaches; to minimize cumulative costs; to simplify and harmonize overlapping regulations, which can often be confusing and very expensive; and to identify and consider flexible approaches that maintain freedom of choice for the American public. It is clear that these requirements bear directly on rules that affect State, local, and tribal governments, as well as the private sector.

Fourth, and finally, the new Executive order requires a regulatory look-back through the creation of plans by which agencies and departments will eliminate excessive costs and burdens, revise rules that are too complicated and confusing, streamline rules that have too much red tape; and that applies directly to State, local, and tribal government, as well as the private sector.

There is a sibling to the Executive order, the Presidential Memorandum on Administrative Flexibility, which draws explicit attention to requirements that have been sometimes “onerous” and “unnecessary.” With references of that sort, the memorandum seeks to increase flexibility for non-Federal entities. To that end, it directs the Office of Management and Budget, the Director, in fact, to lead a process of consultation to promote increased flexibility. The Presidential Memorandum also requires agencies to work with State, local, and tribal governments to improve program outcomes, including reduction and streamlining of duplicative reporting, paperwork, and regulatory requirements.

It should be clear that UMRA, the new Executive order, and the Administrative Flexibility Memorandum are mutually reinforcing. We are greatly looking forward to working with you on implementing and promoting the purposes of the three sets of requirements, and I look forward now to answering your questions.

[The prepared statement of Mr. Sunstein follows:]

**TESTIMONY OF CASS R. SUNSTEIN
ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS**

**U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ON OVERSIGHT AND
GOVERNMENT REFORM, SUBCOMMITTEE ON TECHNOLOGY, INFORMATION
POLICY, INTERGOVERNMENTAL RELATIONS AND PROCUREMENT REFORM
MAY 25, 2011**

Mr. Chairman and Members of the Committee:

I am grateful for the opportunity to appear before you today to discuss issues relating to Title II of the Unfunded Mandates Reform Act of 1995 (UMRA).

A central goal of UMRA is, of course, to minimize the imposition of regulatory burdens on State, local, and tribal governments, and to ensure that those burdens are imposed only after careful and informed consideration. In these opening remarks, I will be emphasizing the relationship between this central goal and the goals of two presidential documents from this year: Executive Order 13563, "Improving Regulation and Regulatory Review," and the Presidential Memorandum entitled "Administrative Flexibility, Lower Costs, and Better Results for State, Local, and Tribal Governments." My purpose is to explore how the 1995 statute and the 2011 documents are mutually reinforcing.

As you are aware, Title II of UMRA imposes reporting and consultation requirements with respect to certain rules with mandates that may result in the expenditure of annual costs of \$100 million or more (adjusted for inflation) on State, local, and tribal governments (or on the private sector). Those reporting requirements involve, among other things, an assessment of costs and benefits, as well as an accounting of various potential effects on the economy. In addition, Title II requires agencies to identify and consider alternatives and to select the least costly, most cost-effective, or least burdensome alternative. Notably, UMRA places its principal responsibilities on agencies themselves; for example, section 202(a)(4) provides that, with respect to certain economic effects, agencies must make estimates "if and to the extent that the agency in its sole discretion determines that accurate estimates are reasonably feasible and that such effect is relevant and material." The Office of Management and Budget is directed to provide annual reports to the Congress on new regulations covered by UMRA.

Insofar as UMRA is designed to require certain analyses of the effects of rules and to ensure that costs and burdens are reduced, the Act's goals evidently overlap with those of Executive Order 12866, which was issued in 1993 and has long governed the process of regulatory review. Indeed, Executive Order 12866 contains a number of specific provisions expressly designed to ensure consultation with State, local, and tribal governments, as well as to ensure minimization of burdens on non-federal entities. UMRA and Executive Order 12866 have worked in concert for many years, operating under both Democratic and Republican Administrations. As you are undoubtedly aware, President Obama has recently issued Executive Order 13563, which reaffirms the requirements of Executive Order 12866 and also contains a number of provisions that bear directly on the goals of UMRA. Four provisions deserve particular attention:

- Executive Order 13563 directs that “regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives *among State, local, and tribal officials*, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole” (emphasis added). With this direction, Executive Order 13563 emphasizes the importance of consultation with State, local, and tribal officials.
- Executive Order 13563 states that “[b]efore issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.” Where appropriate, State, local, and tribal governments may be among those to be consulted.
- Executive Order 13563 directs agencies to select the least burdensome approaches, to minimize cumulative costs, to simplify and harmonize overlapping regulations, and to identify and consider flexible approaches that maintain freedom of choice for the American public. It is clear that these requirements directly bear on rules that affect State, local, and tribal governments.
- Executive Order 13563 requires agencies to review existing significant regulations to see if those rules make sense and continue to be justified. Preliminary plans were submitted to OIRA on May 18. One of the central goals of this “regulatory look-back,” which is ongoing, is to eliminate excessive costs and burdens, including those faced by State, local, and tribal governments.

In all of these ways, there is a direct relationship between Executive Order 13563 and UMRA.¹

While the coverage of Executive Order 13563 is broad, the Presidential Memorandum, “Administrative Flexibility, Lower Costs, and Better Results for State, Local, and Tribal Governments” is specifically focused on State, local, and tribal governments. Drawing attention to requirements that have sometimes been “onerous” and “unnecessary,” the Memorandum seeks to increase flexibility for nonfederal entities. To achieve that goal, the Memorandum directs “the Director of the Office of Management and Budget (OMB) to lead a process, in consultation with State, local, and tribal governments, and agencies, to: (1) provide input to multiple agencies on State-specific, regional, or multistate strategies for eliminating unnecessary administrative, regulatory, and legislative burdens; (2) enable State, local, and tribal governments to request increased flexibility, as appropriate, from multiple agencies simultaneously and receive

¹ In addition, on November 5, 2009, President Obama issued a memorandum directing all federal agencies to develop detailed plans to implement Executive Order 13175, which mandates meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications, including regulations. Mandating consultation with tribes on regulatory efforts that affect them further promotes the goals of UMRA.

expeditious and judicious consideration of those requests . . .” The Director of OMB, Jack Lew, issued a memorandum on implementation of these provisions on April 29, 2011.

The Presidential Memorandum also directs agencies to “[w]ork with State, local, and tribal governments to identify the best opportunities to realize efficiency, promote program integrity, and improve program outcomes, including opportunities, consistent with law, that reduce or streamline duplicative paperwork, reporting, and regulatory burdens” Agencies must take action to this effect by August 29, 2011.

It should be clear that UMRA, Executive Order 13563, and the Presidential Memorandum on Administrative Flexibility are mutually reinforcing. The Administration looks forward to working with nonfederal entities, and with this Subcommittee, to promote the shared goals associated with UMRA, Executive Order 13563, and the Presidential Memorandum on Administrative Flexibility.

Mr. LANKFORD. Thank you, sir, and you did successfully beat your time there.

I am going to yield myself 5 minutes in the question time. We will probably do two rounds of questions, as I mentioned to you before. If there are additional things, we will continue to hold our conversation.

