



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

**FORUM ON UNDERSERVED COMMUNITIES AND
the Regulation Process**

**Panel 2: Sources of Reforms to Improve Engagement
with Underserved Communities**

November 8, 2021

TRANSCRIPT
(Not Reviewed for Errors)

Remarks

Cass R. Sunstein, Senior Counselor, Department of Homeland Security; Robert Walmsley University Professor, Harvard Law School; Former Administrator, Office of Information and Regulatory Affairs

Panelists

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John D. Graham, Professor, Indiana University O'Neill School of Public and Environmental Affairs; Former Administrator, Office of Information and Regulatory Affairs

Bijal Shah, Associate Professor of Law, Arizona State University Sandra Day O' Connor College of Law

Moderator

Sally Katzen, Professor of Practice and Distinguished Scholar in Residence, New York University School of Law; Former Administrator, Office of Information and Regulatory Affairs.

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Transcription of Video

Panel 2

Video Runtime: 1:12:29

1 (Beginning of Audio Recording.)
2 MR. THOMSON: (Inaudible) of the
3 United States. And I want to welcome you to
4 the second of six panel in ACUS's ongoing
5 forum on Underserved Communities and the
6 Regulatory Process. Today's panel focuses on
7 different approaches for developing and
8 implementing strategies to enable underserved
9 communities to more fully participate in
10 regulatory policy-making. We have a
11 fantastic collection of speaker to address
12 several aspect of that topic, starting with
13 Sally Katzen, who will be moderating today's
14 panel.

15 Sally is a senior fellow here at ACUS
16 and currently Professor of Practice and
17 Distinguished Scholar in Residence at NYU
18 School of Law. Before that, she served as
19 Administrator of the Office of Information
20 and Regulatory Affairs, which is fortunate
21 because I have a hunch we will be hearing
22 about OIRA throughout the day's event. So
23 without further ado, I will turn it over to
24 Sally now. Sally?

25 MS. KATZEN: Thank you, Mark, and

1 welcome to everybody. And a particular
2 thanks to ACUS for convening this panel,
3 indeed, the series of panels on Underserved
4 Communities in the Regulatory Process:
5 Looking at increasing participating by
6 underserved communities and their members in
7 the process by which agencies make regulatory
8 decisions.

9 The first panel was held last week and
10 focused on identifying who are the
11 underserved communities. Today's panel is
12 looking at the sources of reform to improve
13 engagement with these communities. And the
14 third panel, which is scheduled for later
15 this week, will look at barriers preventing
16 underserved communities from participating in
17 regulatory policy-making.

18 Now, our first speaker today is Cass
19 Sunstein, a man who need no introduction to
20 this audience. Among the most prolific
21 writers and creative thinkers of our time, he
22 has -- and these are just the last three
23 positions he's held -- been OIRA
24 Administrator from 2009 to 2012, the Robert
25 Walmsley University Professor at the Harvard

1 Law School, and now serving as Senior
2 Counselor at the Department of Homeland
3 Security. Cass?

4 MR. SUNSTEIN: Thank you so much,
5 Sally, and it's a particular pleasure to be
6 introduced by Sally, from whom I have learned
7 so much, particularly in the House and as
8 during the transition from President Bush to
9 President Obama. Now, I'm going to talk
10 about sludge, and we need a definition of
11 sludge for me to do that. Thick, soft, wet
12 mud or similar viscous mixture of solid or
13 liquid components.

14 That's sludge. I want to understand
15 sludge to mean administrative burdens
16 requiring people to obtain information to
17 figure out whom to call to find out exactly
18 what they are supposed to do. Mud sludge
19 involves paperwork and reporting
20 requirements. Some of it involves training.
21 Some of it involves waiting time. Much of it
22 involves having to go someplace in person.
23 That's a little definition of sludge. I'm
24 going to be calling for three things in these
25 remarks.

1 The first is sludge audits, meaning an
2 effort to audit the volume of sludge that is
3 within government processes and affecting
4 people, particularly members of underserved
5 communities. Second, a cost-benefit analysis
6 of sludge -- it could be formal and very
7 disciplined. It could be more qualitative
8 but informal.

9 And the third is a distributive
10 analysis of sludge, asking who is helped and
11 who is hurt with particular reference to, for
12 example, people who are poor, people who are
13 sick, and people who are elderly. So sludge
14 audits, cost-benefit analysis of sludge, and
15 asking the question of distributive justice.

16 As many of you know, the Office of
17 Management and Budget produces an annual
18 report called the Information Collection
19 Budget of the United States Government. The
20 ICB, as those of us who love it, call it,
21 quantifies the annual paperwork burden
22 imposed by the U.S. government.

23 According to a recent ICB, the number
24 is 11.4 billion hours on federal paperwork.
25 Paus, if you would, over that number. If we

1 value an hour of work at \$27 -- not a bad cut
2 at it -- we're speaking of the equivalent of
3 \$307.8 billion in monetary equivalent.
4 That's more than eight times the budget of
5 the Department of Energy, more than triple
6 the budget of the Department of Education,
7 more than double the budget of Department of
8 Transportation and the Department of State.

9 That number understates the problem.
10 Sludge often makes it difficult or impossible
11 for people to avoid crushing hardship. In
12 the worst cases, sludge kills. Every day, it
13 impairs education by depriving people of
14 educational opportunity. Think of the FASFA
15 form. It cripples economic growth.

16 Think of excessive permitting and
17 licensing requirements. It decreased
18 employment, in part because it can stifle
19 entrepreneurship and innovation. It can, in
20 some cases, compromise fundamental rights,
21 and it is a pervasive source of inequality.

22 Sludge is, also, an assault on human
23 dignity. Confronting sludge and having to
24 find a way to overcome it can create a sense
25 of humiliation. If you were faced with

1 sludge, you are a supplicant rather than a
2 right-holder. People without much money
3 struggle with sludge. It hurts all of us.
4 But if you are old, disabled, sick, or poor
5 or if you don't have a ton of education,
6 sludge can be a curse. I'm still -- even
7 though I'm a government official these days,
8 I'm still affiliated with a university, and
9 in my contract, I have to talk about
10 behavioral economics, not literally but
11 that's implicit.

12 Let's talk a little bit about that,
13 shall we? And let's work in three stages.
14 If you are a rational citizen, maybe a person
15 trying to get some educational opportunity to
16 which the law entitles you, maybe to get some
17 resources to which the law entitled you, if
18 you have to wade through sludge and deal with
19 administrative process to get what you have a
20 right to, even if you're entirely rational,
21 the cost of sludge navigation may exceed the
22 benefits. So you might give up just on the
23 ground that it's too challenging, even if the
24 eventual pay-off is significant.

25 If you are not fully rational -- and

1 this is stage two -- if you are subject to
2 procrastination, as human beings are, if you
3 focus on the short-term and not the long-
4 term, if you have present bias, as many
5 people do, or if you suffer or benefit from
6 unrealistic optimism, sludge might be a wall
7 that separates you from something to which
8 you have a legal right.

9 So people are human, as they tend to
10 be, rather than homo or economicus, as they
11 rarely are, present bias, (inaudible)
12 procrastination, and unrealistic optimism can
13 make sludge into an impermeable wall.

14 But here in stage three is the heart
15 of the problem from the standpoint of equity.
16 What we know about the human mind is that it
17 has limited bandwidth, even among those who
18 have a lot of processing power.

