

## EXECUTIVE SESSION -- (Senate - September 09, 2009)

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

The PRESIDING OFFICER. Under the previous order, the Senator from Connecticut is recognized.

Mr. LIEBERMAN. Mr. President, as chairman of the Committee on Homeland Security and Governmental Affairs, I am pleased to both express my unqualified support for the nomination of Cass Sunstein to lead the Office of Information and Regulatory Affairs, which is known in government circles as OIRA, and also to favorably report the nomination out from our Homeland Security Committee.

This nomination was considered and reported out by the committee on May 20. That was almost 3 1/2 months ago. But unfortunately, Professor Sunstein's nomination has been the subject of unnecessary holds and delays. This is an important position that needs to be filled.

I thank Majority Leader *Reid* for bringing this important nomination to a vote. Obviously, there was a filibuster, and we will now need to invoke cloture so Professor Sunstein can get on with the important job that President Obama has nominated him to do for our country and each one of us.

OIRA is one of those governmental agencies that has a low public profile but exerts high influence over the workings of government and therefore the daily lives of most Americans.

In Congress, we pass laws that express our values, that draw lines between what is right and wrong, what is desirable and undesirable for our society. But because we cannot ever foresee every permutation of the law or its effect, we must leave many of the details to the executive branch and its regulatory actions or implementation of the laws we pass.

For over a quarter of a century now, Presidents of the United States have asked OIRA to help oversee and coordinate this critical regulatory process. Thus, OIRA has a huge impact on the widest range of problems, as wide as the purview of our government itself, including the health and safety of every American and the health and stability of the American economy.

In Professor Cass Sunstein, the President has found someone with exceptional qualifications and talent, capable of leading OIRA in a positive direction to fulfill Congress's intention in the adoption of laws.

When he began teaching at Harvard Law School in 2008, after a distinguished career teaching and residing in the city of Chicago, which is ably represented by the occupant of the chair, his new employers at Harvard announced that they had secured for their faculty "the preeminent legal scholar of our time, the most wide-ranging, the most prolific, the most cited, and the most influential." As a graduate of Yale Law School, I was initially quite suspect of those superlatives. The truth is that those words of Elena Kagan, then dean of Harvard, now Solicitor General of the United States, are validated by the extraordinary record of Professor Cass Sunstein. He has taught and written about many subjects, including particularly regulation, the management of risk, and, in fact, OIRA itself.

Our committee conducted a thorough review of Professor Sunstein's writings and his background, and he has met individually with me, Senator *Collins*, our ranking member, and most other members of the committee. We held a confirmation hearing on this nomination on May 12 of this year, at which the members of our committee thoroughly questioned Professor Sunstein about his views on several important matters.

And I believe he responded directly, sincerely, and addressed each of the members' concerns.

For example, I wanted to be sure his previous advocacy for a rigorous implementation of cost-benefit analysis to regulations did not mean that OIRA under his leadership would interfere with the agency's issuing of regulations necessary to protect public health and safety. Professor Sunstein convinced me in his answer that he would diligently support the purposes of laws to protect public health and safety as adopted by Congress and signed by the President.

Because Professor Sunstein is brilliant, creative, and prolific, he has written some things that are unconventional and, for some, controversial. I believe when asked about each of those matters he answered sincerely and fully and reassuringly.

For example, hunters were concerned about Professor Sunstein's views on gun rights. He made very clear he believes the second amendment creates an individual right to possess guns for hunting and self-defense. To farmers and others concerned with his previous writings and comments on cruelty to animals, Professor Sunstein has said he would take no steps to promote litigation on behalf of animals, which some concluded was his position based on a provocative article he wrote, and that he has no plans, certainly, to regulate animal husbandry.

So this is a bright, thoughtful, creative man who, as a professor, has written some provocative, unconventional ideas. I suppose if one wanted to take advantage of them for one's own purposes, to politicize, in some sense, or ideologize, in some sense, this nomination, one might seize on those. But at bottom, this is a person extraordinarily well qualified for this position.