Can I just give you a general statement that we also gave to Susan Dudley when she was here? What have you learned from the unfunded mandates, the application of 12866 and now for the 13563 Executive orders that you would suggest goes into an updated writing of an UMRA law, that you would say these are deficiencies, this existed in UMRA or did not exist in UMRA, it does exist in the Executive orders, or these are ways to be able to fix it? So that is just a general question to you.

Mr. Sunstein. I will tell you the most important thing I have learned that bears on all of those, and that is the crucial importance of public participation to good regulatory outcomes. I taught administrative law for many years. There is a cliché among administrative law professors: that by the time a rule goes out for public comment, it is baked, it is cooked, and the public comments are not that important. I have learned that cliché is false. And to get rules right, it is very important to engage with the public.

Mr. LANKFORD. OK. With that, I heard you mention that as well, how do you select who gives the public comments? Since this is not an open, large-scale process, it is not already out there, obviously, there has to be some sort of notification behind the scenes to get the public comment. If it is a State, tribal government, if it is a private entity, who selects that?

Mr. SUNSTEIN. The best way is connected with the Executive orders' reference to freedom of choice for the American public. So the best way is to let people who have interests and concerns voice those interests and concerns, rather than having bureaucrats select people. There are two mechanisms for that are built into the existing process, of which UMRA is a significant part.

One is the rule goes out for public notice, and then people, and sometimes many thousands of people, suggest their comments; and no one asks them or chose them, they chose themselves. The second is our office is—and this is very important for those concerned about regulatory burdens to be aware of—our office is open, our doors are open to those who think that a proposed rule or a final rule is a problem, and we want to hear what they have to say.

Mr. LANKFORD. So in that conversation back and forth, you mentioned specifically using the term onerous. If a regulation in a look-back, or whatever stage of the process it may be, whether it is already on the books and we are looking back at it, or whether it is a proposed rule, if some groups consider it onerous and other groups do not. Let me give you a for instance. If a private entity or a State or local government says this is a really onerous rule and the Federal agency says no, it is not, who arbitrates that?

Mr. SUNSTEIN. Thank you for that. That is a crucial thing for my office and you all who have lawmaking authority to try to get right. What we try to do is have both an internal and external process of peer review. So if a rule comes in with, let's say, a low cost estimate, and then people in the private sector or State and local gov-

ernment have said at some part of the process that is inaccurate, we have an internal process which involves the Council of Economic Advisors, the National Economic Council, economists, and informed people within the government who try to make an assessment.

And there is not always literal peer review, but there is a form of external peer review, speaking colloquially, in the sense that the regulatory impact analysis goes out for public review and not infrequently people who are affected say that cost estimate is inaccurate, and the question is what is their evidence, and sometimes they have pretty good evidence.

Mr. LANKFORD. So who do they appeal up to? When there is a disagreement, there is public comment, there is all that back, is it within that same agency or does it come to OIRA or is a judicial review? Who reviews it and says, no, an outside arbitrator?

Mr. SUNSTEIN. It definitely, the ultimate decision is made by the agency working with OIRA, so we ultimately have the authority not to approve a regulatory impact analysis, and that means that it will be a consensual process to make sure we get it right.

Mr. LANKFORD. OK, let me ask a couple questions as well, then I am going to defer my time as well. The private sector, you mentioned that multiple times. In UMRA it is very clear that it is State, local, tribal governments, and the private sector. It mentions it multiple times; it defines it clearly in UMRA and the law. That is included.

You also made the statement several times; the President has made the statement several times. What are your thoughts on the private sector and regulations that are coming down on them, as well as the public sector? Is there a difference? Do we need to evaluate it the same?

Mr. SUNSTEIN. It is a great question. We are very concerned, in this economic environment, with any form of costs. State and local government are particularly strapped, so if there is a rule that burdens them economically, the choice of the least burdensome alternative, as the Executive order and UMRA require, and even the best alternative may not be to impose the burden at all. So that is one set of—

Mr. LANKFORD. Would that be true for the private sector as well as the State and local governments?

Mr. SUNSTEIN. Absolutely. What I was going to say is that even though each raises distinctive concerns, I wouldn't want to rank one higher in the hierarchy. If you are hitting small business hard in an economically challenging time, that is a problem.

Mr. LANKFORD. OK, thank you.

I now recognize Mr. Connolly for 5 minutes.

Mr. CONNOLLY. Thank you, Mr. Chairman.

Presumably, Mr. Sunstein, we hear a lot of talk in this Congress about the burden of regulation, but there is also benefit to be derived from regulation and protecting the public, and sometimes in concrete savings, is that not true?

Mr. SUNSTEIN. Absolutely.

Mr. CONNOLLY. And certainly your office looks at the benefits as well as the costs.

Mr. SUNSTEIN. Under the President's Executive order, benefits are as highlighted as costs.

Mr. CONNOLLY. For example, in agreeing to new fuel efficiency standards, which certainly has an impact both in the public and private sector, EPA projects that over the lifetime of a model, a 2016 model, the average consumer will save \$3,000 and the United States will save 1.8 billion barrels of imported oil. Is that a benefit?

Mr. SUNSTEIN. No question.

Mr. CONNOLLY. Do we put a number on that benefit?

Mr. SUNSTEIN. Yes.

Mr. CONNOLLY. And we certainly consider that as we contemplate new regulations.

Mr. SUNSTEIN. Absolutely.

Mr. CONNOLLY. So there is an example where we are weighing costs and benefits. In looking at light bulb standards, the same thing. EPA came up with—or DOE came up with an analysis that said we could save \$1.4 billion with new energy efficient standards for light bulbs. That would be another benefit, presumably, from a regulation.

Mr. SUNSTEIN. Energy efficiency standards have benefits and imposed costs.

Mr. CONNOLLY. Now, when one looks at—let me ask does your office also look at the risks of cost shifting? For example, I spent 14 years in local government. Sometimes my State government conveniently would shift costs onto the local governments and it would become our burden, and that has a real cost to it.

I mentioned in my opening statement that in the partisan budget that passed the House here a few months ago, it slashes Medicaid funding 35 to 49 percent. That has the effect of shifting the cost of Medicaid onto State and localities, and indeed even the private sector. Has your office looked at that issue of cost shifting as, in effect, an unfunded mandate?

Mr. SUNSTEIN. That is not a standard part of what our role is under the Executive order and under the Unfunded Mandates Act, but there is a role for the analysis to which you point, under the rubric of distributional impacts. So if it is the case that a cost is shifted from one sector to another sector, and that is a consequence of a rule, that is appropriate to lay out.

Mr. CONNOLLY. Now, that same budget also, in many respects, eviscerated the ability of EPA to continue to regulate under the Clean Air Act. Has your office looked at the cost benefit analysis over the years of the Clean Air Act?

Mr. SUNSTEIN. We look at the costs and benefits of particular rules issued under the Clean Air Act. EPA has recently issued a general report on costs and benefits. Our analysis tends to be rule-by-rule, though we do some cataloging in our annual report to you.

Mr. CONNOLLY. For example, do you also look at externalities? I know when you start to get into something like global warming, it is a little harder, we know what the problems are, it is a little harder to put a value on averting something or mitigating something, but does your office also do that analysis as well?

Mr. SUNSTEIN. Absolutely. That is a significant part of the analysis of rules under the Clean Air Act, the externality which comes

from mortality and morbidity effects from high levels of air pollution.