19 And if you're dealing with a health
20 problem, an economic problem, a problem of
21 depression, a problem of -- of old age, then
22 your processing power is likely to be
23 reduced, either because of literal limits or
24 because you are dealing with something that's
25 taking a lot of the processing power up, like

1 navigating economic stress. The scarcity of
2 cognitive resources can turn sludge into an
3 extremely severe obstacle for people who are
4 simply trying to get educational help or a
5 little job training or some money that can
6 make their days and weeks and months better.

7 None of this means that sludge is
8 always bad. It can be optimal or
9 insufficient or excessive. If you're going
10 to do something major with your life, sludge
11 might be an excellent idea. Are-you-sure-
12 you-want-to questions from the government can
13 be annoying, but they can provide individual
14 and social benefits.

15 Program integrity matters a lot, and
16 sometimes sludge is essential to guarantee
17 program integrity. But I'm here mostly to
18 bury sludge, not to praise it, and to urge
19 that it is a problem of the first order, not
20 a problem of footnotes.

21 To understand that, we need look no
22 further than the response to the pandemic to
23 see the United States has waged war on
24 sludge, one that has not been widely noticed
25 but that actually happened. The pandemic

1 concentrated the bureaucratic mind, leading
2 to impressive and brisk reforms. Some of the
3 most aggressive sludge-reduction efforts came
4 from the Department of Health and Human
5 Services in a kind of bottom-up process.
6 Often, reporting, auditing, and paperwork
7 requirements were eliminated. In-person
8 interview requirements were scaled back.
9 Importantly, a lot of medical services were
10 authorized through telehealth.

11 Why did all of this happen? One
12 reason was a new cost-benefit analysis. When
13 countless people are getting sick or poor,
14 the harmful effects of paperwork and other
15 burdens grow exponentially.

16 In normal times, it might seem
17 accessible or sensible to tolerate a delay
18 and to require people to do some less-than-
19 fun work to ensure they really do require for
20 benefits or to protect against some kind of
21 harm. But if people are at risk of getting
22 sick or suffering from severe deprivation, we
23 might be willing to accept less-than-ideal
24 safeguards.

25 But there's another, subtler factor

1 behind the war on sludge. In the midst of
2 the pandemic, many people have been scared,
3 confused, overwhelmed, or anxious about their
4 health or finances. They might have been
5 dealing with kids at home, with sick or
6 elderly friend and relatives or both.

7 They might have been sick themselves.
8 Because they were frightened and preoccupied,
9 they didn't have a lot of bandwidth to manage
10 sludge, which could defeat them, and people
11 in government knew that. It could defeat
12 them with respect to programs on which their
13 economic situation or physical and mental
14 wellbeing depended.

15 The United States has long had a
16 program that gives free school meals to poor
17 kids. The problem is that many parents
18 didn't enroll their kids. They didn't manage
19 the sludge. Maybe they didn't understand
20 what they were supposed to do.

21 In response to persistent low take-up
22 rates, the USDA adopted a program called
23 Direct Certification, which means that kids
24 can be enrolled without their parents filling
25 out anything at all. Sludge removal,

1 according to a recent study, has ensured that
2 more than 15 million kids have benefitted
3 from the program and others like it, about 91
4 percent of the eligible population. Sludge
5 removal has had a big impact on the lives of
6 those kids and their families.

7 I'm urging here that we ought to be
8 seeing sludge audits cropping up like
9 beautiful flowers all over government in the
10 United States, including nationally, in which
11 we're getting a count of the magnitude of
12 sludge and getting clarity about individual
13 contributors, whether they're particular
14 paperwork mandates or particular forms.
15 After the sludge audit, we need a cost-
16 benefit analysis.

17 Are the burdens really justified?
18 Does -- do -- are they helping more than
19 they're hurting? We, also, need to ask the
20 distributional question: who is being helped
21 and who is being hurt? Often, the answer is
22 sludge is hurting the most vulnerable members
23 of society, which is why the question of
24 equity is central to the program of sludge
25 reduction.

1 Sludge, I say once more, infringes on
2 human dignity. It makes people feel that
3 their time does not matter. It's a time tax.
4 In extreme cases, it makes people feel that
5 their lives don't matter. True, it's a
6 stretch to see sludge reduction as a
7 compliment to the universal declaration of
8 human rights.

9 It's a little mischievous to draw
10 sludge in contact with the universal
11 declaration of human rights, but I'm here to
12 say that it's not that much of a stretch to
13 put them in contact.

14 In the midst of a pandemic, I think a
15 question often asked by college students
16 around the room late at night and sometimes
17 by older people, too, has new clarity, I
18 think. The question is, what is it that
19 human beings are most blessed to have?
20 What's the most precious thing we have?
21 There's lots of candidate answers to that
22 question.

23 In 2021, I think one answer stands
24 above all else, and the answer is a four-
25 letter word: time. Time is the most precious

1 commodity that human beings have. Let's
2 find, shall we, ways to give our brothers and
3 sisters more of that. Thank you.

4 MS. KATZEN: Thank you, Cass, for your
5 interesting and thought-provoking -- as
6 always -- comments. And now, our
7 panelists -- other panelists will be joining
8 us on the screen. And I'd like to introduce
9 them in alphabetical order, which is the
10 order in which they will be speaking.

11 First, Boris Bershteyn is a Partner in
12 the litigation and anti-trust practice of
13 Skadden Arps, and a Senior Fellow at ACUS.
14 He served in the White House Counsel's Office
15 in the Obama Administration, and then as
16 General Counsel OMB and Acting Administrator
17 of OIRA during Obama.

18 Second is John Graham, who is
19 Professor Risk Analysis at the Indiana
20 University's O'Neill School of Public and
21 Environmental Affairs. He, also, served as
22 Administrator of OIRA from 2001 to 2006 in
23 the George W. Bush Administration. He, too,
24 is prolific. His new book, which is now
25 available for sale, is entitled The Global

1 Rise of the Plug-In Electric Vehicle.

2 Now, if you're think of OIRA-nians --
3 and we are -- our third panelist is here to
4 keep us honest or pushback on some of our
5 positions or arguments, Bijal Shah. Bijal is
6 an Associate Professor of Law at the Arizona
7 State University Sandra Day O'Conner College
8 of Law.

9 Her research lies in the intersection
10 of administrative law and structural
11 constitutionalism and is grounded in the
12 specifics of agency dynamics. Her work
13 appears in many prestigious publications and
14 journals. Before entering the academy, she
15 was an Associate General Counsel for the
16 Department of Justice Executive Office for
17 Immigration and Review.

18 Now, I am serving as a moderator, not
19 a presenter. But I was told that you all
20 would indulge me to T-up, at least, one of
21 the several issues that we will be
22 considering today.

23 So I roughly translated our charge:
24 what are the sources of reform to better
25 analyze the effects of proposed regulatory

1 activities on marginalized communities to
2 something like, which entity or entities
3 should be the impetus for or lead the efforts
4 and/or provide models or instructions or
5 guidance about how to do it and/or follow up
6 to ensure that it is done?

7 And the it I am referring to is the
8 ingredient that President Biden emphasized in
9 his day one modernization memorandum, namely,
10 how to analyze distributional equities and
11 incorporate those considerations in agency
12 decision-making process?