I will say he has been endorsed by the American Farm Bureau Federation, insofar as concerns of the agricultural community are concerned. He met with them, and he answered their questions. They said:

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..... we hope the Senate can take up this nomination in the near future and all Senators will vote to confirm him in this post.

Professor Sunstein has also won the public endorsement of a variety of groups, including the U.S. Chamber of Commerce and the National Association of Manufacturers which has concluded, based on his writings and their meetings with him, that he will be fair and not antibusiness, anti-economic growth in this important position.

As for myself, after meeting with this distinguished, thoughtful, and very gentlemanly individual, listening to him at our hearings, seeing how he has responded thoroughly and forthrightly to those who have approached him with their concerns, I am convinced Professor Sunstein has superior qualifications for this office and a strong commitment, if concerned, to guide OIRA in conformity with the law and the public interest above all. That is why I urge my colleagues to support cloture and to support this nomination.

Mr. President, I am pleased to see the senior Senator from Minnesota. I yield to her at this time.

The PRESIDING OFFICER. The Senator from Minnesota.

Ms. KLOBUCHAR. Mr. President, I rise today to talk about Cass Sunstein and his qualifications to be Administrator of the Office of Information and Regulatory Affairs. I thank Senator *Lieberman* for his leadership. I am going to try not to say the word "OIRA" in my remarks because it is a very difficult agency, and no one is quite sure what it does. But I can tell you it does something very important, which is to cut through the redtape for

citizens and to try to get some sensible rules for this country.

How do I know Cass Sunstein? Back in the 1980s I was privileged to have him as my law professor at the University of Chicago. I took his administrative law class, and he was also my adviser on the law review.

His career as a legal scholar was just beginning to take off, but he was already making a very strong impression as a teacher. I think many of my fellow classmates believed he was, in fact, their favorite teacher.

When we first saw Cass Sunstein in class, he looked like a boy in a man's suit. He was so thin but with such enthusiasm. These were the days before white boards, and he would always get a lot of white chalk on his black suits, which he seemed oblivious to, but he was far from an absent-minded professor. He would race along a mile a minute in his lecture, a fountain with a never-ending stream of ideas. He was never boring, which is a tough standard for law students.

Today Professor Sunstein is one of the Nation's most thoughtful and respected legal scholars with a distinguished record of accomplishments. He is a graduate of Harvard Law School, a law clerk to Supreme Court Justice Thurgood Marshall, a professor at the University of Chicago for 27 years, the author and coauthor of more than 15 books and hundreds of scholarly articles.

By a large margin, Cass Sunstein is the most cited scholar on any law faculty in the United States of America. One envious observer said:

If you look at what he's written and done, he should be 900 years old.

What are the concerns of his academic work? The overriding concern is we have smart, science-based, cost-effective policies to protect public health and safety, to promote energy security, and to strengthen our economy and financial system.

In a recent book Professor Sunstein coauthored called "Nudge," he wrote that by knowing how people think, we can design rules and policies that make it easier for Americans to choose what is best for themselves and their families. In other words, Cass Sunstein believes the best types of rules and regulations are the ones that encourage American consumers and businesses to make good decisions without demanding that they do so.

I thought a lot about his work when Congress debated the first-time home buyers tax credit which helped spur home sales after months of decline again. Again, if you shape policies and programs that are easy to understand, that provide incentives, that give Americans control over their fate, you get the right results.

That is why it is so important we confirm Cass Sunstein to this critical post. His pragmatic, sensible approach to policy and regulation will help make our Federal agencies work smarter and ensure that our government works better for our citizens and for our businesses.

It is no surprise to me, as Senator *Lieberman* just discussed, the kind of support that Cass Sunstein has gathered. The Wall Street Journal editorial board has been positive about his nomination. You have heard the support from the U.S. Chamber of Commerce, the National Association of Manufacturers, the American Farm Bureau Federation, 13 Nobel Prize winners, and C. Boyden Gray, who served as White House Counsel under both Presidents Bush.

While all these individuals and organizations are supportive, what they say about Cass Sunstein is what I have always known about him. He is a pragmatist. He cares about ideas, but ultimately he cares about the right results.