Mr. CONNOLLY. What about more physical things like rise in sea levels and potential damage to coastal areas and infrastructure?

Mr. SUNSTEIN. The global warming issue poses very difficult conceptual and empirical challenges in terms of monetization. What has happened in the last years is there is an effort to build on existing scientific models, not to do significant departures from the existing models, and to incorporate them into our analysis, and they do include economic costs of rising sea levels.

Mr. CONNOLLY. And when we look at this undue burden on the private sector, and certainly none of us want an undue burden, for example, look at the liability cap, regulatory liability cap on oil companies for oil spills is at \$75 million. Obviously, if we don't address that inadequacy, all it does is shift the cost of cleanup when an oil spill occurs, such as did at Deepwater Horizon, onto the public, is that not correct?

Mr. SUNSTEIN. That particular issue isn't one that my office sees because our role is to look over regulations, rather than legislation, but you are absolutely right that if there is a regulation that prevents some significant economic or public health related harm, that is part of the analysis.

Mr. CONNOLLY. Thank you, Mr. Chairman.

Mr. LANKFORD. I would like to now go for questioning to the chairman of the full committee, Mr. Issa.

Mr. ISSA. Thank you, Mr. Chairman. I will be brief with this question.

After the election that created an opportunity for Mr. Connolly to start calling anything that passes by the majority as a partisan budget and eviscerating and so on, right after that, November 15th, I sent your department a letter with a series of questions, and in December I got a quick response that basically said here is the public record, we will give you no more. We have twice since requested responses. Will you commit today to answer questions that were asked and that you agreed to answer as early as December, but have not yet answered?

Mr. SUNSTEIN. Thank you for that, Mr. Chairman. I am very focused on your concerns about regulatory costs and burdens. I want to see what questions exactly, but—

Mr. ISSA. We will give you the questions, but they are the questions from November 15th.

Mr. SUNSTEIN. I would be very happy to engage with you on questions involving regulatory burdens. I don't have the piece of paper in front of me right now.

Mr. ISSA. So it never got to you or it has been forgotten since November 15th of last year?

Mr. SUNSTEIN. I have a pretty good memory, but I don't remember exactly what the questions were.

Mr. ISSA. No, I understand that you wouldn't remember the questions, but it is your signature responding on this—unfortunately, it is an undated letter, but it came in to us in December, in which you said you would give us the rest of the responses. I am just saying will you commit today to keep that promise from December of last year.

Mr. SUNSTEIN. I think if there is a promise there that my office made, I can commit to following through.

Mr. ISSA. OK, then I will take that as a yes, that what you signed and said you would do you will now do in a timely fashion.

Let me just ask a basic question. You referred to the previous administration more than any other administration. Let me ask a question, though, about this whole idea of announcing you are going to go through a rule process or an executive order and then basically consulting. That is a great thing and I think all of us on the dais would commend that, but if in fact an agency announces that they are going to do something and then begins effectively compelling States or individual parties to live up to the proposed rule, isn't that contrary to good government?

Mr. SUNSTEIN. Well, it is very important for agencies to listen to what people have to say, so if the agency hasn't carefully considered comments, then that would not be consistent with the spirit of the President's Executive order or the Administrative Procedure Act.

Mr. ISSA. So if the administration wanted to make it clear that they were looking at something but did not want to have it be compelled as though it was a rule, they should say so in the process, shouldn't they?

Mr. SUNSTEIN. I am not sure I understand exactly—

Mr. ISSA. Well, let me just make it clear. EPA has a policy that now what they do is they announce or give guidance to what may someday be rules, and if they get enough compliance from the States and other stakeholders, they never have to issue a rule that they have changed things without ever having it.

That seems to be a part of this administration's direction, and I am asking you shouldn't the administration, any agency be clear that if rulemaking is the appropriate goal, that they make it clear that they are not looking for change in advance of rulemaking unless there is a real emergency and that emergency is stated and stated here on the Hill?

Mr. SUNSTEIN. I fundamentally agree with what you have just said, and what I would say is the Administrative Procedure Act makes a clear distinction between guidance documents and rules. Guidance documents lack the force of law; they are not binding; they have an advisory quality; and under a memorandum from March 2009, guidance documents are subject to OIRA review, as are rules, and we work very closely with agencies to make sure the guidance documents don't become rules.

Mr. ISSA. And the guidance from the previous administration, 13422, you revoked it, you have gone your own way. Let me ask a broader question, though, in addition to that, since the time is limited. Yesterday we had the EPA Administrator repeatedly tell us that something was from the previous administration, in other words, permits, rules, studies, and so on; and that they automatically appear to have been set aside to start over anew simply because this is a new administration. Don't you believe that, for the most part, there is a binding authority, unless justified for a change, from previous administrations, whether they be republican or democratic?

Mr. SUNSTEIN. My mind is going through. I taught administrative law for many years and, as you are aware, there is a jurisprudence on exactly that question.

Mr. ISSA. Certainly, if a permit is granted under one administration, wouldn't you think that permit is a contract with the government and should not be essentially revoked simply because there has been a change in party? That is pretty Third World, isn't it?

Mr. SUNSTEIN. Rulemaking is my lane, and what I can tell you is that rules issued under the Bush administration are binding on everybody until they are changed.

Mr. ISSA. Changed by a full rulemaking procedure.

Mr. SUNSTEIN. Absolutely. Interpretive rules and guidance documents can be changed more quickly, but rules typically are binding until changed.

Mr. ISSA. Thank you.

Thank you, Mr. Chairman.

Mr. LANKFORD. I would like to recognize the ranking member of the full committee, Mr. Cummings.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

Mr. Sunstein, today I come concerned about Medicaid, as Mr. Connolly. I want to pick up on some of the things that he was talking about. As you know, Medicaid is a vital program that serves the most vulnerable Americans in this country. As a matter of fact, Medicaid accounts for 42 percent of long-term care spending. And in a time when there are those on the other side of the aisle who want to eliminate the traditional Medicare, put private insurance companies in charge of health benefits, and costing users to pay more for their health care, I am concerned about the shifting to States with regard to our seniors.

It is the No. 1 topic when I go into my district. As you know, programs like Medicaid and No Child Left Behind are not technically covered by UMRA; however, we also know that the Federal Government can impose significant costs on States when it changes the conditions required to receive Federal aid.

The Republican budget resolution would dramatically change Medicaid from an entitlement program into a block grant, essentially removing any guaranty of care for those least likely to be able to care for themselves, people like my mother, who is 85 years old. Medicaid would be cut by \$771 billion over the next 10 years. The Congressional Budget Office's analysis of the Republican budget plan estimates that the Federal Medicaid funding to States would be cut by 35 percent in 2022 and by 49 percent in 2030. Whether technically covered by UMRA or not, these changes would impose a remarkable unfunded mandate on States that would like to continue to provide the same level of existing coverage for their most vulnerable citizens.

Now, this subcommittee has held three hearings on unfunded mandates and offered rhetorical support for relief from Federal mandates. But when it comes to their budget resolution, it is clear that the Republicans have no problem whatsoever imposing greater costs on States and local governments. The drastic cuts to Medicaid would add significant burdens on State budgets to maintain current coverage or cover a consequent increase in emergency room visits by previously Medicaid eligible people.

