January 31, 2019

United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Graham, Ranking Member Feinstein, and Committee Members:

On behalf of our hundreds of thousands of members across the United States, People For the American Way opposes the nomination of Neomi Rao to the United States Court of Appeals for the District of Columbia Circuit. President Trump nominated her for her current position as the administrator of OMB's Office of Information and Regulatory Affairs (OIRA), and he is apparently considering her for the Supreme Court should there be a vacancy.[i] Rao has a dangerously reactionary view of the Constitution that would sharply restrict the ability of the American people to impose reasonable limits on the power of large corporations. Her viewpoint would essentially undo the New Deal, an agenda shared by many of Trump's circuit court nominees.[ii] She also has extreme views on presidential power that would disrupt the careful balance established by the Constitution and effectively place the president above the law. Moreover, her inflammatory statements and writings on a wide variety of civil rights and other issues, disturbing in themselves, foreshadow the troubling positions she has taken at OIRA.

The D.C. Circuit has a unique role in America's judicial system, because it is the appellate court that generally hears challenges to health and safety measures adopted by federal agencies. Since the Supreme Court accepts so few cases, the D.C. Circuit usually has the last word on whether and how the federal government can carry out the directives of Congress. It is the perfect court to engage in a far-right campaign to "relieve" powerful corporations from rules of the road that get in the way of their bottom line.

Rao would significantly curtail Congress's ability to effectively task federal agencies with adopting health, safety, and other protective measures. The Supreme Court has long recognized that as long as Congress gives agencies a guiding principle, they may use their expertise to devise and adopt public protections and safeguards in the areas assigned to them, even though they are not part of the legislative branch. This basic tenet of constitutional law ("the non-delegation doctrine") was recognized long ago. Only twice has the Supreme Court struck down an administrative agency regulation as violating this doctrine, and both times were in the discredited *Lochner* era.

But Rao writes of "returning government to its proper and limited role" so we can have "a more constitutional government."[iii] In her vision of the Constitution, agencies can only adopt public safeguards specifically directed by Congress, a view that would require an impossible level of congressional time and expertise and, as a result, would empower corporations to impose their will on consumers, employees, the environment, and entire industries with impunity. It would become harder to effectively protect the public health and safety in any arena from food and drug safety to consumer protections to toxic waste, to name just a few. Her nomination to the D.C.

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Circuit, like her placement to lead OIRA, is part of the far-right's long-sought-after "deconstruction of the administrative state."[iv]

This is no mere academic argument and should be of great concern to every senator. A return to the pre-New Deal *Lochner* era would harm most constituents and benefit those whose power over everyone else is limited only by our laws. American history shows that corporations generally do not protect their workers and ensure that their products are safe out of the goodness of their hearts. In fact, they often do just the opposite unless the government intervenes to prevent that. Indeed it is through our government that people who are individually powerless against an enormous corporation can establish "rules of the road" that rein in corporate power and protect all of us. It is the very essence of self-government.

Rao would also do away with the *Chevron* doctrine, adopted by the Supreme Court in 1984, requiring courts to defer to an agency's expertise in interpreting an ambiguous statute it is tasked to carry out, as long as its interpretation is reasonable. This provides needed flexibility to effectively address changing needs while keeping policymaking in the hands of entities created and run by the elected branches of government. But Rao has written that "the practice of deference cannot be separated from the current acceptance of very expansive delegations to agencies,"[v] which as noted above she believes are not constitutional.

Rao would also overturn decisions by Congress to create agencies that are insulated from undue political pressure. In 1935, the Supreme Court upheld the creation of independent agencies whose directors cannot be fired by the president without cause.[vi] Under that precedent, Congress has created critically important agencies such as the Federal Reserve Board, the Federal Trade Commission, the Commodity Futures Trading Commission, the National Labor Relations Board, and the Consumer Product Safety Commission. Their independence is central to their purpose.