13 Now admittedly, I have a bias towards
14 a more-or-less top-down approach with OIRA
15 using its position to push agencies to
16 undertake and use this analysis. Even as I
17 acknowledge that each agency is different,
18 facing different challenges, and clearly
19 appreciably more in-tune with the affected
20 shareholders or stakeholders than some
21 centralized body, nonetheless, I'm of the
22 school that thinks that the agencies are
23 generally responsive to what OIRA cares
24 about.

25 And if OIRA doesn't focus on it, then

1 it doesn't get much play at the agencies. I
2 may be wrong on that, but if I'm right, then
3 what are OIRA's responsibilities here?

4 Then, as I thought about it, it seemed
5 almost like deja'vu all over again. When I
6 came to OIRA in 1993, cost-benefit
7 analysis -- or I think it's called now
8 benefit cost analysis -- was the coin of the
9 realm of regulatory review, so to speak.

10 It was the centerpiece of President
11 Reagan's Executive Order 12291 and the
12 accepted methodology for determining if a
13 proposal met the decisional criteria set out
14 in that order, net benefit to society. Now,
15 while Executive Order 12866 changed many
16 things about the Reagan regime, it retained
17 the requirement that agencies undertake an
18 economic analysis, typically CBA, and send it
19 along with the Draft Regulatory Action for
20 OIRA review.

21 At that time, some agencies would
22 actually pretty good at CBA, EPA, and DOT to
23 name two. But even though the requirement
24 had been in place for over a decade, some
25 agencies were woefully inept or at least

1 untutored in undertaking such analysis.

2 Now, that changed over the years as
3 OIRA continued to push, continued to insist
4 on CBA, and provide guidance and informal
5 advice to agencies. And agencies, in turn,
6 built up competent and, indeed, very
7 competent staff. Is that the path that we
8 would expect to see here with respect to
9 agencies undertaking distributional analyses?

10 One big difference is that there was
11 and continues to be a generally-accepted
12 methodology for doing cost-benefit analysis
13 in the economic literature. That's not the
14 case with respect to distributional analysis.
15 And what does that mean for sharpening our
16 pencils and getting it done? Do we need more
17 input from the agencies? More
18 experimentations? More creativity?

19 CBA looks at total cost and total
20 benefits. How can it be modified to
21 incorporate distributional concerns? Who
22 bears the cost? Who enjoys the benefits?
23 And should CBA be so modified? Also, are
24 there other players beside OIRA and the
25 agencies who can or should continue --

1 contribute to the process?

2 What role can academicians play? Or
3 other stakeholders and, critically, which
4 stakeholders? And what can we or should we
5 expect from marginalized communities
6 themselves? But my musings may or may not be
7 where our panel wants to go. So let me turn
8 to Boris, who is going to lead us off and ask
9 him to begin.

10 MR. BERSHTEYN: Good afternoon. Thank
11 you all for joining us, and thank you to
12 ACUS. It's a great honor to be on a panel --
13 such an august panel, including several
14 former leaders of OIRA. You know, us old
15 OIRA hands are a bit of tight-knit group, but
16 Sally is indisputably our field marshal. And
17 the charge that field marshal gave to this
18 foot soldier today is to focus on
19 participatory issues, that is, improving the
20 engagement of underserved communities in the
21 administrative process.

22 And through the lens of participation,
23 I will address the question that's the big
24 question before this panel: should the
25 approach be centralized at the White House or

1 OMB, or should it be decentralized with the
2 agencies?

3 Now, I take on this charge with some
4 considerable humility. I am not an expert in
5 stakeholder engagement, certainly not
6 compared to the folks who will be speaking on
7 the third ACUS panel this coming Wednesday.
8 But before tackling the
9 centralized/decentralized debate, it's
10 helpful to get a sense of at least what I
11 mean by stakeholder engagement. So I offer
12 ten quick observations on the subject.

13 First, meaningful engagement much
14 reach beyond the notice and comment model.
15 Examples might include community roundtables
16 and other structured discussions that provide
17 individuals opportunities to speak to their
18 lived experience, sometimes in ways that
19 quantitative analysis may not readily
20 capture.

21 Two, underserved communities face
22 significant resource barriers to greater
23 engagement, and agencies should consider
24 offering participants stipends or other
25 participation, and it's, also, a reality that

1 members of underserved communities may need
2 assistance with childcare or transportation
3 before they can meaningful participate in the
4 administrative process.

5 Three, resources are not the only
6 barrier. Member of communities have -- may
7 have limited English proficiency. Agencies
8 must, also, consider accessibility for
9 individuals with different visual or hearing
10 abilities.

11 Four, even those proficient in English
12 may not engage with the convoluted
13 government-ese, which many administrative
14 documents are written in. We've all read
15 these. Some of us have written them. And we
16 all must do more to make plain language the
17 rule, not the exception.

18 Five, another barrier is a lack of
19 trust. Some communities have been harmed by
20 government activity, and structural and
21 institutional inequality reduces faith in the
22 capacity of engagement to cause positive
23 change.

24 Six, technology helps. Greater
25 acceptance of video during the pandemic is an

1 opportunity to make in-person engagement a
2 norm. In addition, many younger members of
3 the underserved communities may prefer social
4 media, for example, as a mode for engagement.

5 Seven, technology is not a panacea.
6 Not all communities embrace social media, and
7 we must be mindful of disparities and
8 broadband access, for example, in our rural
9 communities.

10 Eight, engagement with underserved
11 communities maybe best accomplished by local
12 intermediaries that have built trust in those
13 communities, non-profit organizations,
14 schools, faith-based leaders and
15 organizations.

16 Nine -- and Cass touched on this
17 extensively -- engagement must affirm the
18 dignity and respect of participants from
19 underserved communities.

20 And ten, community engagement can be
21 and probably will be resource-and-time-
22 intensive. We must not only devote the
23 necessary resources, but also look for ways
24 to measure success to make sure that those
25 resources are well-spent.

1 So with those observations, I come to
2 the question that ACUS framed for this panel
3 about engagement with underserved
4 communities. The relative merits of, on the
5 one hand, a top-down approach in which White
6 House manages efforts and, on the other hand,
7 a more decentralized approach in which
8 agencies have greater discretion to develop
9 or implement reform.

10 And in essence, the questions -- the
11 question answers itself because many of the
12 strategies for improving participation of
13 underserved communities that are just
14 discussed can only be meaningfully addressed
15 in the context of particular rule-makings or
16 sets of inter-related rule-makings by
17 particular agencies.

18 Indeed, OMB came to the same
19 conclusion in its report to the President
20 just this past August. It wrote: there is no
21 one-size-fits-all approach to stakeholder
22 engagement. Now, but if even complete
23 centralization is impracticable, does the
24 White House, and in particular OMB, have a
25 role? I think it does. First, OMB can

1 promulgate guidance encouraging, if not
2 requiring, agencies to meaningful engage with
3 underserved communities. The guidance should
4 set a framework for matters agencies should
5 consider in designing their engagement
6 strategies.

7 Second, OMB can ensure transparency,
8 accountability, and, where appropriate,
9 inter-agency coordination. Agencies should
10 report on their engagement with underserved
11 stakeholders to OMB at regular intervals and
12 in standardized ways that allow for cross-
13 agency comparisons.

14 These agency-level reports should be
15 made public, and OMB in turn should assess
16 the progress of stakeholder engagement on a
17 whole-of-government level. What are the
18 successes? What areas need improvement?
19 What are the priority next steps?

