Trump's New 'Regulatory Czar'

Poised to Lead the Assault on Our Safeguards

By CPR Member Scholars
Thomas McGarity, Amy Sinden,
Rena Steinzor, and
Robert Verchick, and
CPR Senior Policy Analyst
James Goodwin

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About the Authors

Thomas McGarity is a professor at the University of Texas at Austin School of Law and a Board Member of the Center for Progressive Reform.

Amy Sinden is a professor at Temple University Beasley School of Law and a Board Member of the Center for Progressive Reform.

Rena Steinzor is a professor at the University of Maryland Francis King Carey School of Law and a Member Scholar of the Center for Progressive Reform.

Robert Verchick is a professor at Loyola University, New Orleans and President of the Center for Progressive Reform.

James Goodwin is a senior policy analyst at the Center for Progressive Reform.

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Direct media inquiries by email to Brian Gumm or Matthew Freeman, or by phone at 202.747.0698.

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Executive Summary

Donald Trump has made no secret of his desire to deploy the full scope of his authorities toward achieving the "deconstruction of the administrative state," as White House advisor Steve Bannon has ominously put it. With Trump's nomination of Neomi Rao, a professor at George Mason University's Scalia Law School, to head the White House Office of Information and Regulatory Affairs (OIRA), the last of the pieces will soon be lined up on his administration's side of the deregulatory chessboard. And, much like real chess pieces, each of the administration officials who will help to advance Trump's assault on regulatory safeguards can be called upon to play a unique and potentially complementary role in this effort. The OIRA Administrator, who has traditionally served as the leading anti-regulatory force in every administration dating back to President Reagan, could turn out to be the most powerful piece of all.

Much of Professor Neomi Rao's scholarship and other public statements reflect a deep distrust of federal agencies and their role as policymaking institutions within our constitutional system of government.

Professor Rao's record suggests that she will strongly support the Trump administration's anti-protections agenda, and, if confirmed, she will likely help spearhead the effort. Much of Professor Rao's scholarship and other public statements reflect a deep distrust of federal agencies and their role as policymaking institutions within our constitutional system of government. She has called for more constraints on regulatory agencies – including enhanced centralized presidential control over both executive branch and independent agencies – that would inhibit their ability to carry out their respective missions by instituting new public safeguards and enforcing existing ones. In addition, she has staked out an extremely narrow conception of some human rights, which could lead to a low-balling of rules intended to protect those rights.

Serving as Trump's "regulatory czar," as OIRA's Administrator is often known, Rao would preside over the agency's longstanding "regulatory gatekeeping" role. A series of executive orders dating back to the Reagan administration has required executive branch agencies like the Environmental Protection Agency (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. OIRA grants this approval only after it has conducted an intrusive and often lengthy review of the rule's substance, along with a supporting economic assessment – known as a cost-benefit analysis – that is supposed to show whether and to what extent the rule's benefits outweigh its costs. Historically, this gatekeeping authority has provided the OIRA Administrator with significant power to dictate the substance of agency rules, as agencies

will often accede to any demands for changes made by OIRA personnel as the price of clearing their rules through the review process.

During the Trump administration, OIRA is likely to continue playing the role of regulatory gatekeeper, though with some important twists. In particular, two interrelated factors are likely to transform how this role is performed over the next several years. The first is Trump's' selection of individuals – such as EPA Administrator Scott Pruitt – who are actively hostile to the missions of the agencies they will be running. The other is Trump's two new anti-regulatory executive orders, which together make deregulation a top policy priority for the administration and a shared commitment among Trump-appointed officials to comply with those orders.

During the Trump administration, OIRA will likely reorient its centralized review process to assist agencies in their efforts to comply with Executive Order 13771's mandate to eliminate existing regulations.

Together, these two factors will contribute to a significant reduction in agencies' regulatory activities during the Trump administration. Under their respective new leadership, agencies are likely to abandon most non-routine or controversial regulatory actions, save for those few that are subject to enforceable legal deadlines. At the same time, the new executive orders will reinforce this regulatory slowdown by imposing significant new burdens that agencies must overcome before issuing new rules. Even if the agencies' leaders were committed to pursuing a robust regulatory agenda, they would lack the capacity to do so, particularly given the large budget cuts agencies are expected to face over the next several years.