Rao is an adherent of the "unitary executive" theory, under which presidents have dangerously expansive power allowing him to simply ignore numerous laws they disagree with. Among those powers is the ability to fire anyone in the executive branch for any reason, which means independent agencies are unconstitutional in her view:

> The ability to remove principal officers is necessary and sufficient for presidential control of the executive branch. This means that all agencies, including the so-called independent agencies, must answer to the President. … Limits on the President's removal authority have always been in tension with the basic constitutional design.[vii]

Indeed, "Abolishing Agency Independence" was the title she chose for a law review article she authored analyzing the Supreme Court's 2010 *Free Enterprise Fund* case.[viii] While acknowledging that "[m]ost commentators have pronounced the decision insignificant for presidential authority," Rao posited that it actually "sets the foundation for a wider assault on agency independence," the goal of which is to have the courts go against congressional intent and make members of no-longer-independent agencies removable at will by the president.[ix]

In her constitutional view, the president's removal power extends to all policymaking officials within the executive branch, not just agency heads. Under the unitary executive theory,

“[i]ndependent discretion for executive officers, however, runs contrary to the best understanding of Article II.”[x] Her belief that the president “must have the ability to remove all executive branch officers at will”[xi] suggests that, as a judge, she would not uphold congressional action protecting Special Counsel Robert Mueller from removal without cause.

Indeed, among the vast powers she ascribes to the presidency is to simply ignore the law and the courts:

> The President has powerful tools with which to defend his considerable sphere of action against Congress and the Court. Although enforcement of statutes and adherence to Supreme Court precedent is the ordinary course, the President retains the power to act against the constitutional judgments of the other branches. If after careful review the President determines that a statute is unconstitutional, he may decline to enforce it. The President may also decide not to follow Supreme Court precedent, and in the rare instance, may decide against enforcement of a particular judgment.[xii]

Rao is apparently unconcerned that such presidential power contradicts the Supreme Court’s authority as the final interpreter of the Constitution, making the claim that this authority “exists … not as a constitutional necessity, but largely through political acquiescence.”[xiii]

As administrator of OIRA, Rao has acted on her belief that eliminating health and safety protections across the board is needed to give us what she calls “a more constitutional government” Those actions have also been consistent with separate beliefs that she expressed in numerous columns she wrote in and immediately after college on matters such as racism, sexual assault, and climate change.

As a general matter, Rao has belittled societal discrimination and those harmed by it. For instance, she wrote:

> Myths of sexual and racial oppression propogate [sic] themselves, create hysteria and finally lead to the formation of some whining new group. One can only hope to scream, ‘Perspective, just a little perspective, dahling!’[xiv]

Ironically, perspective is exactly what is lacking in such a statement. For instance, implicit racial bias is a serious problem in our criminal justice system. As such, it is not only a humanitarian concern but also a constitutional concern, so it is important that federal judges are well aware of its existence and its impact. The many ways it routinely affects African American men, for instance, may be invisible to many who are not part of that community, making it critically important for a judge to understand that their own perspectives may be inaccurate due to their own set of life experiences. As Sen. Cory Booker pointed out to attorney general nominee William Barr at his confirmation hearing in the context of Barr’s perception of his own criminal justice policies:

> I just want to say I was a young black guy in the 1990s. I was a 20 something-year-old and experienced a dramatically different justice system.

Of course, Rao has had more than 20 years of life experience since college, experience that may have affected her perspective on any number of issues.

But it is disturbing that her current work at OIRA dismantling legal protections for survivors of sexual assault seems to align so closely with her prior disturbing writings on sexual violence. In college, she seemed to accept male sexual aggression as a given, with the onus on women to avoid it rather than on men to change their behavior. For instance, she wrote that:

> Date rape exemplifies the attempts of the nurture feminists to develop an artificial, alternative world in which women are free from sexual danger and "no always means no." The battle against date rape is a reaction to the problems of a society without traditional protections for women. Changing the behavior of men, rather than educating women is the focus of such movements. The language of "date rape" is something constructed by white middle class academic feminists in prestigious northeastern universities, who fail to consider the extensive sexual ambiguity involved with relationships. The "date rape" culture has almost no influence in poorer minority communities or in other equally advanced countries in Europe.
>
> The recent adaptation and propagation of such language attempts to bring the dangers women face into popular consciousness. It is true that without traditional social protection, most women are vulnerable and defenseless. Such sexual danger has existed throughout time. Protection from the horrors of date rape do [sic] not come from posters and scary statistics. Rather, women must be thoroughly educated about the consequences of their sexuality in order to prevent such problems.[xv]