20 Third, OMB should consider its own
21 practices. For years, OIRA has been subject
22 to criticism, some of which is unfair in my
23 view, because according to critics,
24 stakeholder meetings in connection with rule
25 reviews have been disproportionately with

1 regulated entities. Why is the criticism
2 somewhat unfair? Because OIRA tends to meet
3 with all who ask, and regulated entities tend
4 to ask. Why is the criticism only somewhat
5 unfair? Because OIRA could likely do more to
6 solicit engagement from underserved
7 communities, and on reflection, I'm sure I
8 could have done more on this score when I was
9 the Acting Administrator.

10 I expect the idea of affirmatively
11 soliciting engagement will stretch OIRA's
12 comfort level. Just as OIRA is more used to
13 simply reviewing submitted rule-makings than
14 prompting them, OIRA is, also, more used to
15 receiving engagement than to eliciting it.
16 But at a minimum, now we're -- the first
17 question we'll face from OIRA is, where will
18 we get the additional staff to engage in
19 underserved communities and will that staff
20 have the right expertise?

21 And that brings me to the fourth
22 priority for OMB, ensuring that agencies have
23 the requisite resources for stakeholder
24 engagement. Those include funding from the B
25 side of OMB, but it, also, includes the human

1 resources as coordinated on the M side of OMB
2 with the Office of Performance and Personnel
3 Management. The resource challenge may be
4 greatest for small agencies, like OMB itself.
5 OMB has a small appropriation.

6 It doesn't build aircraft carriers and
7 doesn't operate large benefit programs. It's
8 appropriation largely covers the salaries of
9 its significantly overworked staff. So for
10 an agency like OMB undertaking a meaningful
11 stakeholder engagement program requires
12 careful attention to resources.

13 These are what I see as important,
14 central roles for OMB in a largely-
15 decentralized effort to improve stakeholder
16 engagement. Sally, with those thoughts, back
17 to you.

18 MS. KATZEN: Thank you very much, and
19 I'm going to turn it over to John.

20 MR. GRAHAM: Thank you, Sally. Let me
21 start by applauding President Biden for
22 instructing OIRA to investigate how federal
23 regulations impact low-income households in
24 this country. This, I believe, is a crucial
25 step forward on the challenge we're

1 discussing in this session. Now, part of the
2 solution as you've heard is more
3 participation in rule-makings by low-income
4 Americans or people who are concerned about
5 their welfare.

6 But it's also crucial to expand the
7 analytic framework for regulatory analysis to
8 include an explicit focus on whether this
9 regulation is a good idea or a bad idea for
10 low-income Americans. How can we design this
11 regulatory framework so it makes federal
12 regulations more equitable in their impact?

13 Now, in the bureaucratic world of
14 regulatory politics, analytic changes just
15 don't happen by accident. They require
16 presidential instruction as a starting point,
17 but they, also, require, as Sally has
18 mentioned, technical guidance from OIRA to
19 the agency staff on how to go about actually
20 performing a distributional analysis or an
21 equity-oriented regulatory impact analysis.
22 I'm here to tell you this is not as easy as
23 it might sound. I've actually tried to do
24 this, and in fact, I have recently co-
25 authored a major study of how federal

1 regulations of the automobile industry for
2 safety, air quality, and fuel economy -- how
3 they have impacted low-income Americans.

4 And what we find is that
5 regulations -- the good news is that the
6 regulations do benefit low -- low-income
7 Americans, which predominantly use private
8 automobiles for their daily transportation.
9 They have experienced significant benefits
10 from automobile airbags, from catalytic
11 converters that clean the exhaust stream, and
12 from electric vehicle technologies that are
13 now entering the marketplace.

14 The bad news is that regulations are,
15 also, costly, costly for low-income Americans
16 because they raise the cost of producing
17 vehicles and, in some cases, they make it
18 more expensive to own and maintain and
19 operate a vehicle. As a result, a valid
20 distributional study of auto regulations
21 needs to look at both sides of the equation,
22 the cost and benefits, not just to society as
23 a whole, but to low-income Americans.

24 Now, in the course of our study, we
25 stumbled on some very disturbing findings.

1 We learned that some federal agencies do not
2 even collect information, poverty-related
3 information about the benefits of their
4 program, so they have no way of knowing
5 whether their programs are disproportionately
6 benefiting low-income Americans.

7 So, for example, when automobile
8 crashes occur, the federal government does
9 not collect basic income data on the
10 motorists who are killed and the motorists
11 who survive the crashes. We just don't know
12 the relative proportions of low-income people
13 (inaudible) who are surviving these crashes.
14 That means we don't know how many low-income
15 Americans -- how many lives were saved by
16 automobile airbag systems.

17 Likewise, the federal government does
18 not have a comprehensive data system on how
19 personal exposures to air pollution vary by
20 income level. There are numerous studies in
21 the literature, and they're all using what
22 scientists call proxies. That means when you
23 don't really have the information you need,
24 you creatively try to create some metric to
25 cover up the fact that you don't have the

1 ideal information you need.

2 Now, what I'm saying is agencies will
3 need to make new investments and improved
4 data systems in order to perform equity-
5 oriented cost-benefit analysis. I hope Cass
6 is still on the line because I am proposing
7 more sludge. But Cass did acknowledge that
8 in some cases, you have to create a little
9 sludge in order to create some benefits. And
10 we are going to have to do that in the case
11 of equity-oriented cost-benefit analysis.

12 It's, also, important to get beyond
13 political correctness on this topic and ask
14 hard questions about how new technologies
15 will actually influence the lives of low-
16 income Americans. In some cases, it will be
17 good, in some cases maybe not so good. In
18 the long run, for example, electric cars may
19 be a great deal for low-income Americans
20 because they are very cheap to operate.

21 In a near term, however, electric
22 vehicles are not very practical for low-
23 income Americans. Those people often don't
24 have a place to charge their vehicle at home,
25 so they will have to use so-called public-

1 charging networks. Let me assure you -- and
2 I've studied this -- that public-charging
3 networks are not necessarily a fun place to
4 be. They're not convenient, they have
5 expensive electricity, and you can get in
6 waiting lines if you're in an area with a lot
7 of electric cars.

8 In addition, heavy use of public fast-
9 chargers can actually degrade the performance
10 of your battery pack. And that means, as
11 your car gets older, you may have to replace
12 your batter pack, and that is very expensive,
13 \$4-10,000 for a battery pack replacement for
14 many of these electric vehicles.

15 Their warranties only last eight years
16 and 100,000 miles. Who are the people who
17 predominantly use vehicles that are beyond
18 the warranty period? They are often low-
19 income Americans.

20 So we will solve these problems
21 eventually with new technology and with new
22 policies, but I make this point to illustrate
23 a careful analysis of the impact of electric
24 vehicle technologies on low-income Americans
25 is actually a pretty complicated analysis,

1 and it requires some objectivity to enter
2 that analysis.

3 I conclude with two -- two
4 constructive suggestions. One is we need a
5 couple agencies to step forward, as Sally has
6 suggested, and innovate and provide model
7 analyses of how low-income Americans will be
8 impacted by new regulatory policies. And
9 then other agencies can look at those and
10 adapt the innovations they have that are
11 applicable to their own regulatory issues.

