

There may be room for this kind of thinking in academia. But it has no place in the executive branch of the U.S. Government, especially in the top regulatory office of the administration.

As the Discovery Institute's Wesley J. Smith has written on Professor Sunstein's position on animal standing in courts, it "would do more than just plunge the entire animal industry into chaos . . . the perceived exceptional importance of human life would suffer a staggering blow by erasing one of the clear legal boundaries that distinguishes people from animals."

Professor Sunstein was also out of the mainstream when, in a 2003 paper, "Lives, Life Years, and Willingness to Pay," he explained his views on a life-valuation system: "No regulatory program makes people immortal. The only issue is life extension, and, in terms of welfare, a program that saves 10,000 life years is better than one that saves 1,000 life years, holding all else constant. In welfare terms, a program that saves younger people is unquestionably better than one that saves older people." That is plainly not true if you believe in the moral equality of all lives.

While discussions about the value of an older person's versus a younger person's life may be acceptable inside the cozy confines of elite academic settings, they raise serious concerns when written by the person nominated to be America's regulatory czar. This is especially true at a time when we are engaged in a debate over the future of our healthcare system and as Congress considers several proposed bills that call for the administration to act on new healthcare regulations that could end up under the purview of OIRA.

Cost-benefit analysis is fine, but not as a means to ration healthcare, e.g., to America's elderly. Professor Sunstein's views call to mind the British basis for healthcare rationing: the Quality-Adjusted Life Years, (QALY.)

I am also troubled by the outcome of a Democratic retreat in which Professor Sunstein participated after the 2000 election. As the New York Times reported in May of 2001, the "principal topic was forging a unified party strategy to combat the White House on judicial nominees."

The strategy that resulted from this retreat led to two fundamental, and I believe, corrosive, changes in the way judicial nominees are considered. The first was to encourage filibusters, previously unknown for judges, and the second was that when voting for a judicial nominee, a Senator should determine the political views of nominees and vote against those with whom you disagree.

As the Times reported, one participant said of the panel discussion in which Professor Sunstein's participated, "They said it was important for the Senate to change the ground rules and there was no obligation to confirm someone just because they are scholarly or erudite."

The net result, a very negative result, of these changes was a hyper-par-

tisan judicial confirmation process during the Bush administration, one that tarnished many nominees and in which too many votes were determined by party affiliation and ideology. Some very worthy nominees, such as Miguel Estrada, were filibustered and, therefore, wrongly denied a confirmation vote.

I see this nomination as part of a broader pattern: One that shows that the Obama administration has repeatedly nominated or hired individuals with overly-partisan or bizarre views. Just last week, the facts came to light about the radical ideology and associations of Van Jones, President Obama's now-former green jobs czar, who was not subject to a Senate confirmation process.

While he has tried to explain away some of his views and assure Senators that he won't try to apply his personal opinions as part of his official duties, I believe that Professor Sunstein's nomination reflects this administration's pattern of favoring out-of-the-mainstream individuals for key jobs. If a Republican judicial nominee harbored such views, I have no doubt that the participants at the Democratic retreat in which Professor Sunstein participated would have found justification for a filibuster or negative vote, notwithstanding his fine legal credentials. While I have serious concerns about the standard, Democrats won that debate and now apply the standard. There cannot be one standard for Democrats and one standard for Republicans. Therefore, I must oppose this nomination.

The PRESIDING OFFICER. The Senator from Florida.

Mr. NELSON of Florida. Madam President, I ask unanimous consent to speak as in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### WELCOMING GEORGE S. LEMIEUX

Mr. NELSON of Florida. Madam President, momentarily, the Vice President will arrive to conduct one of the most important and very signal events of an individual's life, and that is being sworn in as one of 100 Senators representing the United States. As our new Senator, GEORGE LEMIEUX from Florida, assumes his duties, he will find that, indeed, he will understand that this has been called one of the greatest debating institutions designed by mankind to exist on the face of this planet. It is a great privilege to be a part of an institution that values democracy, that values free debate, that values the opinions of others. In this mix of two Senators representing each of our States, we come together to build consensus in order to lend our part to this constitutional process. For GEORGE LEMIEUX, this is going to be a red-letter day. I want to share with the Senate that it is a privilege for me to have the new Senator as my colleague. Our colleagues know the special rela-

tionship I had with Senator Martinez who I have had the privilege of having a 30-year personal relationship with. We continued that in our professional relationship here. Now with the new Senator duly appointed according to Florida law by our Governor, we have him coming to join us in this august body representing our State of Florida. That opportunity is now upon us since the Vice President has entered the Chamber.