Administrator Sunstein, have you considered how converting Medicaid into a block grant would impact the ability of States to provide care to their citizens?

Mr. SUNSTEIN. Thank you, Congressman, for that. That question I want to defer to some of my OMB colleagues.

Mr. CUMMINGS. OK.

Mr. SUNSTEIN. That is their business, not quite mine.

Mr. CUMMINGS. All right. Let me ask you this. If States are given less money from the Federal Government as part of a Medicaid block grant, what kind of budget pressures would States likely face in maintaining existing levels of care and coverage for their most vulnerable citizens?

Mr. SUNSTEIN. Again——

Mr. CUMMINGS. That same answer?

Mr. SUNSTEIN. Yes. My boss, Jack Lew, is the expert on——

Mr. CUMMINGS. OK. I am sure we will be talking to Mr. Lew at some point. Let me ask you this. What would happen to Medicaid beneficiaries who are forced out of coverage because of program cuts or if funds from the block grant simply run out?

Mr. SUNSTEIN. Same answer.

Mr. CUMMINGS. The Federal Government increased its percentage of contribution for Medicaid costs as the recession hit. This increase resulted in States receiving an estimated \$107 billion in additional funding to help defray the costs associated with increasing Medicaid enrollment. According to the Kaiser Foundation, Mr. Sunstein, for every 1 percent increase in national unemployment, Medicaid enrollment increases by 1 million individuals. Does the Republican budget block grant plan include any funding contingencies in the event of another economic downturn or a natural disaster similar to Hurricane Katrina?

Mr. SUNSTEIN. With your indulgence, I would like to note that the Office of Information and Regulatory Affairs, we have a defined narrow rule and there are budget colleagues who specialize in that sort of question.

Mr. CUMMINGS. Well, let me ask you this, Mr. Sunstein. Some have suggested the UMRA be modified by expanding its judicial review provision to allow agency rules to be delayed or invalidated if an agency fails to adequately perform the required analysis. UMRA currently includes language expressly providing that an agency's failure to perform any estimate analysis statement or description under UMRA cannot be used as a basis for delaying or invalidating a rule. Removing this language limiting judicial review would be a significant change to UMRA. In 2009, GAO issued a report on rulemaking process. In that report, GAO found that, of the agencies reviewed, the average time needed to complete a rulemaking was 4 years.

If UMRA was amended to allow rules to be delayed by legal challenges, what kind of impact could that have on agencies' ability to issue rules in a timely manner?

Mr. SUNSTEIN. It is a very important question and it is a pervasive question whether judicial review is worth a candle, whether it provides sufficient safeguards to rely on self-policing or whether a judicial check is an important supplement. On that question you

pose a crucial empirical question, and I just don't have the data on that.

Mr. CUMMINGS. Very well. Can you get back to me on that one?

Mr. SUNSTEIN. We can——

Mr. CUMMINGS. That is within your purview, is it not?

Mr. SUNSTEIN. Well, I should say that it is in my purview, though I don't know if the information is available on what kind of incremental delay you get from judicial——

Mr. CUMMINGS. Well, do the best you can.

Thank you very much, Mr. Chairman, for your indulgence.

Mr. LANKFORD. Thank you.

I want to now yield 5 minutes to the Vice Chair of this committee, Mr. Kelly.

Mr. KELLY. Professor, thanks for being here, and I appreciate your indulgence as we test out campaign strategies for the 2012 elections.

But more directly, as evidence of Executive Order 13563 in President Obama's recent announcement that he will propose a package of regulations to delineate in the coming weeks, would you agree that the President has clearly recognized that at least some regulations and businesses are having a negative effect?

Mr. SUNSTEIN. Yes.

Mr. KELLY. OK, thank you. And isn't it true that one of the purposes of UMRA is to assist Congress in its consideration of proposed legislation containing Federal mandates in the private sector?

Mr. SUNSTEIN. Yes, absolutely.

Mr. KELLY. In fact, the law states that each agency shall assess the effects of the Federal regulatory actions on State, local, tribal governments, and the private sector, isn't that correct?

Mr. SUNSTEIN. Yes.

Mr. KELLY. OK. So if the President has made that commitment, and we all agree that there is this overwhelming amount of regulation that comes out, and I have to tell you, coming from the private sector and somebody who actually funds all these programs that are mandated, and a lot of these unfunded mandates in the direction we go, I want to ask you is there any remedial process at all, having sat through many, many, many, many audits myself, both in my private life and serving in a city council, where is the remedial process?

Mr. SUNSTEIN. OK. Well, since the President issued Executive Order 13563, we have seen some significant developments. Dairy farmers and the milk industry have not been thrilled at the fact that milk has been defined as oil under the oil spill rule, and there were concerns and references to expenses, and the EPA recently exempted milk and dairy from the oil spill rule. That saves \$140 million annually.

Mr. KELLY. I understand. Let me just, if I could, because we really run short in this and I don't want to be disrespectful to you, and I know you are being asked questions that absolutely have nothing to do with what we are talking about today, but these committees' agencies that come in and the oversight that takes place or the audits that take place, my concern has always been in the private

sector, that where is the private sector's role on these committees and when do we get a chance to weigh in?

Because most of the time the people that come in have never actually done what the people that they are overseeing have done and actually haven't walked in their shoes, so really don't know what it takes to run these different entities, and yet they are being regulated and mandated to do things that in some cases can't be done for a number of reasons. So is there a process—

Mr. SUNSTEIN. Yes.

Mr. KELLY [continuing]. That we actually can come to the table? I have never been invited, that is why I ask.

Mr. SUNSTEIN. Oh, for members. Oh, OK. Well—

Mr. KELLY. Not for Members of Congress. I am talking about people in the private sector.

Mr. SUNSTEIN. OK, well, what we have done for the regulatory look-back is to ask the public for ideas, and we have gotten a lot, about rules that are causing the sorts of problems to which you point, and those ideas have come in and they are reflected in the agency plans that will be released soon.

Mr. KELLY. OK, I know you said we have asked the public, but have we actually engaged those people who are actually doing what it is that we are overseeing or regulating to be at the table to have some input as to what is being asked of them?

Mr. SUNSTEIN. Yes. There are a few mechanisms for that. We are available, that is, the Office of Information and Regulatory Affairs is available for meeting with people certainly on rules under review. If there are concerns about a rule on the books or a coming rule, then if a letter is sent to me, the chance that I will read it is 100 percent.

Mr. KELLY. Would it happen during the regulatory process?

Mr. SUNSTEIN. Yes. If a rule goes out for public comment, then there—

Mr. KELLY. I am not talking about public comment. What I am speaking of, and I mean specifically because I am involved in a lot of these different things, the private sector is really not consulted on a cost-benefit analysis. In fact, in your testimony it says the agency, at its sole discretion. So what that says to me is it will determine.

Again, I am very leery of a government that thinks it can do better than anybody else and thinks it is smarter than anybody else, but has actually never done what it is that they are trying to regulate, and it drives the cost of that up. Now, we talk about cost savings and cost benefits. I would suggest to you that is not always the case. At the end of the day, the government decides what it is going to be, and those people who are left holding the bag, are left holding the bill, are not really brought to the table; and I would say that is more the case than not the case.