I have heard time and time again from the people in my State office about the redtape and regulations citizens run into on an everyday basis with the U.S. Government. It is time to put someone in this job who actually sees that connection, is able to connect human behavior with what those rules are, and make those rules make some sense. He has the intellect, the ability, and the force to get this done, and I am proud to support his nomination.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. LIEBERMAN. Mr. President, first, I thank Senator *Klobuchar* for those very thoughtful and, I thought, compelling words in support of Professor Sunstein's nomination. They were both thoughtful and personal, and that matters a lot. I thank her for taking the time to come and speak on this important nomination.

I thought it might be helpful if I read from a few of the letters of endorsement of Professor Sunstein because this is one of those nominations that I think has become unnecessarily controversial. A rule I have always tried to apply--I think I have done it pretty well over the years, playing it uniformly--is when, as a Senator, we exercise our authority to advise and consent, the judgment for us to make is not whether we would have nominated that person to that office but whether on due consideration we conclude that nominee is within an acceptable range and capable of fulfilling that job. That is quite a different situation.

One might agree or disagree, let's put it that way, with Professor Sunstein on one or another thing he has written in a remarkably productive, prolific career, but one would have to decide if he is unqualified for this position, not just that he wouldn't be your first choice but seems to be he is unqualified or there is a level of risk in fulfilling it that even if he was qualified, one would vote against it.

I want to reassure my colleagues. I mentioned the American Farm Bureau Federation because there had been concern in the Agriculture Committee. I read a letter from Bob Stallman, president of the American Farm Bureau Federation:

Like others in the agriculture community, we were concerned about reports related to Mr. Sunstein's views on animal rights and the impact that could occur should such views be reflected in Federal regulations. We have, however, had the opportunity to discuss this subject in person with Mr. Sunstein. He has been candid, forthright and very open about how he views his role in OIRA. He has shared his perspective on the issues in question and stressed that he would not use his position to undermine further law or further policies inconsistent with congressional directives.

I quoted in my opening statement of the president of the American Farm Bureau Federation:

..... we hope the Senate can take up this nomination in the near future and that all Senators will vote to confirm him in this post.

Second, a very different association and important one in our country is the Chamber of Commerce of the United States of America, and in a letter from R. Bruce Josten, the first paragraph says:

The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations--

He says about the nominee--

Over the course of an impressive career as a legal academic, Professor Sunstein has made important contributions in such diverse areas as environmental law, behavioral economics, and consumer safety. Through his work, he has improved our understanding of the law and public policy in a

continuing effort to improve the ability of government to beneficially impact the lives of its citizens.

As OIRA Administrator, Professor Sunstein is almost certain to apply a thoughtful approach to regulatory oversight and review. His extensive writings and teachings provide a useful blueprint of his pragmatic approach to regulation, including his continued defense of cost-benefit analysis as a tool for developing rational regulation. His approach is not influenced by an ideological predisposition.

I repeat, from Bruce Josten, executive VP of the Chamber of Commerce:

His approach is not influenced by an ideological predisposition--to the contrary, his writings show a strong commitment to a balanced review that is biased neither in favor of nor against regulation.

By all accounts, Professor Sunstein is a man of personal integrity and formidable intellectual prowess, and the Chamber applauds his willingness to suspend an exceptional academic career in order to serve his country.

Mr. Josten concludes by saying:

The Chamber urges you to expeditiously confirm Professor Sunstein as Administrator of OIRA.

I need not tell my colleagues in the Senate that the Chamber of Commerce is a probusiness group, and if they believed Cass Sunstein as OIRA Administrator would harm business entrepreneurship, economic growth, and the free market in our country, they would say so, loudly and clearly. But they did not say so. They did not just remain silent. The Chamber of Commerce of the United States said Cass Sunstein is qualified by his writings, he is fair, and they urge us to confirm this nomination.

I have a similar letter from the National Association of Manufacturers, Rosario Palmieri, vice president of NAM, writing to Senator *Collins* and me:

..... I am writing to offer our support for the confirmation of Cass Sunstein to be Administrator of the Office of Information & Regulatory Affairs in the Office of Management & Budget. ....