I yield the floor.

#### CERTIFICATE OF APPOINTMENT

The VICE PRESIDENT. The Chair lays before the Senate a certificate of appointment to fill the vacancy created by the resignation of former Senator Mel Martinez of Florida. The certificate, the Chair is advised, is in the form suggested by the Senate. If there is no objection, the reading of the certificate will be waived, and it will be printed in full in the RECORD.

There being no objection, the material was ordered to be printed in the Record, as follows:

STATE OF FLORIDA

Office of the Governor

CERTIFICATE OF APPOINTMENT

To the President of the Senate of the United States:

This is to certify that, pursuant to the power vested in me by the Constitution of the United States and the laws of the State of Florida, I, Charlie Crist, the Governor of the State of Florida, do hereby appoint George S. LeMieux, a Senator from Florida to represent the State of Florida in the Senate of the United States until the vacancy therein caused by the resignation of Mel Martinez, is filled by election as provided by law.

In testimony whereof, I have hereunto set my hand and caused the Great Seal of the State of Florida to be affixed at Tallahassee, this 9th day of September, 2009

CHARLIE CRIST

Governor.

KURT S. BROWNING,

Secretary of State.

[State Seal Affixed]

FILED

2009 SEP 9 AM 10:25

DEPARTMENT OF STATE

TALLAHASSEE, FLORIDA

#### ADMINISTRATION OF OATH OF OFFICE

The VICE PRESIDENT. If the Senator-designate will present himself to the desk, the Chair will administer the oath of office.

The Senator-designate, GEORGE S. LEMIEUX, escorted by Mr. NELSON of Florida and former Senator Connie Mack, advanced to the desk of the Vice President; the oath prescribed by law was administered to him by the Vice President, and he subscribed to the oath in the Official Oath book.

The VICE PRESIDENT. Congratulations, Senator.

(Applause. Senators rising.)

Mr. DURBIN. I suggest the absence of a quorum and ask unanimous consent

that time during the quorum call be forced equally to both sides.

The PRESIDING OFFICER (Mr. BROWN). Without objection, it is so ordered.

The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. SESSIONS. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mrs. MCCASKILL). Without objection, it is so ordered.

#### EXECUTIVE SESSION

#### CASS R. SUNSTEIN TO BE ADMINISTRATOR OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET—Continued

Mr. SESSIONS. Madam President, the nominee to be Administrator of the Office of Information and Regulatory Affairs, Mr. Cass Sunstein, is before the body. He will be, if confirmed, a part of the White House Office of Management and Budget. He will have a number of responsibilities. It is certainly a very significant position.

This job has the responsibility of renewing all regulations proposed by all the Departments and agencies of the government. The regulations they issue are many. Laws are passed in this Congress, sometimes in haste, leaving the details of execution to the various agencies of our government—the Department of Defense, the Department of Homeland Security, the Department of Agriculture, all the agencies.

They have powers to effectuate the statutes passed by Congress. They set forth the details of how it is done. There are thousands of pages of regulations enacted every year. They are published in the Federal Register. No Senator or Congressman, to my knowledge, has ever sat down and read the Federal Register.

Federal regulations have much the same force as law. Indeed, people can go to jail for violating Federal regulations, and some do go to jail for violations of Federal regulations.

Some of this is, in fact, a product of necessity. For example, you create a park. When does the park open and close? And if people come in and litter, or people come in after hours, they can be punished, arrested, put in jail. Often those regulations and the punishment are set forth through regulation and not through the statute that created the park to begin with.

But it is a matter of real importance. Persons who produce these regulations are nameless and faceless denizens of the bureaucratic deep. They possess enormous power. As a prosecutor, I prosecuted cases. At the DEA, many of the drug regulations enforced by the Drug Enforcement Administration are based on regulations they pass, not what was actually required by the Con-

gress of the United States. Major policy decisions are often set forth in that fashion, including environmental regulations, health care regulations, and reimbursement rules and hospital requirements. Financial institutions can be done through regulations and controlled through them. Truly, there is a concern about the disconnect between the democratic accountability we are known for in our country and this process of administrative regulations.