In the same article, she wrote that:

> [W]omen have to understand and accept the consequences of their sexuality.[xvi]

In the context of alcohol at fraternity parties, she seemed to present a drunk man's decision to sexually assault a woman as morally equivalent to a drunk woman's inability to stop him:

> Unless someone made her drinks undetectably strong or forced them down her throat, a woman, like a man, decides when and how much to drink. And if she drinks to the point where she can no longer choose, well, getting to that point was part of her choice. Implying that a drunk woman has no control of her actions, but that a drunk man does, strips women of all moral responsibility.[xvii]

Unfortunately, sexual assault and harassment remain just as much of a problem today as they were in the 1990s, but now Rao is doing much more than simply writing columns criticizing survivors and their allies. As administrator of OIRA, she played a major role in the Education Department's 2017 rescission of Obama-era Title IX guidance for how schools should address sexual misconduct. She has also shaped the Trump administration's recently proposed regulations that would roll back Title IX protections in a number of ways.[xviii] For instance, under those proposals:

- schools would in many cases be able to escape responsibility for addressing students' allegations, even when school employees knew about the harassment;
- schools would be required to ignore incidents that occur outside of school activities, including most off-campus and online incidents, even when they directly impact a student's education;
- schools would have to wait until the harassment becomes so severe and harmful that it denies a student educational opportunities; and
- schools could treat survivors poorly as long as they follow various procedures in place, regardless of how those procedures fail to help or even harm survivors

In another area, Rao's actions to dismantle environmental protections are also consistent with the dismissive views she expressed in the 1990s. She dismissed climate change, the depleting ozone layer, and acid rain as the "three major environmental bogeymen," criticizing environmentalists for "accept[ing] issues such as global warming as truth with no reference to the prevailing scientific doubts."[xix] This has echoes of the industry-funded disinformation campaign that has been used to justify placing corporate profits over protecting people's health and meaningfully addressing global climate change.

Unfortunately, that is exactly what Rao has done as OIRA administrator. For instance, when the Trump administration's EPA proposed to replace the Clean Power Plan with a more industry-friendly scheme, the agency sought to release a proposal acknowledging the existence and causes of climate change. However, those science-based warnings were removed by OIRA. As noted by Bloomberg:

> The abandoned assertions would have represented surprisingly candid admissions for an administration stacked with officials who have questioned how much human activity drives climate change and led by a president who once suggested global warming was a hoax perpetrated by the Chinese.
>
> The spiked language also would have provided more justification for government regulation of greenhouse gas emissions, further tying the EPA's hands on the issue.[xx]

Rao did the same thing with proposed EPA rules on hydrofluorocarbons, a significant cause of climate change. The agency submitted a proposal to OIRA noting that children, the elderly, and the poor are particularly vulnerable to health threats caused by climate change. This scientifically uncontroversial statement is certainly relevant to an agency weighing the costs and benefits of a new policy as required by law. However, OIRA had that information removed before allowing the proposal to be released to the public.[xxi]

If she is confirmed to the D.C. Circuit, Rao would hear numerous cases involving environmental protections. A nominee who as a government official dismisses or conceals inconvenient facts is simply not qualified to serve as a judge on that court or on any other.

Powerful business interests and their supported right-wing organizations have been seeking to undo the New Deal and the many health and safety protections adopted in the years since. The

placement of a narrow-minded elitist judge on the D.C. Circuit would no doubt please them, but it would do great harm to the nation. Neomi Rao should not be confirmed.

Sincerely,

Marge Baker
Executive Vice President for Policy and Program

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[i] "Trump White House urging allies to prepare for possible RBG departure," Politico, Jan. 10, 2019, https://www.politico.com/story/2019/01/10/trump-white-house-urging-allies-to-prepare-for-possible-rbg-departure-1096102.