12 And second, there is a very obscure
13 technical guidance document out of OMB called
14 Circular A4, and this little document needs a
15 little sprucing up in the area of equity-
16 oriented cost-benefit analysis. And that's a
17 practical thing that OIRA could do. Thank
18 you very much. I look forward to the
19 comments and questions.

20 MS. KATZEN: Thank you. And speaking
21 of comments and questions, we have a very
22 large audience, but we are very interested in
23 what some of you have to say. And so if you
24 can put in the -- I think it's in the Q&A box
25 your questions, not necessarily your answers,

1 but your questions for the panelists. If you
2 want to identify for whom the question is --
3 to whom the question is directed, that's
4 fine, too. But we're looking forward to
5 having your input. But it gives me great
6 pleasure to turn the microphone over to
7 Bijal.

8 MR. SHAH: Thanks, Sally. And hi,
9 everyone. It's -- it's a delight to be here,
10 speaking with this terrific and experienced
11 group. And thanks, as well, to ACUS for
12 putting on this entire multi-day program
13 on -- on best to serve vulnerable
14 communities. I'm glad that in this -- in
15 this panel we're focused on this important
16 matter of what role the White House should
17 play in developing and implementing policies
18 aimed at improving underserved communities'
19 access to participation in the regulatory
20 process.

21 And I very much appreciate the focus
22 thus far on OMB and OIRA. Afterall, as the
23 centerpiece of the President's leadership
24 mechanism, OIRA serves as both overseer of
25 the quality of agency actions and mouthpiece

1 for the President's policy goals.

2 But in my brief remarks, I'd like to
3 touch on the potential drawbacks of a top-
4 down approach. And I'd, also, like to
5 advocate for a top-down approach that
6 entrenches change in leadership and
7 institutional design at the agency level. In
8 other words, a top-down approach that fosters
9 bottom-up improvements in order to create
10 more lasting change.

11 So the broader question I'm asking is,
12 how can top-down and bottom-up approaches
13 interact in ways that foster more permanent
14 changes to how the administrative state
15 engages participation and accessibility,
16 particularly among marginalized, underserved,
17 and vulnerable communities.

18 And Executive Order 13985 itself
19 suggests that advancing equity requires a
20 systematic approach to imbedding fairness in
21 decision-making processes, executive
22 departments, and agencies. And so I -- I
23 advocate for multi-faceted approach to
24 accomplishing this. For what it's worth, I
25 touch on these matters a bit in a recent

1 essay I wrote for a northwestern law review
2 online symposium on racial subordination and
3 structural marginalization, in case you are
4 interested in, you know, thinking more about
5 this as it pertains to minority communities.

6 So the bad thing or, in some cases, a
7 good thing about executive orders is that
8 they only last as long as the President who
9 issued them is in office. So as a result, we
10 might argue in favor of expanding OIRA's role
11 in order to better serve certain values over
12 time, right?

13 And -- and Richard Ravesz --
14 (inaudible) Revesz, Sally, your colleague at
15 NYU -- has suggested that OIRA must be pushed
16 beyond its traditional stance as a reactive
17 player in the regulatory review process and
18 evolved beyond its usual tact of pushing back
19 against regulatory initiatives only when the
20 benefits do not justify the costs.

21 This perspective complements his other
22 work on the distributional consequences of
23 regulation, which advocates either for OIRA
24 itself or an OIRA-like body to enforce
25 presidential initiatives that focus on

1 distributional outcomes.

2 And so we might liken this approach to
3 the way in which OIRA has fostered a strong
4 culture of cost-benefit analysis since the
5 Reagan Administration. A strong presidential
6 enforcement body could encourage a similarly-
7 strong orientation among agencies toward
8 taking into account the distributional
9 outcomes of regulation. While this is an
10 attractive approach in many ways, it's
11 nonetheless idealized.

12 Afterall, the reason that cost-benefit
13 analysis can proliferated throughout the
14 government and has been the favored approach
15 for Presidents, regardless of political
16 party, is because it is a way to strengthen
17 political control over agency action. And
18 notably, the control fostered by CBA can be
19 used to further any sort of substantive
20 policy or agency, which renders it useful to
21 Presidents regardless of their partisan
22 leanings.

23 However, an interest in evaluating
24 distributional consequences, enhancing
25 participation for underserved communities,

1 focusing on equity, or more generally,
2 improving distributional outcomes does not
3 benefit a President's capacity to wield
4 control over agencies for their own policy
5 purposes. So as a result, it seems unlikely
6 that Presidents will employ OIRA to further
7 these values in particular across changes and
8 administration and shifts in party dominance.

9 So what can we do about this? The
10 answer is not to forego centralization all
11 together. Rather, political appointees,
12 including White House officials and heads of
13 agencies, as well as expert civil servants,
14 should work together to entrench change in
15 the administrative state that is resistant to
16 shifting political winds.

17 In other words, it would be beneficial
18 to use Biden's executive order, which will
19 surely be revoked once the opposing party
20 comes into office, as an impetus to change
21 administrative structures and practices on an
22 agency level. In doing so, the White House
23 might better ensure that improved
24 administrative access to and outcomes for
25 underserved communities become part of

1 agencies' standard operating procedures.
2 And, in fact, OIRA under Biden could play a
3 primary role in entrenching these changes in
4 the administrative state. Indeed, the more
5 carefully and collaborative --
6 collaboratively this is accomplished, the
7 more likely these changes are to stick.

8 So what might this look like? Let me
9 mention some possibilities, which I'm happy
10 to discuss more in the Q&A. So first, it
11 goes without saying that at the absolute
12 minimum, Presidents and their, you know --
13 their proxies should refrain from employing
14 the bully pulpit or interfering in ground-
15 level administrative policies in a manner
16 that exacerbates injustice.

17 The President should, at the very
18 least, engage in rhetoric in support of
19 equity. This type of speech would be, as
20 I -- I have heard it called by the ACLU, a
21 decent but limited start.

22 Additionally, the President could
23 direct inter-agency administrative
24 coordination, more detailed regulatory
25 action, the issuance of agency guidances, and

1 the prioritized enforcement of law and other
2 policies that expand administrative
3 capacities to improve their engagement and
4 outcomes.

5 The President could, also, proactively
6 arm OIRA to force regulatory review and
7 shifts in the application of cost-benefit
8 analysis to ensure that agencies prioritize
9 the needs of vulnerable communities. But
10 note that this prescription is not intended
11 to produce a more robust concentration of
12 presidential power.

13 Rather, it -- this suggest harnesses
14 the President's capacity to distribute and
15 diffuse power within the executive branch,
16 away from herself in order to enhance
17 agencies' potential to act as a check against
18 future residents of the White House that
19 might interfere with or put an end to agency
20 efforts to improve equity.

21 In addition, the White House,
22 including the current OIRA, might require
23 agencies themselves to identify, investigate,
24 and discontinue administrative policies that
25 render participation inaccessible to some.

1 Also, the White House could appoint policy-
2 makers that encourage the proliferation of
3 civil servants that have an interest in
4 furthering equitable administrative policies.

5 And finally, the White House could
6 empower offices within agencies, such as
7 offices of civil rights, which are currently
8 both ubiquitous and rather toothless or a
9 newly -- a set of newly-created institutions
10 serving as mini-OIRAs within agencies to
11 improve regulatory processes and
12 distributional consequences.

13 These intra-agency bodies could be
14 harnessed to encourage agencies on a more
15 individualized basis to implement mandates
16 that improve regulatory access to and
17 outcomes for underserved communities.