Mr. SUNSTEIN. OK, you are absolutely right. For some of the high profile, high expense rules, including the CAFE rule, the fuel economy rule, where the benefits were really high and costs were a lot lower, people were brought to the table, the automobile industry was brought to the table to ask what is feasible and what is reasonable, and that is happening on an ongoing basis.

Mr. KELLY. And I understand it, being an automobile dealer. But while they are brought to the table, they are pretty much told what the gas mileage is going to be, and there are unintended consequences. As we know, a lot of the things that are funded in the highway transportation are revenues derived from the sale of gasoline. So when you eliminate one source, it has to come up someplace else.

And we have this habit down here to try and place the blame on, when you are up to your rear end in alligators, who was supposed to drain the swam; and I think it is a little bit of bass-ackwards way of doing things, and I would just suggest that while you have this ability, please, let's make sure that we get the private sector to the table. Let's get their input before we impose regulations and costs to them that are really burdensome and cannot be done.

Mr. SUNSTEIN. I agree completely and I would love to explore ways to do that going forward.

Mr. KELLY. I will work with you on that. Thank you.

I yield back, Mr. Chairman.

Mr. LANKFORD. Thank you, Mr. Kelly.

I would like to recognize Mr. Chaffetz for 5 minutes.

Mr. CHAFFETZ. Thank you.

Thank you, Administrator, for being here. In a 2007 speech I believe you said, "We ought to ban hunting." Is that something you or anybody in the administration is working on at this point?

Mr. SUNSTEIN. Absolutely not.

Mr. CHAFFETZ. You had said, in your book, written in your book *Radicals and Robes*, "Almost all gun control legislation is constitutionally fine. And if the court is right, then fundamentalism does not justify the view that the Second Amendment protects an individual's right to bear arms." Is that something that you or anybody in the administration is working on?

Mr. SUNSTEIN. No. That quotation, actually, was from a position, not a position I held at the time, I was describing a position that some other people held. In any case, one thing that is very clear is what academics write in their academic capacity has exactly no appropriate bearing on what government officials do in their governmental capacity.

Mr. CHAFFETZ. And I appreciate that. That is why I am asking you if those previous positions are something that you are currently working on now. I believe you had said, "Animals should be permitted to bring suit with human beings as their representatives." Is that something you are working on or anybody in the administration is working on?

Mr. SUNSTEIN. I am working on implementation of Executive Order 13563, and not on those issues.

Mr. CHAFFETZ. Let me ask one more specific one. This is something, again, the rights of animals, "There should be extensive regulation of the use of animals in entertainment scientific experiments and in agriculture." Is that something you or anybody in the administration is working on or has worked on?

Mr. SUNSTEIN. Well, I can't speak for all of the administration—

Mr. CHAFFETZ. To the best of your knowledge.

Mr. SUNSTEIN [continuing]. But I would be very surprised, and I am certainly not working on those issues.

Mr. CHAFFETZ. At an earlier hearing the GAO testified that one of the most frequently cited reasons that a rule was not considered to be an unfunded mandate was the fact that the rule did not go through the proposed rule stage, meaning that the agency skipped the regular process and, instead, issued an interim final or direct final rule. Do you find concurrence with that view, of what GAO came up with in their conclusion?

Mr. SUNSTEIN. I don't actually know about the numbers, but I do know that the general claim about the law is correct, that if there is no proposed rule stage, then UMRA doesn't apply.

Mr. CHAFFETZ. So they can just bypass that whole thing and—

Mr. SUNSTEIN. Well, in a sense it is bypassing; in a sense it is built into the fabric, it is kind of hardwired into UMRA, which applies only when there is a proposed rule stage.

Mr. CHAFFETZ. One of the other concerns here is that the major exclusions from UMRA is the status of an agency as "independent." If the issuing agency is considered to be an independent regulatory agency, they are not required to conduct an UMRA analysis, so this would include the SEC, the FCC, the FTC, the CFTC, the new Consumer Financial Protection Bureau. All are not subject to UMRA.

Mr. SUNSTEIN. That is correct.

Mr. CHAFFETZ. But why? I mean, I realize we are looking back, but moving forward it seems that these are some of the agencies that are some of the most egregious in just unilateral rulemaking that is bypassing the Congress and causing chaos.

Mr. SUNSTEIN. Well, it is a very important question. The Office of Information and Regulatory Affairs has an implementation rule. To answer that important question, there would be an independent process where, of course, this would be Congress's judgment, and I am sure the executive branch would have a view.

Mr. CHAFFETZ. There are some of us that are really struggling to understand where rulemaking should stop and where, really, Congress should have the ability to write the laws of the land. Do you see any conflict with the rules as it relates to the separation of powers and Congress's ability and mandate to actually institute the laws of the land?

Mr. SUNSTEIN. Well, if it were the case that rulemaking were done without congressional authorization, that would be a serious problem. So the first question we ask, the first question I personally ask is is there legal authority from Congress to act. That is the foundation stone for every exercise of rulemaking authority that the executive branch legitimately engages in.

Mr. CHAFFETZ. OK, so the other end. And, again, I am just doing a hypothetical. You said there aren't going to be any rulemaking authority, it all has to go through Congress. What you are saying, though, right now is that Congress has given the executive branch too much of this power.

Mr. SUNSTEIN. Well, I wouldn't want to say too much, but I would say that the exercises of legitimate rulemaking authority are congressionally authorized.

Mr. CHAFFETZ. Are there any exceptions that you see to that?

Mr. SUNSTEIN. Well, the President has some constitutional authorities that may relate to rulemaking, but that would be very limited.

Mr. CHAFFETZ. Thank you. My time has expired.

I yield back.

Mr. LANKFORD. Thank you, Mr. Chaffetz.

I yield to Mr. Labrador.

Mr. LABRADOR. Mr. Chairman, I have no questions. I yield back to the Chair.

Mr. LANKFORD. Thank you.

Let me followup on a few things Mr. Chaffetz was saying. It is hard for me to find a rule out there that I couldn't find, at some point, some benefit for. If I look hard enough and you allow me to be able to pick the assumptions, I can say this will prolong life for certain people; this will help the economy in some country, ours or some other place; this will help, somehow, the global environment.

Just about everything that we could do, if you allow me to create the assumptions, I could come up with enough benefit to say, yes, we should do this. I know it is going to cost \$75 million, but we should do this because it will benefit the economy over the next 50 years, \$75 million. So the cost-benefit weighs out. The difficulty of this becomes how do we evaluate that.

And the previous question that you were just referring to, do we have authority to do this, is this constitutional, is this the right thing to do within our free republic, or are we imposing arbitrary rules on people because we have a preference and we think, at this point, this is a good idea, knowing full well if the politics change and the presidency changes and the Executive Office changes, they may switch it right back, as this administration released some of the old rules and said, no, we are not going to do those, we are going to do it differently. What we want to have is a stable environment that is not just at the whims of the executive branch, constantly moving on State and local governments, tribal governments, and private business. How do we balance that out, where it is not preference-based with some benefits out there in the sky?