During President Reagan's time, I believe, Congress passed a law that created this position: the Administrator for the Office of Information and Regulatory Affairs, the idea being to have another unelected bureaucrat—and that is what this one is—but to be a central clearinghouse for all the proposed regulations and to question the lawfulness or the necessity or the cost of these thousands of regulations that get promulgated on a yearly basis.

It is an important position that can protect and at least somewhat ensure that our constitutional liberties are not being eroded.

Enter Mr. Sunstein. He is a most likable person, a national intellectual, always interesting, sometimes taking positions that those on the left—of which he clearly is a part—disagree. Indisputably, he is a man of the left. However, he has taken, over the years, quite a number of positions, some of which are pretty shocking. So I think he is not normally the kind of person you would appoint to this kind of green-eyeshades position—somebody who would be sitting down on a daily basis reading the regulations and studying them and researching them—to be a free spirit, as our nominee is. So I have some concerns about it.

Over the course of his career in academia, Professor Sunstein has clearly advocated a number of positions that are outside—well outside—the American mainstream. While much of the criticism of his nomination rightly has focused on his animal rights advocacy, where he, in effect, and plainly said he thought animals should be able to have lawyers appointed to defend their interests—and these are controversial matters—but he has other legal writings that are controversial also and do not just deal with the question of animal rights. I would like to highlight just a few of those positions.

In his 2008 book titled “Nudge: Improving Decisions About Health, Wealth and Happiness,” Professor Sunstein advocates an approach to the law based on economic and behavioral principles which he dubs “libertarian paternalism.”

Under Professor Sunstein's theory, the government can take steps to “nudge” individuals toward making what he would say are better decisions, and at least what the government considers to be more desirable social behavior.

Professor Sunstein argues that the government can achieve these goals while not being actively, or at least ob-

viously, coercive. His theory operates on the assumption that the average person is “lazy, busy, impulsive, inert, irrational, and highly susceptible to predictable biases and errors.”

So the government needs to be a little paternalistic, he suggests, and take care of them and issue regulations and pass laws that keep them from doing things that some bureaucrat or some Congressman thinks is not socially desirable.

As Professor Sunstein argues:

For too long, the United States has been trapped in a debate between the *laissez-faire* types who believe markets will solve all our problems and the command-and-control types who believe that if there is a market failure then you need a mandate. The *laissez-faire* types are right that . . . government can blunder, so opt-outs are important. The mandate types are right that people are fallible, and they make mistakes, and sometimes people who are specialists know better and can steer people in directions that will make their lives better.

That is what he has said.

Presumably, in Professor Sunstein's view, the “specialists” who “know better” than ordinary Americans are government bureaucrats. He seems to believe Americans are “lazy” and “inert,” and I think this is not a healthy view. So I question whether anyone who thinks Americans are fundamentally lazy can perform his role as the gatekeeper of government regulation in the Obama administration.

Professor Sunstein's approach is consistent with much of what we have seen from this administration, I have to say, which seems to believe that government control of health care, the financial markets, and the business community generally is preferable to free market policies. Americans are not comfortable with this.

I have been out having townhall meetings. I know they are not comfortable with it. According to recent polling, 52 percent of voters worry that the government will do too much to “help” the economy.

That is from a Rasmussen poll of June 2, 2009. Fifty-nine percent of voters believe the financial bailouts were a “bad idea.” The masters of the universe thought it was going to be great. We spent \$800 billion, the largest expenditure in the history of the American Republic, and every penny of that is going to the national debt because we were already in debt. We borrowed every penny of it. We have had very low stimulative effect from that. The American people are right about that.

Only 31 percent of voters believe this stimulus bill has helped the economy. And we do not need a poll to tell us how uncomfortable the American people are with the President's effort to overhaul health care.

So the American people ought to understand if we confirm Professor Sunstein, he will be the chief architect and gatekeeper over all of the regulations that this administration will be attempting to implement in a myriad of areas—not just health care and financial markets but agriculture, the