18 So ultimately, as Professor of Public
19 Policy Brian Williams has written, the
20 President could lead the effort to foster a
21 new administrative state dependent on
22 regulatory agencies and public administrators
23 who are anti-racists and who create -- who
24 seek to create and promote a fair, just, and
25 equitable approach to public administration.

1 This is preferable, perhaps, to harnessing
2 the old administrative state for only the
3 short period of time that the President is in
4 office.

5 Thanks for your attention, and I'm
6 looking forward to our conversation.

7 MS. KATZEN: Right. And we're
8 beginning to get some materials in the Q&A.
9 Keep them coming. And meanwhile, I would
10 like to give all of our panelists an
11 opportunity to respond to anything that any
12 of the panelists have already said or take
13 issue or seek clarification. Do I have any
14 takers? Come on, guys.

15 MR. GRAHAM: Let me start, Sally, by
16 just reacting to part of the last
17 presentation, which I thought was very well
18 done. But the idea that each President is
19 inevitably going to discard the executive
20 order of the previous President, I think it's
21 important to actually look at the history and
22 how this has evolved because in some -- in
23 some cases, Presidents have changed parties
24 and they haven't changed the executive order.
25 That was true on George W. Bush compared to

1 the Clinton Administration.

2 And if you look closely, for example,
3 at the Clinton executive order and you
4 compare it to the Reagan executive order,
5 there's actually strong areas of similarity,
6 as well as the significant differences that
7 Sally mentioned. So even when these
8 executive orders do change and one's repealed
9 versus the other one, it doesn't mean that
10 all the insight and experience that was
11 developed in the previous administration is
12 discarded.

13 Now having said all that, I also want
14 to admit things have gotten a lot more
15 polarized in Washington D.C. than they were
16 when I in the Bush Administration.

17 So I think it -- maybe you're right,
18 then, in the future we're going to see much
19 more of this. You know, just everybody has
20 to have their own executive order and they're
21 really going to radically change things. But
22 the history, I think, is a more complex
23 story.

24 MR. SHAH: Thank you, John, for that.

25 If it --

1 MS. KATZEN: Indeed, I think it's fair
2 to say that President Obama who issued an
3 executive order built on 122 -- 12866. Trump
4 didn't change it at all, and we know he sort
5 of enjoyed flipping apple carts and -- and
6 changing things. He left that one in -- in
7 place.

8 So far Biden hasn't changed that
9 executive order, either. Does that mean that
10 anything one President does will have
11 longevity? No. I think Bijal is right on
12 that, and you run the risk, unless what a
13 President does is arrive at a decision based
14 on a lot of consultation, a lot of thought.

15 There's been a lot written about how
16 12866 came into being that made it a little
17 more balanced than many of the people in the
18 process would have wanted. Much has been
19 written on that, and I won't repeat here.
20 But any other thoughts on that point or any
21 of the other points that have been raised?

22 MR. SHAH: Would it be possible for me
23 to respond to John?

24 MS. KATZEN: Certainly.

25 MR. SHAH: Wonderful. I'm so glad to

1 hear that. John, thank you and, Sally, as
2 well. Thank you, as well, for your
3 historical perspective. You have deep
4 experience in the sense of the -- you know,
5 where there's been continuity in
6 presidentialism and where there have been
7 breaks.

8 I think there are a couple of things
9 we should note as distinct about the types of
10 directives that have to do with
11 substantive -- a substantive focus on
12 engendering equity and other sorts of
13 directives that focus on process or ways to
14 centralize power in the executive branch. In
15 other words, I -- I do agree that --
16 certainly in the cost-benefit analysis
17 context, as well as others, that Presidents
18 have built on previously policies, in part
19 because those approaches have continued to
20 serve Presidents' interests in garnering
21 control over agencies and -- and ensuring the
22 continued centralization of -- of executive
23 power, right?

24 I think, however, we have to be sort
25 of realistic about the type of directive

1 we're looking at here. And so to agree on
2 one point with John, I think the fact that
3 sort of increasing polarization between
4 parties is an important factor.

5 I think we have to be realistic and
6 sort of truly, you know -- forefront of the
7 opposing -- the views that the previous
8 President had in direct opposition to
9 measures that furthered equity and the way in
10 which, you know, certain members of the
11 Republican party continue to sort of have
12 positions that -- that -- that -- that
13 actively advocate against things like
14 additional education in classrooms
15 surrounding, you know, racial equity and --
16 and sort of understand that the -- the
17 pathway that executive directives are going
18 to take when it comes to matters of equity is
19 not going to be the same as the sort of
20 continual building of regular -- you know,
21 of -- of executive orders that we've seen in
22 other contexts, such as cost-benefit
23 analysis.

24 MS. KATZEN: I -- Boris raised his
25 hand, and I don't know if Cass wants to

1 contribute to this piece, but let's go with
2 Boris first, and we'll see.

3 MR. BERSHTEYN: I hope Cass doesn't
4 want to contribute to this piece because I
5 wanted to take us down a -- maybe a perhaps
6 slightly more technocratic road and -- on a
7 couple of issues. One, I wanted to agree
8 with John that one -- one document that one
9 wishes was updated more often even in the
10 executive order is Circular A4, and there
11 is -- I just want to register my agreement
12 that there's quite a bit of work to be done
13 on that Circular when it comes to addressing
14 the analytical aspects of regulatory effects
15 of underserved communities.

16 You know, some of those may involve
17 guidance on how to desegregate information
18 that's being collected in support of cost-
19 benefit analysis in order to more
20 meaningfully analyze effects on underserved
21 communities. Another might be how those
22 analytical tools might be wielded towards
23 rules of decision in actually deciding which
24 of alternative options to follow in making
25 regulatory decisions.

1 And finally, I wanted to -- I wanted
2 to agree with something that one of the -- a
3 point one of the commentators made just a
4 minute ago, and it has to do with the
5 retro -- retrospective analysis. That's
6 something we spend quite a bit of time on --
7 on -- both during Cass's tenure and a little
8 bit during mine during the Obama
9 Administration.

10 And it is -- it is always come to me
11 as a -- you know, as a -- as an intellectual
12 challenge that we spend a lot of time on
13 prospective cost-benefit analysis and perhaps
14 -- perhaps less time than we should thinking
15 about what roads were taken and whether --
16 whether those roads have brought us to the
17 place where we expected to go when we did
18 prospective analysis way back when.

19 And I think one -- you know, one
20 significant area for research here is what
21 effects have rules had on underserved
22 communities and can we -- you know, can we
23 take a step back and think about what could
24 have been done differently now that we have
25 access to some meaningful information about

1 regulatory outcomes. Thank you.

2 MS. KATZEN: Certainly, Cass was
3 instrumental in emphasizing retrospective
4 analysis. Do you want to join this piece of
5 it?

6 MR. SUNSTEIN: I think two things.
7 Thank you, Sally. So speaking in my capacity
8 as scribbler. My current job is in the Biden
9 Administration, and I'm not authorized to say
10 anything in that capacity. So I'll make
11 maybe just two points. One is that the White
12 House consists of lots of agencies, many of
13 whom has as a primary job spurring regulatory
14 initiatives.