Trump's Executive Order 13771 is especially important here. It requires agencies to identify at least two existing rules to repeal for every new one they seek to issue and to ensure that the compliance cost savings that would be achieved from repealing those rules at least fully offset the compliance costs associated with the new rule. Under federal law, however, repealing existing rules involves the same burdensome process that agencies must use for implementing new ones. In effect, then, the order transforms each new rulemaking into three – one for the new rule and one each for the existing rules to be repealed.

With agencies unlikely to implement many new regulatory actions of any consequence during the Trump administration, OIRA will have few opportunities to play its traditional regulatory gatekeeping role – namely, weakening and delaying agency rules that might inconvenience politically powerful corporate interests. Instead, OIRA will likely reorient its centralized review process to assist agencies in their efforts to comply with Executive Order 13771's mandate to eliminate existing regulations. Because agencies must navigate the standard rulemaking process when eliminating existing rules, they must also supply a policy rationale that is consistent with applicable law and supported by the evidence in the rulemaking record. Accordingly, during the review process, OIRA could supply a "quality control check" on the legal and economic rationales that agencies devise to support their deregulatory rulemakings and work with the agencies to strengthen

them in anticipation of the likely legal challenges that will be brought by public interest organizations (or potentially even by affected businesses that would prefer to maintain the regulatory status quo).

This quality control function, carried out through its centralized process, could potentially become the most important task that OIRA undertakes in supporting the Trump's administration's broader assault on regulatory safeguards.

Beyond its regulatory gatekeeping role, OIRA will likely undertake several other tasks aimed at contributing to the Trump administration's agenda, including the following:

- Overseeing the implementation of Trump's anti-regulatory executive orders, including drafting guidance and memoranda to provide agencies with further direction on how to fulfill their responsibilities under the orders;
- Coordinating executive branch-wide efforts aimed at providing regulatory relief to certain favored industrial sectors, such as oil refining or industrial chemical manufacturing;
- Developing new government-wide guidance on broader regulatory policy matters, including revising the existing guidance document that directs agencies on how to prepare cost-benefit analyses for pending rulemakings; and
- Issuing "prompt letters" to help shape individual agency's regulatory agendas to focus on certain specified deregulatory actions.

OIRA will certainly continue to be a leading anti-regulatory force during the Trump administration, but the manner in which it accomplishes this role is likely to differ significantly from how it has accomplished it in past administrations.

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Unlike in the past, measuring OIRA's influence over the implementation of new public protections will require more than just monitoring how it performs its traditional regulatory gatekeeping function to delay and weaken new safeguards. Instead, other new indicators will be needed to account for the diverse and broader range of activities that will likely dominate much of OIRA's attention during the Trump administration. These indicators will include answers to such questions as "What role, if any, will OIRA play in helping agencies construct statutory or economic-based policy rationales in support of their deregulatory actions to comply with Executive Order 13771?" and "Has OIRA issued any new policy guidance documents, or revise existing ones, that seek to inhibit agencies from instituting new or stronger protective safeguards?"

The Most Anti-Protections Administration in History Welcomes a New Addition

As a candidate for president, Donald Trump famously avoided taking clear stances on matters of public policy. One notable exception was federal regulation. Many times during the campaign, Trump depicted government protections as encroachments on freedom and barriers to job growth without explaining which rules he was talking about or offering a shred of evidence to support his talking points. That would have been a tough feat since nearly all relevant research shows that government standards for environmental protection, worker safety, and other shared social goals benefit citizens enormously and have a neutral or even slightly net positive effect on jobs.

The OIRA Administrator deserves careful scrutiny because past Administrators have used the bureau's position at the hub of the regulatory system to intrude on the efforts of the Environmental Protection Agency, Department of Labor, and other agencies to carry out their public interest missions with little transparency and almost no meaningful input from the individuals those safeguards are meant to protect.