The NAM [National Association of Manufacturers] has supported nominees to OIRA under both Republican and Democratic presidents. The office plays a crucial role in agency prioritization, paperwork reduction, and regulatory review. Cass Sunstein, in particular, is deserving of confirmation because of his keen intellect, expertise in the fields--

The PRESIDING OFFICER. The Senator's time has expired.

Mr. LIEBERMAN. I thank the Chair.

The bottom line is that Professor Sunstein is supported by many groups, including those who some might think would have opposed him. I hope my colleagues will support this nomination in the vote to come and on final passage.

I thank the Chair, and I yield the floor.

Ms. COLLINS. Mr. President, I rise to discuss the nomination of Professor Cass Sunstein to be Administrator of the Office of Information and Regulatory Affairs, OIRA.

Professor Sunstein's nomination has been endorsed by a number of groups, including the Farm Bureau, the Chamber of Commerce, and the National Association of Manufacturers.

I will ask consent to have letters of support from these organizations printed in the *Record* following my remarks.

While many people outside of Washington have never heard of this office, it can have an enormous influence on our everyday lives. Through the process of regulatory review, OIRA--as it is known in Washington--plays an integral role in the rulemaking process. The office advises agencies as rules are developed and then reviews the methodologies used to develop and justify these rules.

Professor Sunstein has extensively studied government regulation and the various methods that can be used to evaluate regulatory effectiveness. During his confirmation hearings, I noted several core principles that seem to underpin Professor Sunstein's work.

He advocates greater transparency in the regulatory process. One of his recommendations is that agencies be required to better justify decisions to regulate, particularly when the costs of regulations appear to exceed the benefits. That makes sense to me.

Professor Sunstein strongly supports the use of cost-benefit analysis as a tool for evaluating regulation. At the same time, he recognizes that such analysis has limitations when it comes to considering intangible costs and benefits.

Recently, Professor Sunstein has proposed an alternative to more draconian ``command-and-control" regulation. In his book ``Nudge," he makes a compelling case for regulation that does not dictate actions but instead encourages certain behavior without limiting personal freedoms. This ``nudging" can promote societal goals without depriving individuals or organizations of other choices.

As with many nominees who make the transition from academia to government service, Professor Sunstein will find that as he steps from the world of theory into the realm of practice, not every idea discussed in the classroom can be easily converted into government policy--nor should it be. During his confirmation hearing, Professor Sunstein and I discussed several

provocative statements he has made in the course of his career, statements that are troubling on their face.

I was deeply concerned, for example, by his past comment that hunting should be banned. When I questioned Professor Sunstein on this statement, he responded as follows:

Hunters are among the strongest environmentalists and conservationists in the United States. And it would be preposterous for anyone in a position like mine to take steps to affect their rights or their interests.

In a July 14, 2009, letter to Senator *Chambliss*, Professor Sunstein promised to respect second amendment rights if confirmed as OIRA Administrator. Professor Sunstein explained:

I strongly believe that the Second Amendment creates an individual right to possess and use guns for purposes of both hunting and self-defense. I agree with the Supreme Court's decision in the *Heller* case, clearly recognizing the individual right to have guns for hunting and self-defense. If confirmed, I would respect the Second Amendment and the individual right that it recognizes.

I was also concerned by several law review articles in which Professor Sunstein made the bizarre statement that animals be given standing to sue in court--allowing ``representatives" to sue on an animal's behalf. In response to questions on this subject during his confirmation hearing, Professor Sunstein clarified that he was suggesting this as a means by which existing animal cruelty laws could be enforced by civil suits. In a letter to me on this

issue, Professor Sunstein further stated:

I have no personal plans to regulate farm animal husbandry in any way. If confirmed, and if the Department of Agriculture were to propose any regulations in that domain, I would work with the Department to ensure that any proposed regulations follow the law and fit with the priorities of the President--and that they take full account of the pressing needs of America's farmers and ranchers and the countless consumers who benefit, every day, from their remarkable efforts.

I will consent to have Professor Sunstein's letter printed in the *Record* following my remarks.