15 So the idea that OIRA should be
16 spurring OIRAn regulatory initiatives should
17 be put in contact with the fact that the
18 Domestic Policy Council and the National
19 Economic Council and sometimes the Office of
20 Science and Technology Policy, sometimes the
21 Council of Economic Advisors see that as --
22 as their role. So that's -- that's an
23 institutional (inaudible) that bears on
24 equity and how to achieve it.

25 The second is kind of a John --

1 footnote to John Graham, which is the best
2 paper I know on distribution and regulation
3 is by Daniel Hemel. It's coming out of the
4 University of Chicago Law Review. It's
5 available. It's called Regulation and
6 Redistribution with Lives in the Balance.
7 And it underlines John's point about the
8 complexity in an interesting rather than oh-
9 my-gosh way of the investigation of the
10 empirical effects of distributional analysis,
11 where it might be that the beneficiaries of
12 regulations are disproportionately people who
13 need and deserve help.

14 But it might be that the cost bearers
15 are disproportionately those who need and
16 deserve help. And both are really important.
17 Hemel's conclusion is that -- that doing it
18 turns out to be a fool's errand for
19 institutional and trade-off-y reasons. I'm
20 not sure he earns the conclusion, but it
21 brought me up short, actually, his -- the
22 rigor of his analysis with particular
23 reference to particular regulations where he
24 does the analysis.

25 MS. KATZEN: Interesting. Thank you.

1 Does anyone want to pursue the issue that
2 Bijal raised that the concentration of
3 authority or power in OIRA is designed to
4 enhance presidential power and that that
5 is -- it is both the objective and the result
6 of centralized review? And in that context,
7 it was presented as almost a negative that --
8 that this is the President grasping at more
9 power. Is that how others see it? Or is
10 there another side of that coin that we'd
11 like to at least discuss for a minute or two?
12 Do I have takers on that? John?

13 MR. GRAHAM: Yes, sure. I think
14 it's -- I think it's a fascinating topic. I
15 agree with the underlying thesis that
16 President have increasingly become of the
17 view that they are politically accountable
18 for all of these regulations and paperwork
19 burdens that come out of the bureaucracy,
20 even though the White House may not even --
21 have even been aware of a number of them when
22 they were actually issued.

23 And I remember very specifically about
24 an example in the Carter Administration where
25 the Food and Drug Administration proposed a

1 ban of the artificial sweetener saccharin, very
2 popular additive for soft drinks still in
3 wide-spread use today but was banned for a
4 while on the theory that it was -- it was a
5 risk of -- of cancer based upon laboratory
6 animal experiments.

7 But it didn't last long because the
8 public basically said, you know, what do you
9 mean, you're taking away my saccharin? And
10 Congress basically allowed saccharin to be
11 continued with a warning label instead of --
12 instead of a ban.

13 But the reason I make that point is
14 that I think the White House is uncomfortable
15 in situations where the federal government is
16 doing thing that people are thinking this is
17 coming from the White House.

18 So I think they've decided that
19 basically they have to assume that ordinary
20 people are going to think that the President
21 is running the federal government and that,
22 therefore, the President could have stopped
23 this, if the President had wanted to, and if
24 they did it, they're accountable for it.

25 So I think regardless of whether you

1 are a very right-wing conservative or a left-
2 wing liberal and you're in the Oval Office,
3 you're going to want to control and have some
4 centralized authority over what's going on in
5 all these agencies. And I think you're
6 absolutely right that that's part of what's
7 going on here.

8 One final point, on the question of
9 whether civil rights executive orders will
10 always be repealed by the next
11 administration, there was, under the Clinton
12 Administration, an executive order designed
13 to protect the interest of people who are not
14 proficient in the use of the English
15 language. They used this term limited
16 English proficiency, and it led to things,
17 like, when you're walking in an airport,
18 you'll see a lot of things that are in
19 English, and then you might see them in
20 Spanish right below. Same with Food Stamp
21 Offices, as well.

22 So when I was in the Bush
23 Administration, there was a big effort by a
24 bunch -- some Republicans who wanted to
25 repeal this executive order because they

1 thought either that it was a waste of money,
2 a lot of sludge, or they thought, on the
3 other hand, that it was counter to the
4 English-first nature of our democracy. And
5 the -- President Bush looked at this pretty
6 carefully. He thought that there -- the
7 executive order was fine.

8 Now, he may be a different type of
9 Republican. He was a governor of Texas. He
10 had strong links to the Hispanic community,
11 but he didn't see any problem with that
12 executive order.

13 So I think even in the area of
14 protecting the interests of marginalized
15 groups or low-income groups or minority
16 groups, I'm not -- it's not obvious to me
17 that you'll see Republicans repealing
18 executive orders designed to defend their
19 interests. I don't even think Trump repealed
20 that executive order, but I could be
21 corrected on the record if he did.

22 MS. KATZEN: Thank you, John. Boris,
23 did you want to say something on this point?

24 MR. BERSHTEYN: First of all, I want
25 to thank Bijal for raising the point. And --

1 and the only thing I might add to John's
2 comments that -- that I find, you know, a
3 challenge in answering the question is --
4 is -- it's like an old -- it's like a
5 question that OMB budget people always ask
6 when -- when they talk about what levels of
7 funding there should be for an agency at a --
8 on the next year, like, well, what's the
9 baseline, right? So what -- what's the
10 alternative if -- if -- if centralized review
11 wasn't placed in OIRA?

12 I mean, I think -- I think the -- if
13 the alternative to centralized review at OIRA
14 is -- it -- you know, it -- it is an
15 environment of agency autonomy. There's the
16 doubt that the if effect of centralized
17 review is to improve -- is to enhance
18 presidential ability to control agency
19 action.

20 I think the tougher question is if
21 OIRA wasn't there, would other institutional
22 mechanisms would have evolved to address
23 presidential accountability? I -- I -- I'm
24 not -- I'm not even close to intelligent
25 enough, particularly on this panel, to

1 address that question. But that's one that
2 puzzles me.

3 MR. SHAH: (Inaudible) briefly, I
4 wanted to thank you for raising that point
5 and to -- to thank John and Boris for your
6 thoughtful responses and contextualized
7 responses.

8 John, I just have to say, don't draw
9 too much attention to this executive order.
10 Maybe that's the -- you know, nobody knew it
11 was there, so now that -- now that it's been
12 raised in sort of a public forum it might
13 become a target in future -- you know, under
14 future administrations. I don't know. But
15 I, also -- I wanted to thank you both, as
16 well.

17 You know, John, grappling with the
18 realities of what it would mean to apply a
19 cost-benefit analysis to enhance
20 distributional outcomes is work that
21 absolutely has to be done. So thank you for
22 doing that.

23 And -- and Boris, I think our work --
24 our -- our comments were quite complementary
25 with the -- you know, the detailed

1 suggestions that you had for agency-level
2 change. You know, each of those could be
3 acted on tomorrow, and so I found that to be
4 really enlightening and sort of a good path
5 forward.

6 I also just had a quick point on
7 Cass's initial, you know, discussion about
8 sludge. I -- you know, I think he implies
9 this in what he said, but I -- I want to sort
10 of put a fine point on it, which is to say
11 that, you know, sludge is not only
12 dehumanizing and difficult to grapple with
13 and -- and -- and particularly challenging
14 for vulnerable communities, I think under the
15 guise of, you know, maintaining program
16 integrity, sludge can be exclusionary.