Since his surprising victory, Trump has worked quickly to beef up his credentials as a force for eliminating environmental rules, workplace protections, and other government initiatives disfavored by large, elite corporations. He started by nominating individuals for leadership roles at the Environmental Protection Agency (EPA), Department of the Interior, Department of Labor, and other important regulatory agencies who seem to share his disdain for limits on business activity, even when those limits keep the air and water clean or ensure workers get paid what they are owed.

Professor Neomi Rao, Trump's nominee for Administrator of the White House Office of Information and Regulatory Affairs (OIRA), could be another key figure in the most anti-protections administration in U.S. presidential history. Because protecting people from dangerous products, workplace accidents, and environmental poisons requires regulatory standards, that's a problem. Americans can't call themselves free or prosperous when they and their families aren't safe and secure.

On the domestic side of government, the OIRA Administrator is frequently cast as the most important official the public has never heard of, though its profile has risen considerably since the George W. Bush administration. The heads of EPA, Labor, and Interior get the headlines. But, if confirmed, Professor Rao will be the administration's point person in pursuit of opportunities to undermine our landmark environmental, public health, and labor laws.

Historically, the OIRA Administrator has played the most influential role of any single administration official in directing the regulatory activity of cabinet-level agencies. That's been true in both Democratic and Republican administrations, and it's bound to be true in the Trump era. The OIRA Administrator deserves careful scrutiny because past Administrators have used the bureau's position at the hub of the regulatory system to intrude on the efforts of the EPA, Department of Labor, and other agencies to carry out

their public interest missions with little transparency and almost no meaningful input from the individuals those safeguards are meant to protect.

OIRA's interference has resulted in final rules that were less protective than they would have been otherwise. For example, OIRA forced the EPA to soften its 2010 coal ash waste disposal rule so that this toxic byproduct from coal-fired power plants was treated as no different from household garbage, rather than as a "hazardous" waste as the agency originally intended, which would require stricter controls on how it is stored, transported, and disposed.[1] OIRA has also rendered final rules inconsistent with Congress's clear statutory instructions. In just such a case, it demanded that the Federal Aviation Administration weaken its 2011 pilot fatigue rule by exempting cargo plane pilots from the rule's new minimum sleep requirements for commercial pilots, even though the authorizing statute directed the agency to set a standard based on relevant medical science.[2] Trump has already taken steps that would provide OIRA with still more opportunities to defeat the public interest, including most notably his January 2017 "Executive Order on Reducing Regulation and Controlling Regulatory Costs."

Under Professor Rao's leadership, OIRA is poised to preside as the "ringmaster" of the Trump administration's deregulatory circus.

As with Trump's other nominees, including Scott Pruitt (EPA), Ryan Zinke (Department of the Interior), Rick Perry (Department of Energy), and Rex Tillerson (State Department), Professor Rao's record suggests that she is likely to pursue an agenda dedicated to permanently weakening the federal regulatory system and rolling back crucial environmental, public health, and labor standards. In particular, her scholarship reflects a deep aversion to the administrative agencies as policymaking institutions, and she has consistently advocated for policies that would inhibit those agencies' ability to fulfill their missions and enforce the laws that Congress empowered them to carry out.

From their respective positions in the Trump administration, we can expect Pruitt, Zinke, and other recently confirmed agency heads to steer their agencies' agendas to benefit the narrow interests of powerful corporations, rather than the broader public interest. We can expect them to dismantle existing regulatory safeguards while softening enforcement of those they cannot eliminate. In the most egregious cases, these actions may be plainly illegal, falling well short of or even rolling back the public protections that Congress mandated in bedrock laws like the Clean Air Act and Clean Water Act.

Under Professor Rao's leadership, OIRA is poised to preside as the "ringmaster" of this deregulatory circus. One of Trump's first acts in office was to sign Executive Order 13771, a pernicious directive that requires federal executive agencies to eliminate at least two of their existing rules before they can issue any new "significant" rules. On top of that, it demands that the costs associated with any new rules be fully "offset" through cost

reductions achieved by eliminating existing regulations.[3] By arbitrarily limiting protective safeguards in this manner, Executive Order 13771 ranks as one of the most retrograde policy measures of the last several decades.