[ii] "Inside Trump's Plan to Pack Our Courts and Repeal the New Deal," People For the American Way, June 5, 2018, http://www.pfaw.org/edit-memos/inside-trumps-plan-to-pack-our-courts-and-repeal-the-new-deal.

[iii] Neomi Rao, "The Administrative State and the Structure of the Constitution," Heritage Foundation lecture delivered Oct. 4, 2017, https://www.heritage.org/the-constitution/report/the-administrative-state-and-the-structure-the-constitution ("2017 Heritage Lecture").

[iv] "Stephen Bannon Reassures Conservatives Uneasy About Trump," New York Times, Feb. 23, 2017, https://www.nytimes.com/2017/02/23/us/politics/cpac-stephen-bannon-reince-priebus.html.

[v] 2017 Heritage Lecture.

[vi] Humphrey's Executor v. United States, 295 U.S. 602 (1935), http://cdn.loc.gov/service/ll/usrep/usrep295/usrep295602/usrep295602.pdf.

[vii] Neomi Rao, "Removal: Necessary and Sufficient for Presidential Control," 2014, 65 Alabama Law Review 1205 (2014), https://www.law.ua.edu/pubs/lrarticles/Volume 65 Issue 5/Issue 5/Rao_1205-1276.pdf.

[viii] Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. 477 (2010), https://www.supremecourt.gov/opinions/boundvolumes/561BV.pdf.

[ix] Neomi Rao, "A Modest Proposal: Abolishing Agency Independence in Free Enterprise Fund v. PCAOB," 79 Fordham Law Review 2541 (2011), http://ir.lawnet.fordham.edu/flr/vol79/iss6/5.

[x] Removal, p. 1220.

[xi] Removal, p. 1227.

[xii] Neomi Rao, "The President's Sphere of Action," 45 Willamette Law Review 527 (2009), http://willamette.edu/law/resources/journals/review/pdf/volume-45/wlr45-3-rao.pdf, p. 551.

[xiii] "The President's Sphere of Action," p. 537.

[xiv] "Trump's Nominee to Replace Kavanaugh Questioned Date Rape, Discrimination, and Climate Change," Mother Jones, Jan. 14, 2019, https://www.motherjones.com/politics/2019/01/trumps-nominee-to-replace-kavanaugh-questioned-date-rape-discrimination-and-climate-change.

[xv] Neomi Rao, "The Feminist Dilemma," Yale Free Press, April 1993, available online at https://afj.org/wp-content/uploads/2019/01/02-The-Feminist-Dilemma.pdf.

[xvi] "The Feminist Dilemma."

[xvii] Neomi Rao, "Shades of Gray," The Yale Herald, Oct. 14, 1994, available online at https://afj.org/wp-content/uploads/2019/01/01-Shades-of-Gray.pdf.

[xviii] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 FR 61462 (2018), https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.

[xix] Neomi Rao, "The Obedient Limbs of YSEC: Yale's Powerful Environmental Movement," Yale Free Press, April 1992 available online at https://afj.org/wpcontent/uploads/2019/01/15-The-Obedient-Limbs-of-YSEC.pdf.

[xx] "Dire Climate Change Warnings Cut From Trump Power-Plant Proposal," Bloomberg, Sept. 4, 2018, https://www.bloomberg.com/news/articles/2018-09-04/dire-climate-change-warnings-cut-from-trump-power-plant-proposal.

[xxi] "Children's health language deleted from climate rule," E&E News PM, Oct. 2, 2018, https://www.eenews.net/eenewspm/stories/1060100339; "Week 89: If You're Reading This, Ryan Zinke Probably Thinks You're Un-American," Natural Resources Defense Council, Oct. 5, 2018,

https://www.nrdc.org/onearth/week-89-if-youre-reading-ryan-zinke-probably-thinks-youre-american; "New EPA rule strikes language listing impact of climate change on children," The Hill, Oct. 3, 2018, https://thehill.com/policy/energy-environment/409675-new-epa-rule-strikes-language-listing-effects-of-climate-change-on.