I know that a number of my colleagues have shared these concerns or raised other concerns based on Professor Sunstein's extensive bibliography. I understand that Professor Sunstein has made himself available to meet with Senators to discuss those concerns and has in some cases provided written clarifications of his positions. I expect that when confirmed as OIRA Administrator, he will continue to be as accessible and responsive to this Congress.

On balance, I support Professor Cass Sunstein as Administrator of the Office of Information and Regulatory Affairs.

Mr. President, I ask unanimous consent to have letters of support and Professor Sunstein's letter, to which I referred, printed in the *Record*.

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

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CHAMBER OF COMMERCE  
OF THE UNITED STATES OF AMERICA,

Washington, DC, June 23, 2009.

Hon. *Harry Reid*,  
Majority Leader, U.S. Senate,  
Washington, DC.

Hon. *Mitch McConnell*,  
Republican Leader, U.S. Senate,  
Washington, DC.

Hon. *Joseph Lieberman*,  
Chairman, Committee on Homeland Security and Government Affairs, U.S. Senate, Washington, DC.

Hon. *Susan Collins*,  
Ranking Member, Committee on Homeland Security and Government Affairs, U.S. Senate, Washington, DC.

**DEAR LEADERS REID AND MCCONNELL, CHAIRMAN LIEBERMAN AND RANKING MEMBER COLLINS:** The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region, urges you to confirm Professor Cass Sunstein as Administrator of the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget.

Over the course of an impressive career as a legal academic, Professor Sunstein has made important contributions in such diverse areas as environmental law, behavioral economics, and consumer safety. Through his work, he has improved our understanding of the law and public policy in a continuing effort to improve the ability of government to beneficially impact the lives of its citizens.

As OIRA Administrator, Professor Sunstein is almost certain to apply a thoughtful approach to regulatory oversight and review. His extensive writings and teachings provide a useful blueprint of his pragmatic approach to regulation, including his continued defense of cost-benefit analysis as a tool for developing rational regulation. His approach is not influenced by an ideological predisposition--to the contrary, his writings show a strong commitment to a balanced review that is biased neither in favor of nor against regulation.

By all accounts, Professor Sunstein is a man of personal integrity and formidable intellectual prowess, and the Chamber applauds his willingness to suspend an exceptional academic career in order to serve his country. The Chamber urges you to expeditiously confirm Professor Sunstein as Administrator of OIRA.

Sincerely,  
R. Bruce Josten,

*Executive Vice President,*  
*Government Affairs.*

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NATIONAL ASSOCIATION  
OF MANUFACTURERS,

Washington, DC, June 22, 2009.

Hon. *Joseph Lieberman*,  
Chairman, Senate Committee on Homeland Security and Government Affairs, Dirksen Building, Washington, DC.

Hon. *Susan Collins*,  
Ranking Member, Senate Committee on Homeland Security and Government Affairs, Dirksen Building, Washington, DC.

**DEAR CHAIRMAN LIEBERMAN AND RANKING MEMBER COLLINS:** On behalf of the National Association of Manufacturers (NAM) and the millions of Americans our members employ, I am writing to offer our support for the confirmation of Cass Sunstein to be Administrator of the Office of Information & Regulatory Affairs (OIRA) in the Office of Management & Budget. Thank you for the swift work of your Committee to report Professor Sunstein favorably to the full Senate.

The NAM has supported nominees to OIRA under both Republican and Democratic presidents. The office plays a crucial role in agency prioritization, paperwork reduction, and regulatory review. President Obama said that the office offers a "dispassionate and analytical 'second opinion' on agency actions." We believe that function is especially crucial during the economic crisis we face and to preserve high wage jobs from being lost due to unnecessary or thoughtless government action.

Cass Sunstein, in particular, is deserving of confirmation because of his keen intellect, expertise in the fields of administrative and environmental law, and his commitment to fair and reasoned deliberation of issues that will come before him. Under an Administrator Sunstein, all sides will be given a fair hearing and a real opportunity to impact the final analysis of an issue.

We stand ready to assist in ensuring confirmation by the full Senate of Cass Sunstein.

Sincerely,  
Rosario Palmieri,

*Vice President,  
Infrastructure, Legal & Regulatory Policy.*

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AMERICAN FARM

BUREAU FEDERATION,

Washington, DC, September 1, 2009.