In practice, Trump's order could force agencies like the EPA into a "Sophie's choice," deciding whether to continue enforcing existing bans on lead additives in gasoline or to instead issue a regulation that would protect farmworkers against harmful exposures to a new carcinogenic pesticide that has just been introduced into the marketplace. Despite the statutory authority for both measures, and despite the fact that both measures would deliver significant environmental and public health benefits to the American people, the EPA could only choose one because benefits play no apparent role in the Trump order.

As OIRA Administrator, Professor Rao would have no shortage of opportunities to contribute to the Trump administration's assault on protective safeguards, thanks in large part to OIRA's institutional bias against bold policymaking and its influential position within the federal regulatory system.

OIRA has already taken the lead role in supervising agency compliance with Trump's Executive Order 13771. Several of OIRA's unique institutional attributes make it a natural choice for the role. A series of earlier executive orders has made OIRA the *de facto* head of the federal rulemaking apparatus by authorizing it to conduct wide-ranging and intrusive reviews of the most important pending agency rules and granting it gatekeeper status before those rules become part of the public record. Under these orders, agencies may not publish any rule in the *Federal Register* until OIRA has completed its review and granted its approval. The only exception covers a handful of agencies designated as "independent," such as the Securities and Exchange Commission, the Federal Communications Commission, and the Consumer Product Safety Commission, which are also exempted from Trump's Executive Order 13771. Over its long history implementing these executive orders, OIRA has built up a strong institutional culture dedicated to rolling back public safeguards and has developed significant expertise on regulatory matters.

As OIRA Administrator, Professor Rao would have no shortage of opportunities to contribute to the Trump administration's assault on protective safeguards, thanks in large part to OIRA's institutional bias against bold policymaking and its influential position within the federal regulatory system. As explained below, the role OIRA ultimately plays in this assault will depend on how Rao chooses to deploy the legal authorities and resources available to her.

Joining the Trump administration in these efforts, the Republican-controlled Congress is poised to launch its own full-scale assault on public safeguards over the next several years. The Republican Party's establishment and Tea Party wings have each made it a top priority to roll back public protections they see as impediments to business. Already, the House of Representatives has passed extreme legislation, such as the REINS Act and the Regulatory Accountability Act, that would make it all but impossible for agencies to carry out their statutory missions in a timely and effective manner.[4] Though

it remains unclear whether Republicans will attract enough support from Senate Democrats for these bills to reach the chamber's 60-vote threshold, President Trump has already indicated his willingness to sign these bills into law if they reach his desk.

The Republican-controlled Congress has also used an obscure law known as the Congressional Review Act (CRA)[5] to repeal Obama-era rules protecting mountain streams from mining waste, ensuring federal contractors disclose labor law violations, and more. They are likely to repeal other protections created by the Obama administration before the CRA's window of opportunity closes later this spring.

Looking forward, congressional Republicans have promised to make full use of the appropriations process to hamstring federal agencies' enforcement programs. They could cut agency budgets and leave them with inadequate resources to implement existing regulations. They could also attach "riders" to must-pass appropriations legislation, prohibiting agencies from using any funds they receive for certain specified activities, including for enforcing existing regulations or for developing new ones.[6]

OIRA as Gatekeeper to a Safer World

The OIRA Administrator is frequently referred to as the president's "regulatory czar" – and for good reason. OIRA holds a powerful position in the rulemaking process, essentially functioning as the "gatekeeper" for critical public interest agencies like the EPA, the Food and Drug Administration (FDA), and the Occupational Safety and Health Administration (OSHA) as they pursue new safeguards to protect people and the environment. A series of executive orders dating back to the Reagan administration has prohibited these agencies from issuing a proposed or final rule without first receiving OIRA's blessing. With this gatekeeping authority, the OIRA Administrator enjoys significant power to dictate the substance and timing of agency rules.[7]