17 In other words, in some cases it may
18 exist precisely to keep people out, not just
19 as, you know, incidental to its existence but
20 as a purpose of its existence. And I think
21 that's one of the things we should sort of
22 look closely at if we're doing an auditing of
23 sludge.

24 As an institutional matter or as an
25 historical matter, you know, when was -- you

1 know, maybe Clinton cases like Welfare or
2 other situations in which sludge was
3 precisely created to ensure that certain
4 communities had less access than others
5 benefits and -- and -- and, you know, rights,
6 even in some cases, and so appreciated that
7 approach and -- and thought we would -- we
8 might think about it in even that more sort
9 of -- as more of an intentional mechanism of
10 exclusion in some instances.

11 MS. KATZEN: That's -- that's helpful.
12 I would like to go back to what you were
13 referring to at the beginning of your
14 response when you talked about how to
15 incorporate into cost-benefit analysis this
16 analysis of distributional equities. And I'd
17 like to turn to John for that.

18 In -- in particular, we have a
19 question in the Q&A that says, lack of data
20 and specificity to affected subgroups can
21 limit ability to do much more than describe
22 the effects and the maximum and minimum
23 extent of a problem. How can these less--
24 precise but more-distributional effects--
25 oriented analyses ever be put on an equal

1 footing with quantitative data presentations?
2 How do we get to incorporate distributional
3 equity when it's now very fuzzy -- my word,
4 not the questioner's -- into cost-benefit
5 analysis which A4 has made very specific?

6 MR. GRAHAM: Wow, it is a great
7 question. And -- and it doesn't have a
8 simple answer. I do want to point to a
9 really delightful paper that Princeton
10 economist -- her name is going to come back
11 to me in a minute.

12 She has written recently where she
13 compared the exposures of African Americans
14 in this country to the particulate pollutant
15 PM2.5, small particle pollution. She
16 compared what it was 15 years ago to what it
17 is to today, and what she demonstrates is not
18 only has the air gotten dramatically cleaner
19 in that period, but progress has been
20 disproportionately greater for African
21 Americans, and the actual amount of deviation
22 between whites and African Americans has
23 declined. And it's with proxy data.

24 She's using fixed station monitoring
25 data and satellite data, rather than actually

1 having people wearing personal exposure
2 monitors, which is probably what you really
3 need to do to do this ideally in terms of a
4 long -- a long-term plan for better data.
5 But nonetheless, so there is some pretty hard
6 data -- hard information on -- on particulate
7 pollution in this county. And in equities in
8 the exposure to such pollution is declining.

9 MS. KATZEN: Thank you. Thank you for
10 that. Anyone else want to speak to that
11 subject? I tossed the ball, as it were, to
12 John, but I'm more than willing to entertain
13 other hands. Another question that has been
14 raised is that for years executive orders
15 have asked agencies to consider
16 distributional equities and concerns.

17 It certainly was in 12866. It
18 certainly was in the Obama executive order.
19 It's been asked for and asked for. Nothing's
20 happened. Why do we have any reason to
21 believe that something will happen now? And
22 as I see, we're getting close to the witching
23 hour. These may be your final opportunity to
24 infuse some optimism in this discussion. And
25 I see Cass wants to jump in.

1 MR. SUNSTEIN: I think there's an
2 empirical question whether nothing's
3 happened, and I -- I think that's not quite
4 right. So with respect to regulations
5 involving disability and disability rights,
6 distributional issues have been discussed.

7 With respect to issues involving prison rape,
8 distributional issues have been discussion.

9 There's an assortment of rules where
10 distributional questions have been discussed.
11 So I don't think there's a full empirical
12 account of what we've seen happen. But the
13 fact is, a number of agencies have given
14 attention to distributional impacts.

15 MS. KATZEN: Okay. Thank you. Boris?

16 MR. BERSHTEYN: I -- I think now in
17 terms of an optimistic note -- an additional
18 optimistic note as, you know, how can we do
19 better. And I think one of lessons of this
20 panel that maybe can -- it can be bridge
21 across all speakers is that, you know,
22 instead of the kind of reverse Nancy Reagan
23 approach -- just say yes -- to distributional
24 analysis, we -- we have to focus on how to do
25 it and -- and giving agencies the resources

1 to do it well and then holding agencies
2 accountable for doing it. I think -- I think
3 -- I think those are -- you know, those are
4 some pathways for making further
5 improvements.

6 MS. KATZEN: Bijal, final comments?

7 MR. SHAH: Yeah, I mean, to respond
8 both to the question about, you know, how can
9 cost-benefit analysis -- or how can the
10 evaluation of distributional outcomes ever be
11 on par with cost-benefit analysis because of
12 the fuzziness of the former as compared to
13 the latter?

14 You know, as our understanding of what
15 a cost is and what sorts of information and
16 data that does exist, as -- as Cass
17 mentioned -- or John mentioned, excuse me --
18 expands, you know, cost-benefit analysis can
19 sort of be brought up to speed with our --
20 our new and evolved understanding of the
21 costs that we should take into consideration
22 as important. And so, you know, I just
23 wanted -- that's really just an addendum to
24 what John had to say.

25 You know, in terms of a positive or

1 optimistic final comment, I think -- you
2 know, I think just like I sort of advocate
3 entrenching change at the ground level and
4 doing so in a nuanced way that creates
5 lasting change, I think we're seeing that.

6 I think as we see more bureaucrats and
7 civil servants who have a broader
8 understanding of the importance of
9 distributional consequences, as this sort of
10 mindset proliferates throughout the
11 government and up and down the sort of, you
12 know, administrative hierarchy, we will see
13 smaller shifts at sort of multiple points in
14 the administrative process and across
15 agencies that hopefully over time will
16 create, you know, bigger and more lasting
17 changes. And so I'm -- I'm optimistic that
18 this will continue to be the case.

19 MS. KATZEN: That is optimistic -- I
20 mean, sounding. I mean, it is -- it's
21 upbeat. Yes, go. John, last thoughts?

22 MR. GRAHAM: One other area where
23 distributional analysis is already well-
24 entrenched in the regulatory process is the
25 look at small businesses and what the impact

1 of regulations are on small businesses.
2 However, my recollection of it is that it
3 didn't really take hold very strongly in the
4 agencies until Congress amended the law and
5 said that agencies had to look at small
6 businesses or they could lose their
7 regulation and judicial review.

8 Now, I think one of the interesting
9 questions is how far are we -- are we away
10 from the point where an agency might lose its
11 regulation and judicial review if it didn't
12 seriously look at the impacts of low-income
13 populations? Personally, I would be in favor
14 of that kind of judicial review requirement.
15 But I'm sure there are a lot of people who
16 don't want the lawyers involved in any more
17 of these things. Thank you so much.

18 MS. KATZEN: John always told me,
19 whenever I spoke with him when he was OIRA
20 Administrator, that he's not a lawyer. And I
21 am not going to attribute his most recent
22 comment to the fact that he's not a lawyer in
23 calling for judicial review. I want to thank
24 each of our panelists. I want to thank you
25 for your thoughtfulness, your contributions

1 to this discussion, your courtesies to one
2 another, and to wish you all a very good day.

3 Thank you.

4 (End of Audio Recording.)

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I, Wendy Sawyer, do hereby certify that I was authorized to and transcribed the foregoing recorded proceedings and that the transcript is a true record, to the best of my ability.

DATED this 14th day of January, 2022.

WENDY SAWYER, CDLT