**TO ALL U.S. SENATORS**

**DEAR SENATOR:** Earlier this year, the Senate received the nomination of Cass Sunstein to serve as administrator of the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget. This office plays a vital role in determining the final disposition of regulations, in particular environmental and natural resource proposals that have a direct impact on the agricultural community. Accordingly, Farm Bureau has a strong interest in the individual that will fill the role of administrator of that office.

Like others in the agricultural community, we were concerned about reports related to Mr. Sunstein's views on animal rights and the impact that could occur should such views be reflected in federal regulations. We have, however, had the opportunity to discuss this subject in person with Mr. Sunstein. He has been candid, forthright and very open about how he views his role in OIRA. He has shared his perspective on the issues in question and stressed that he would not use his position to undermine federal law or further policies inconsistent with congressional directives.

Based on our discussions with Mr. Sunstein, Farm Bureau has no objection to his confirmation to the position of administrator of OIRA and we hope the Senate can take up this nomination in the near future and that all senators will vote to confirm him to this post.

Sincerely,  
Bob Stallman,

*President,  
American Farm Bureau Federation.*

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May 20, 2009.

Hon. Susan Collins,

*Ranking Member, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.*

**DEAR SENATOR COLLINS:** Thank you for your support and the work of your staff throughout the confirmation process. I am honored by the Committee's vote today and the opportunity to serve the Nation as the Administrator of the Office of Information and Regulatory Affairs.

I understand that a question may have arisen recently about my views on the regulation of farming and farm animals. I have no personal plans to regulate farm animal husbandry in any way. If confirmed, and if the Department of Agriculture were to propose any regulations in that domain, I would work with the Department to ensure that any proposed regulations follow the law and fit with the priorities of the President--and that they take full account of the pressing needs of America's farmers and ranchers and the countless consumers who benefit, every day, from their remarkable efforts. The focus of my academic work on animal welfare is not regulation of agriculture, but existing state anticruelty laws (over which OIRA has no authority). My work as Administrator, if I am confirmed, would reflect the law and the President's priorities.

Thank you again for your support throughout this process.

Sincerely,  
**CASS R. SUNSTEIN.**

Mr. BUNNING. Mr. President, I rise today to speak on the nomination of Mr. Cass Sunstein for the Office of Management and Budget's Office of Information and Regulatory Affairs, OIRA. Most Americans have never heard of OIRA, but it has great influence on the daily lives of all Americans. OIRA is responsible for the execution of a wide range of government policies and regulations with its oversight of the executive branch rulemaking. In other words, the OIRA can heavily influence or change the intended purpose of any regulatory proposal. Therefore, it is important for the head of OIRA to be a rational thinker who has every American's best interest at heart.

After reviewing Mr. Sunstein's opinions and past comments, it is very clear that his views are far outside of the mainstream. For example, Mr. Sunstein believes that animals should be given the same rights as humans. In 2004, he wrote, "We could even grant animals a right to bring suit without insisting that animals are persons, or that they are not property." According to Mr. Sunstein's logic, your dog could sue you for putting its collar on a little too tight. Furthermore, Mr. Sunstein is against hunting and compares it to the "mass extermination of human beings." Whether it is for population control or for food consumption, hunting plays a vital role in the lives of many Americans, especially in Kentucky. It is irresponsible for Mr. Sunstein to compare a person who kills a deer which can provide food for his or her family for several weeks, to the likes of Stalin. He has also been very hostile to second amendment rights and has publically stated his resistance to an individual's right to keep and bear arms.

Any regulation that comes out of the Department of Agriculture could negatively impact farmers across the Nation if Mr. Sunstein is the person responsible for implementing that regulation. Livestock farmers across Kentucky could potentially be forced out of business if Cass Sunstein had his way. Additionally, vague rulemaking by the Bureau of Alcohol, Tobacco, Firearms, and Explosives could result in Mr. Sunstein filling in the gaps to push his and the President's radical agenda. There are plenty of other qualified people whom President

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Obama could have chosen for this very significant position. I cannot support this nomination, and I urge my colleagues to vote against this nomination.

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