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The most important of these earlier orders, Executive Order 12866, directs agencies to submit drafts of their larger or most controversial rules to OIRA, along with a cost-benefit analysis, for review.[8] The purported objective of this centralized review process is to ensure that all rules pass a cost-benefit test before they are presented to the public. OIRA's small staff of economists reviews these documents to assess – or perhaps more accurately, second-guess – the agency's determination that a rule's benefits to people or the environment "justify" the costs of compliance, with an eye toward making changes to the rule's substantive requirements that would minimize those costs. OIRA review essentially operates as a "one-way ratchet": The changes it demands are nearly always aimed at decreasing compliance costs, rather than at increasing regulatory benefits.[9] One reason for that is that OIRA generally insists that agencies express the benefits of their actions in dollar terms, which often means important but intangible benefits – things like rare illnesses prevented or cultural heritage preserved – get undercounted. Without accurate accounting of these benefits, OIRA bean counters can insist that compliance costs be limited by weakening rules or delaying their compliance timelines.

As gatekeepers, OIRA staff are not disinterested arbiters cloistered away from the noise that surrounds controversial agency actions. Executive Order 12866 permits members of the public to lobby OIRA over the rules undergoing review, and industry and trade groups take full advantage of this opportunity to push for changes to rules that would lower compliance costs by weakening public protections. The order generally limits the review process to a total of 120 days, but often the reviews can last well over a year or longer. As practiced, OIRA's review process, including the interactions between OIRA and agency staff, as well as the meetings with industry lobbyists, occurs almost entirely behind closed doors, enabling OIRA staff (often advancing the positions of politically well-connected industries) to demand deregulatory changes to pending rules without meaningful public

scrutiny.[10] Agencies often accede to these demands as a condition for obtaining OIRA's approval, which is necessary for concluding the review.

OIRA's traditional regulatory gatekeeper role raises a host of policy and legal problems. Among the central principles of the rulemaking process as laid out in foundational laws like the Administrative Procedure Act are that the public should be afforded a meaningful opportunity to participate in and shape agency decision-making and that the most influential inputs into agency decision-making should be governed by effective transparency mechanisms to allow for public accountability. The observance of these principles by government officials is in part what gives the federal regulatory process its legitimacy. OIRA's centralized review, however, has generally disregarded these principles. In particular, when OIRA demands substantive changes to draft rules without public explanation for their basis, it undermines the goals of meaningful public participation. Likewise, OIRA's failure to disclose the source of changes to agency rules – whether that source is a political official in the White House or an industry lobbyist – defeats meaningful public accountability for the policies that affect our daily lives.

To make matters worse, OIRA's interference in individual agency rulemakings often results in violations of the clear statutory language that authorized those rulemakings. When drafting statutes, Congress almost always commits any policymaking discretion involved in crafting new regulations to the individual agency heads. Yet, OIRA flagrantly disregards this legislative choice by Congress whenever it substitutes its policy judgment for that of the agencies. In addition, Congress often directs agencies to base their regulatory decisions on standards other than cost-benefit analysis – standards that unambiguously prioritize the protection of the public interest.

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For instance, to minimize emissions of mercury, arsenic, and other toxic air pollutants from industrial facilities like power plants, the Clean Air Act directs the EPA to set limits based on the top-performing pollution control equipment in current use. The Clean Air Act further directs the EPA to assess and address any residual risks that remain once the initial standard is fully implemented. This approach in effect puts a thumb on the public health side of the scale by ensuring that all facilities use state of the art pollution control technologies, even if they are expensive to install and operate.[11] By transforming cost-benefit analysis into the rule of decision, however, OIRA review forces agencies to issue rules that deviate from these kinds of clear instructions from Congress by providing far weaker protections than what is called for in the authorizing statute.

Professor Rao's Scholarship: Troubling Views on Regulatory Policy

As President Trump's regulatory czar, Professor Rao would play a leading role in the administration's efforts to permanently weaken the regulatory system and roll back many of the important safeguards that Americans count on to protect our health, safety, financial security, and environment. The overall trajectory of Rao's career leaves little doubt that she is a committed small-government conservative. To the extent that her views on regulatory policy in particular reflect this ideology, Rao is likely to be strongly supportive of the Trump administration's broader anti-regulatory agenda.