Mr. SUNSTEIN. Great. The new Executive order, I think for the first time, actually, has prominent references to predictability and reduction of uncertainty. So especially in this economic environment, to have people surprised by rules or hit on the left and hit on the right by rules, that is a real problem. In terms of the avoidance of arbitrariness, you are clearly right that costs and benefits can be in the eye of the beholder, and it is possible to have manipulation of the process.

Mr. LANKFORD. Correct. If I say that global warming is caused by manmade pollution, suddenly everything that we do that ever relates to global warming, it is we are saving the planet. What value can you put on the earth? So everything, whether it is \$100 billion, it doesn't matter, we are saving the planet.

Mr. SUNSTEIN. Yes. What we have tried to do, and I think there is real continuity, actually, over many years in this effort, is to have pretty disciplined method, at least in the domains that are the kind of staple of government rulemaking, so that if someone says, I guess your number was something like \$70 million that we have over the next 50 years, \$70 million of benefit to justify that,

that \$70 million can't be just asserted or a political preference, it has to be earned by reference to evidence. So the fuel economy rule is pretty strong, this isn't weak stuff. The benefit figures that we are given have been through the wringer.

Mr. LANKFORD. Correct. But in the same preference there, as Mr. Kelly was referencing before, those rules, if you change, for instance, fuel economy standard, which does save us fuel, which does all of those great dynamics over the life of a car, if it also makes a lighter weight car and someone dies in a crash, how do you evaluate the benefit?

Mr. SUNSTEIN. That is an extremely important question and that is something that we, meaning not just the Office of Information and Regulatory Affairs, but the Department of Transportation, the Environmental Protection Agency, and the Council of Economic Advisors, look extremely carefully at.

Mr. LANKFORD. But that is the challenge, because once you start getting into those assumptions and you start evaluating it, it is very difficult for me to be able to say let's hand that to an agency and if private industry or if the government, State, local, tribal government, has a problem with that, considers it onerous, then the agency itself evaluates it and says, no, we like our rule, we are going to keep it.

Mr. SUNSTEIN. I tell you something—

Mr. LANKFORD. And I know it is not that simplistic, but they go through the feedback to go through the end of it, but at the end of the day they can still say, no, we are keeping it.

Mr. SUNSTEIN. It is a very important point, and if you look at our guidance on the regulatory look-back, that is, the guidance the Office of Information and Regulatory Affairs issued, it tried to produce independence between those evaluating the effects of the rules and those who wrote the rules, just because of the concern you mentioned.

Mr. LANKFORD. Still within the same agency, though.

Mr. SUNSTEIN. It can be still within—

Mr. LANKFORD. So it is down the hall, but it is still within the same agency.

Mr. SUNSTEIN. Well, there is some separation. And note that if the numbers aren't good, there are checks, both internal and external. So there are a number of occasions where a projection of costs has been, let's say, optimistic and internal or external review has helped.

Mr. LANKFORD. But you would not suggest that we have a judicial review process or a legislative review that may come back over here, if there is a question that it comes back over for a legislative determination to say this was the legislation, the regulation is written and it doesn't fulfill legislative intent?

Mr. SUNSTEIN. I think judicial review generally is required by the Administrative Procedure Act; it has bipartisan support. On the particular question—

Mr. LANKFORD. Not in UMRA, though.

Mr. SUNSTEIN. That is a question for people who have other roles than my implementation role.

Mr. LANKFORD. OK, thank you. Just to be able to catch you up, we have gone through the initial round. Mr. Labrador just deferred

his question to me, now we are going to start the second round. So I get to reload and do 5 minutes again.

Thank you. Let me get a chance to continue on, then. Referencing something, you noted the 13563 on predictability and uncertainty. Is there a benefit in setting rules when they are set, whether they be UMRA and they are an unfunded mandate that is coming down or whatever significant rule may be coming out and also giving a time line that lengthens that out?

For instance, where a State government that only meets every 2 years in their legislative branch, if they suddenly have a rule that is now going to start 18 months from now, but they just finished their legislative session, they have to call in a special session to figure out how to be able to budget for something that is coming down on them. How is that warranted and how do we start establishing a time period for these?

Mr. SUNSTEIN. That is a great point. One place where the President has clearly signaled this in the small business memorandum, where he called out that part of the Regulatory Flex Act that refers to delayed compliance dates.

Mr. LANKFORD. But is that a waiver that needs to be done or is that something that needs to be established as a process to say regulation cannot go into effect until—

Mr. SUNSTEIN. OK, great. OK, so the first question is whether the law allows consideration of delayed compliance dates for small businesses or for anybody else, State and local government in particular, and not infrequently the law does give the executive branch some discretion in terms of timing. So that is the first question.

Then the second question is whether the delayed compliance date is important to protect predictability, especially perhaps in a very difficult economic time, or whether, in some cases, it would delay very important public health benefits; and that is an assessment that is common.

Mr. LANKFORD. Right. Well, there is a significant challenge for a local municipality that the Department of Transportation says your street signs are not reflective enough, so you have to change all of your street signs. They get some allotment to be able to do that through a grant, there is not enough, and now they are having to determine to make the deadline do I pay police officers and firefighters or do I put in new street signs. It suddenly becomes this whole challenge of if they are given more time.

Now, the battle of that is you shouldn't also have 1,000 waivers sitting on your desk and be able to decide back and forth who gets it and who doesn't, but to establish some sort of process for that. That is what I am suggesting.

Bringing back up the independent agencies, we have a lot of independent agencies, and, by the way, this was very helpful. This is your book, Risk and Reason, going through a prospective in 2002 that you wrote about OIRA, and some of the details in that was very helpful to be able to go through in preparation.

But you made a statement in there about OIRA should also see as one of its central assignments the task of overcoming governmental tunnel vision by ensuring that aggregate risks are reduced and that agencies focus on particular risks, and that does not mean their ancillary risks are ignored or increased. So avoiding this gov-

ernmental tunnel vision. I think that is a great statement to be able to make.

The difficulty becomes in the independent agencies. How do we engage with oversight in the independent agencies, and do you see one of the independents that is out there that you would say they should not have oversight, they should have tunnel vision and be allowed to have that?

Mr. SUNSTEIN. Well, because the independent agencies aren't covered by the Executive order——

Mr. LANKFORD. Correct, or UMRA.

Mr. SUNSTEIN [continuing]. Or UMRA, I will have to be a little cautious in discussing them. I would just add two points. One is that noticing concerns of the sort to which you just pointed—and my voice is genuinely failing, it is not failing because of the difficulty of the question——

Mr. LANKFORD. It wasn't that hard of a question, so I wouldn't worry about it.

Mr. SUNSTEIN [continuing]. We have asked the independent agencies voluntarily to comply.

Mr. LANKFORD. How many of them have voluntarily complied?

Mr. SUNSTEIN. At this date we haven't gotten the returns in, but if past history is prologue, the likelihood of 100 percent compliance is not something you would want to bet on——

Mr. LANKFORD. OK.

Mr. SUNSTEIN [continuing]. With the request. So our, that is, the Office of Information and Regulatory Affairs, has limited tools given——

Mr. LANKFORD. And that is part of my concern. Let me give you a for instance. The new CFPB group. They would be exempt from the executive orders and oversight; they would be exempt from UMRA as they come in as an independent. How do we keep a group with so much authority and so little accountability from getting this tunnel vision that you talk about in your book?

