

The Honorable Ron Johnson
Chairman
U.S. Senate
Homeland Security & Governmental Affairs Committee
Washington, DC 20515

The Honorable Claire McCaskill
Ranking Member
U.S. Senate
Homeland Security & Governmental Affairs Committee
Washington, DC 20515

June 20, 2017

RE: Nomination of Professor Neomi Rao as OIRA Administrator

Dear Senator;

We, the undersigned consumer, small business, labor, good government, financial protection, community, health, environmental, civil rights and public interest groups, oppose the nomination of Neomi Rao, currently a professor at George Mason University's Scalia Law School, for the position of White House Office of Information and Regulatory Affairs (OIRA) Administrator and urge you to vote against her confirmation.

The Trump Administration has taken a strong deregulatory stance and used their selection of individuals, such as Scott Pruitt as the Environmental Protection Agency (EPA) Administrator, Betsy DeVos as the Secretary of Education and Ajit Pai as the Federal Communications Commission (FCC) Chairman, who are actively hostile to the missions of the agencies they run to start the roll back of public protections from within. Coupled with the Trump anti-regulatory executive orders, deregulatory action is a top policy priority for the administration and a shared commitment among Trump-appointed officials to comply with those orders. Professor Rao's nomination to head OIRA is another piece of the Trump deregulatory agenda.

With White House Advisor Steve Bannon's declaration that he and the Trump Administration will aim for the "destruction of the administrative state," Professor Rao's nomination completes part of the puzzle. Professor Rao's record and scholarship suggests that she will strongly support the Trump Administration's anti-public protections and deregulatory agenda, and, if confirmed, she will likely spearhead the effort. As the Trump "regulatory czar" she would preside over OIRA's longstanding "regulatory gatekeeping" role for federal agencies.

This nomination gives the reins of government rulemaking to someone who holds views well outside the mainstream. In her writings, Professor Rao has demonstrated a deep distrust of federal agencies and their role as policymaking institutions. For example, she has called for expanding presidential control over independent agencies¹ by forcing those agencies to undergo OIRA regulatory review, thereby extending President Trump's influence to independent agencies like the Consumer Financial Protection Bureau (CFPB), the U.S. Equal Employment Opportunity Commission (EEOC), and others. Indeed, this Committee made clear the importance of preserving the independence of such agencies from the President this past Congress² and thus should view Professor Rao's views on independent agencies with a critical eye.

Additionally, Professor Rao has staked out an extremely narrow definition of human rights which could lead to potential bias in assessing the benefits of rules intended to protect those rights. Specifically, Professor Rao has been deeply skeptical of policies designed to further racial, gender, and sexual orientation equality that are justified on the basis of recognizing "human dignity."³ If confirmed, Professor Rao could direct OIRA to ignore the "human dignity" benefits when reviewing regulations that prevent discrimination despite clear language in

¹ Removal: Necessary and Sufficient for Presidential Control, 65 ALABAMA LAW REVIEW, 1205 (2014)

² <https://www.hsgac.senate.gov/media/majority-media/chairman-johnson-releases-report-on-how-the-white-house-bowled-over-fcc-independence>

³ Three Concepts of Dignity in Constitutional Law, 86 NOTRE DAME LAW REVIEW, 183 (2011).

Executive Order 12866 directing agencies to fully recognize the benefits of “human dignity” when conducting cost-benefit analyses of regulations, irrespective of whether those benefits are able to be monetized.

Finally, Professor Rao has expressed support⁴ for revival of the so-called “nondelegation” doctrine that embodies a radical belief that large swaths of agency authority have been unconstitutionally delegated by Congress. This point of view is well outside the academic consensus in administrative law and has been soundly rejected by decades of Supreme Court jurisprudence. Support for the “nondelegation” doctrine makes clear that Professor Rao is ideologically opposed to the concept of regulation, an extreme position that makes her unfit to serve as OIRA Administrator.

As OIRA Administrator, Professor Rao would hold significant power to dictate the substance of agency rules. A series of executive orders dating back to the Reagan administration has required executive branch agencies like the EPA and the Food and Drug Administration (FDA) to seek out and obtain OIRA’s approval before they can issue a proposed or final rule. Her OIRA would likely deem much needed protective rules as too costly even if the rule benefits outweigh the industry stated costs. Under new agency and new OIRA leadership, agencies are likely to abandon most non-routine or controversial public protections, except for those few that are subject to enforceable legal deadlines.

Beyond the regulatory gatekeeping role, Rao’s OIRA will likely undertake several other tasks aimed at contributing to the Trump deregulatory mission, including:

- Overseeing the implementation of the Trump anti-regulatory executive orders through the drafting of guidance and memos to provide agencies with further direction on how to fulfill their responsibilities under the orders.
- Coordinating executive branch-wide efforts aimed at providing big business and other industries favors in rolling back safety standards in their fields.
- Developing new government-wide guidance on broader public protection policy matters, including revising the existing guidance document that directs agencies on how to prepare cost-benefit analyses for pending rulemakings.

We need someone in the position of OIRA Administrator who believes in the vital role that federal agencies set safety standards to protect the public. Professor Rao does not. Therefore, we urge you to reject the nomination of Professor Rao to the position of White House Office of Information and Regulatory Affairs Administrator.

Thank you,

AFL-CIO
Alliance for Justice
Allied Progress
American Federation of State, County, and Municipal Employees (AFSCME)
Americans for Financial Reform
Asbestos Disease Awareness Organization (ADAO)
Center for Biological Diversity
Center for Popular Democracy
Center for Progressive Reform
Center for Science in the Public Interest

⁴ Administrative Collusion: How Delegation Diminishes the Collective Congress, 90 NEW YORK UNIVERSITY LAW REVIEW, 1463 (2015).

Citizens' Environmental Coalition
Clean Water Action
Communications Workers of America
Consumer Action
Earthjustice
Economic Policy Institute Policy Center
Environmental Working Group
Food & Water Watch
Friends of the Earth - US
Homeowners Against Deficient Dwellings
Institute for Agriculture and Trade Policy
Institute for Science and Human Values
Interfaith Center on Corporate Responsibility
National Association of Social Workers
National Employment Law Project
National LGBTQ Task Force Action Fund
Professor Emeritus Charles Levenstein of University of Massachusetts Lowell
Public Citizen
Public Knowledge
Sargent Shriver National Center on Poverty Law
Strategic Consulting, Former Chief of Cal/OSHA
The Interfaith Alliance of Colorado
The Leadership Conference on Civil and Human Rights
Union of Concerned Scientists
United Steelworkers
United Support and Memorial for Workplace Fatalities - USMWF
Voices for Progress
Waterkeeper Alliance
Woodstock Institute
Workplace Fairness