Mr. SUNSTEIN. It is a very important question and since we are narrowly focused on implementation as an OIRA administration, I don't have a position on that, but it is a very important question, and if there is legislation that is proposed, I am sure the appropriate people would be——

Mr. LANKFORD. There will obviously be significant rules that will come out of those, many of them with millions of dollars of impact on the economy, just based on the basis of how it comes out with Dodd-Frank. We suddenly have a group with no accountability to anyone, and when there is an issue that arises, who checks unfunded mandates with an agency that is that large?

So with that I would like to be able to defer to Mr. Connolly, my ranking member, for 5 minutes of questions.

Mr. CONNOLLY. Thank you again, Mr. Chairman.

Mr. Sunstein, a couple of things. I am sorry our full committee chairman, Mr. Issa, is not here, but he took some exception to the characterization of the adoption of H.R. 1 earlier this year as a partisan budget. When only Members of one party vote for it and not a single Member of the other party vote for it, I don't know that is a normative statement; I think it is just a factual statement, it is a partisan budget.

He made reference to a shift in direction from the Bush administration to the Obama administration, and his specific reference, I believe, had to do with a mining issue, the issue of permits under regulatory review. Now, it is my understanding that some of the strip mining permits granted under the previous administration were in fact in violation of Federal law under the Clean Water Act. Is that the case?

Mr. SUNSTEIN. You know, our role is not in—we don't have a role over permits except insofar as there are rules behind the permit process. So I would plead limited role with respect to that question.

Mr. CONNOLLY. But you might agree that if a subsequent administration finds that, deliberately or inadvertently, there is in fact, by the issuance of a permit, the circumvention of existing statutory framework with respect to regulation, it is incumbent upon that administration to enforce the law.

Mr. SUNSTEIN. I would agree with that.

Mr. CONNOLLY. And, therefore, the issuance of permits be revoked.

Mr. SUNSTEIN. Well, on that question I would want to look in the details.

Mr. CONNOLLY. With respect to this subject, mining, have there been any loss of human lives in the mining industry in the last 10 years?

Mr. SUNSTEIN. Yes.

Mr. CONNOLLY. Does Federal regulation cover that industry?

Mr. SUNSTEIN. Yes.

Mr. CONNOLLY. Does it constitute an undue burden on the mining industry?

Mr. SUNSTEIN. The rules that have been proposed and issued in this administration have been carefully scrutinized to make sure there is compliance with the law and with existing executive orders, and insofar as they are not finalized but proposed, we are eager to hear what people have to say.

Mr. CONNOLLY. But presumably, again, we use that word externalities, but, I mean, the value of a human life, the prevention of the loss of it has to factor in to the decision about whether or not A, to enforce regulations and/or new regulations, I mean, to impose, and second, to enforce those that are existing, is that not correct?

Mr. SUNSTEIN. That is a crucially important point, and the fact is that the net benefits of regulations in the first 2 years of this administration are significantly higher, actually three times those under the Clinton administration, more than three times those in the first years of the Clinton administration, and the main reason is lifesaving initiatives.

Mr. CONNOLLY. I wasn't clear on your response to our friend, my colleague, Mr. Kelly, his questions. Like him, I spent 20 years in the private sector, more in the technology realm, so I intersected with the Federal Government regulatory frameworks in technology before I came here to Congress, but I also served, like he did, in local government for 14 years. Could you expand a little bit on what is the current process for the opportunity of the private sector or, for that matter, the public sector, to participate in the formula-

tion of new regulations or a review of existing ones to streamline or eliminate or make better?

Mr. SUNSTEIN. OK, great. Thank you for that. I will give you a bunch of opportunities people have, and they won't be in sequence, but they are all really important. If there is a rule pending before the Office of Information and Regulatory Affairs, we have about 125 right now, our doors are open at both the proposed and final stage for people to come in and express their concerns. This is very important and perhaps not sufficiently appreciated, the availability of the process. By the way, the agency, the rulemaking agency will be present also to hear the concerns, and that is something that happens a great deal; it could happen more.

Under the President's Executive order, before a rule is proposed, if feasible, agencies should be engaging with State and local officials to see whether the rule makes sense. So for rules that affect their interest—and that could be well under \$100 million annually, it could be an exemption for one or another reason from the UMRA—there is supposed to be engagement before the fact.

Then there is an opportunity, after the rule is proposed, to engage through the comment process. And while it seems a little dry and perhaps formal, one thing I have learned in government is, yes, it is dry, but it is not formal in the sense of empty; it really matters. Many people in agencies, and I personally, spend a lot of time—it is a little pathetic on my part, to be sure, to be studying Regulations.gov and the comments that come in from State and local government at night, but I actually do because you often learn a great deal about something that is maybe not going in quite the right direction, and you can make it better. So there is that stage of commenting.

Then at the final stage agencies not infrequently engage, before they write the final rule, with State and local government, and that is consistent with the President's Executive order. And also when the final rule comes over to OIRA there is an additional bite at the apple.

Now, you referred to the look-back process, which is an unprecedented and, in that sense, historic effort to look at the regulations now on the books, and this has gotten a lot of bipartisan enthusiasm. The agencies went out to the private and public sectors, most cabinet level departments and agencies, asking for comments by the Federal Register.

But that is just the beginning. The plans that will be announced soon are under the Executive order, by design, preliminary plans, and under guidance we issued, taking note of many of the points that have come up today, and maybe we will be able to do a better job now that I and we in back of me have heard these concerns, will have a public process where, if people think the plans are too aggressive, maybe, in the deregulatory area, then that is important to hear. If they think they are too weak, if they have other ideas for cost reduction, then there is a great opportunity.

So this is really taking the open government goal with a new level of seriousness in the rulemaking process.

Mr. CONNOLLY. Thank you, Mr. Chairman.

Mr. LANKFORD. Thank you.

I defer to Mr. Labrador for 5 minutes.

Mr. LABRADOR. Thank you, Mr. Chair. I just have a quick question.

Is there a point of diminishing returns in regulation?

Mr. SUNSTEIN. Yes.

Mr. LABRADOR. And when does that point occur?

Mr. SUNSTEIN. Offhand, where the costs of increased stringency are higher than the benefits.

Mr. LABRADOR. OK, I will give you an example. A lot of the mayors in my cities in Idaho are complaining, and these are bipartisan, Republicans, Democrats, Independents, they are complaining because they are being asked to clean the water and get rid of phosphorus in the water, and they are going to be spending billions of dollars over the next 10 years, and the improvement is going to be 0.5 percent. So from something like 2 percent of phosphorous in the water to 1½ percent. And obviously this is going to cost money to fix it, and it is going to cost businesses. At what point do we start realizing the difference between 2 percent and 1½ percent is not worth the cost?

Mr. SUNSTEIN. That is a really important point, and on the particulars I would want to study the details. But if it turned out that it cost billions of dollars over the next 10 years, then the question is what do you get on the other side. Is it significant ecological and human health benefits? That would be one thing. If it is not, that would be another thing.

Mr. LABRADOR. So how do we study that and is that something that we can send to you and you can look at?

Mr. SUNSTEIN. We would be happy to look at it. If it stems from a rule, then that is really our lane. We would be happy to look at it and engage with the agency. But the question you are asking is under the President's Executive order, our staple, which is that increased level of stringency really protective, is it really expensive, is it worthwhile.

Mr. LABRADOR. OK, thank you.

I yield the balance of my time to the chairman.

Mr. LANKFORD. Thank you.

We will have the same challenge dealing with that same issue on it. It could be that we require every single traveler and passenger of every single vehicle in America to also wear bubble wrap suits while they drive and say that not just seatbelts, but bubble wrap. At some point it gets absurd. But you can always say, but it will save it a life. So we have to require that in balancing out the freedom of our Nation with any kind of onerous requirement. And evaluating who determines whether it is onerous or not becomes the other challenge.

You also mentioned the historic nature of the look-back. I would agree that it is historic. But there will also be a lot of people very attuned to seeing what the agencies consider as things to be able to kick out. If they are choosing only certain regulations that came down during certain political times in our Nation's history and say, OK, this one, this one and this one we no longer prefer, then that definitely becomes even more historic, where we are now clearing the deck of everything that doesn't meet our personal preferences of the day. So that is part of the challenge as well and part of the anxiety of watching the look-back. It is a good idea. The application

of it, though, will be interesting to see if it has political consequences with it as well.

We had spoken before about the issue of \$100 million or \$50 million in UMRA in those requirements and as it is allotted for inflation as well. Do you think that number is still the right number? 12866 just does \$100 million, period, without the inflation on it. Is that too high, is that too low? Should it be \$20 million? What becomes an unfunded mandate and economically significant?

Mr. SUNSTEIN. I think what I can tell you is kind of our day-to-day operation and how it bears on that question. If, under the President's Executive order, incorporating 12866, the \$100 million threshold not adjusted for inflation is met, then there has to be a whole apparatus, including a regulatory impact analysis, to try to make sure we have what you are concerned about, which is an objective and kind of scrutinized analysis of costs and benefits. The President's reaffirmation of the \$100 million threshold fits well, I think, with our best practices in this—

Mr. LANKFORD. So that number you think is about right?

Mr. SUNSTEIN. I think it is fine. The only thing I would add is that if there is a \$40 million or \$50 million expenditure, under the Executive order, that is, we look carefully at that too. So that is a lot of money.

Mr. LANKFORD. So just to clarify on it, \$100 million nationwide, so \$2 million per State, added altogether in aggregate, that suddenly becomes an unfunded mandate.

Mr. SUNSTEIN. That would be—under UMRA, you would have to adjust for inflation.

Mr. LANKFORD. Correct.

Mr. SUNSTEIN. But with that qualification, yes.

Mr. LANKFORD. Right. Well, in UMRA the standard would actually be even lower because for State and local governments it is actually \$50 million, adjusted for inflation.

Let me ask this. Regulation is the fulfillment of a piece of legislation. Would you agree with that? Legislation comes first; regulation is filling in the details from there. When there is a question about regulation, and if it is appropriate or inappropriate, who do you think is the best entity to determine whether that regulation fulfills the legislative intent?

Mr. SUNSTEIN. Well, ultimately the best is the Federal courts. That is what they are there for. Before that, then the relevant lawyers or the Justice Department and the General Council's Office, including the OMB General Council's Office, have a role.

Mr. LANKFORD. Do you sense the judicial branch, not just determining whether this is constitutional or whether the actions are consistent with the law, but is there a gain to be able to go back to the legislative branch to say what was the intent here, or do you think you ask the administration can't determine what the intent is and so you go to a third party and ask them what the intent is? Is there a gain to just sending it back to the people who wrote it and say, what is the intent here?

Mr. SUNSTEIN. Well, a little out of my OIRA lane on that question, but the courts' view is that the best indicator of the views or intentions of the enacting Congress is the language and supporting materials of the enacting Congress, and the courts are typically

wary of what a subsequent Congress, which may have either different membership or different attitudes, thinks about the judgments of its predecessor.

Mr. LANKFORD. Just to be clear on it, when we are dealing with the Judicial Branch reviewing the regulatory intent, you would think that is appropriate. But if you are dealing with an agency doing something that the private sector or a State considers onerous, you think the agency should be the one to settle that, not the Judicial Branch?

Mr. SUNSTEIN. Well, ultimately on onerousness Congress has the final say.

Mr. LANKFORD. So that one should come back to the legislative branch.

Mr. SUNSTEIN. Well, to determine reasonableness and legitimacy, the lawmaking authority is final. To determine legality, then the judicial judgment is the one. But we have had occasions over the last years where an administrative action doesn't fit with the views of the current Congress and then the current Congress makes a change.

Mr. LANKFORD. OK. Terrific.

With that——

Mr. Connolly. Can I——

Mr. LANKFORD. Yes, you sure may.

Mr. CONNOLLY. I just wanted to ask one followup to your line of questioning, Mr. Chairman.

Given your answer to the chairman with respect to what constituted an unfunded mandate, would No Child Left Behind become an unfunded mandate?

Mr. SUNSTEIN. You know, that one I would want to look at the particular regulations and whether they meet the statutory requirements. The regulations under that statute have not fallen within the Unfunded Mandates Act. In fact, as the chairman said, we have only had four in the last 10 years, none under that statute.

Mr. CONNOLLY. Well, if I could commend it to your review, as somebody who ran the eleventh largest school district in America, it costs a lot of money to implement No Child Left Behind, well in excess of \$100 million. And given the timeliness of it, the President himself has recognized some of the flaws in the legislation and many of us certainly hear from our respective school districts about the fact that good intentions, though it may represent, it is an onerous burden.

And remember that in lean times for State and local governments and school systems, it also represents an opportunity cost; every dollar I have to spend implementing that, in addition to the cash outlay, is a dollar I am not investing somewhere else in the school system. So I would urge OMB to look at No Child Left Behind in a timely fashion so the Congress can benefit from your analysis before we consider legislation later this year. Thank you very much.

Mr. SUNSTEIN. Thank you.

Mr. CONNOLLY. Thank you, Mr. Chairman.

Mr. LANKFORD. You are very welcome. And I would recommend to you, you just said it is an onerous regulation. You don't get to

pick if it is an onerous regulation, only the agency does. Just a little joke for you.

Can I mention one thing with that as well? Then I would like to be able to close out. Is there the opportunity you sense for an agency to say here is a larger regulation, we think this is going to be over \$100 million. If we break this up into five pieces of \$20 million each, it is basically not taking an aggregate, is it possible for an agency to break up a piece into multiple sections and to now say it is under the threshold because it is not one big piece, it is five smaller?

Mr. SUNSTEIN. It is possible. We haven't seen it.

Mr. LANKFORD. OK. Well, hopefully we never will on that one.

Thank you very much for coming and being able to testify today. Appreciate your input on this as we try to settle this issue. This is a piece of legislation that desperately needs repair, and I am sure we will have very robust conversations on the solutions to repair it. Thank you very much for this.

We stand adjourned.

[Whereupon, at 11 a.m., the subcommittee was adjourned.]