Professor Rao's perspective on regulatory policy appears to closely align with the narrow focus on compliance costs that already pervades OIRA and that serves to undermine the achievement of the visionary policy objectives at the heart of our environmental, public health, consumer protection, and labor laws.

Professor Rao has been a member of the George Mason University Law School's faculty for more than ten years. The law school, which recently changed its name to honor the late Supreme Court Justice Antonin Scalia, has long been a source of free market legal scholarship and has received substantial financial support from the Charles Koch Foundation and other conservative philanthropies that are committed to spreading libertarian ideas in academic and policymaking circles.[12]

In 2015, Rao helped establish the Center for the Study of the Administrative State at the George Mason University Antonin Scalia Law School. According to the Center's website, it was created in part to respond to the "[p]roblems of administrative accountability," including supposed over-delegation of policymaking authority by Congress to agencies, improper deference to agency decision-making by the judiciary, and the resulting aggrandizement of power by regulatory agencies themselves.[13] The law school helped raise money for the Center in part by leveraging a 2016 donation from the Charles Koch Foundation that is potentially worth up to $10 million over a period of ten years.[14] The Center's affiliated faculty and senior fellows include several noted libertarian and free market legal scholars from across the country.

Prior to entering academia, Professor Rao clerked for conservative Supreme Court Justice Clarence Thomas from July 2001 to June 2002 and later served a short stint as an Associate Counsel and Special Assistant to then President George W. Bush from April 2005 to June 2006.

While in academia, Professor Rao's limited record of scholarship has covered various topics in constitutional and administrative law. With respect to regulatory policy, her scholarship and other public statements appear to be animated by a strong mistrust of, if not hostility toward, regulatory agencies and their role in policy implementation and enforcement. This perspective would closely align with the narrow focus on compliance costs that already pervades OIRA and that serves to undermine the achievement of the

visionary policy objectives at the heart of our environmental, public health, consumer protection, and labor laws.

One of the common themes that run throughout Professor Rao's writings on regulatory policy is a preoccupation with controlling the growth of the executive branch. For Rao, an agency-administered executive branch is somehow inherently incompatible with individual liberty, and thus its growth necessarily comes at the expense of our personal freedoms.[15] Nowhere in her world view, it seems, would it be possible for a regulation to have the effect of *enhancing* freedom. Plenty of regulations have this precise effect, though. For example, design standards adopted in accordance with the Americans with Disabilities Act promote the freedom of people with limited mobility to lead dignified and independent lives by establishing basic accessibility standards for public facilities, such as restrooms.

One of the common themes that run throughout Professor Rao's writings on regulatory policy is a preoccupation with controlling the growth of the executive branch.

In her writings, Professor Rao identifies several root causes of the growth of regulatory agencies and suggests tools to limit that growth, including some blunt and rusty ones. The root causes she identifies include Congress over-delegating policymaking authority to agencies, the judiciary being overly deferential to agency legal interpretations, and the president failing to exercise adequate centralized oversight. Accordingly, her recommendations for addressing the problem of "excessive" regulation involve reinstating institutional constraints on the actions of regulatory agencies. In one article, for example, she outlines various reforms aimed at preventing Congress from delegating "excessive" policymaking authority to regulatory agencies. Among her suggested recommendations is reinvigorating judicial enforcement of the "non-delegation doctrine," a controversial position that has found little support among mainstream legal thinkers over the last several decades.[16]

Much of Rao's scholarship in this area has been on the special case of independent regulatory agencies. In contrast to executive branch agencies, over which presidents exercise significant control, independent regulatory agencies were structurally designed by Congress to limit excessive interference from the White House. One of the most important of these structural design elements is a limitation on the president's ability to remove the agencies' leadership. In most cases, these agencies are headed by multi-member, bipartisan boards. The agency heads typically serve according to terms that are both staggered and tend to run longer than four-year presidential administration cycles, and they typically can only be removed for cause. These constraints are intended to limit the president's ability to dictate the substance of the agencies' decision-making through threat of removal of the agency heads so that agencies can instead base their decisions on expertise-based analysis and judgment, even when it leads to politically inconvenient conclusions and policies. This insulation from political interference is particularly important for independent agencies that tend to oversee policy areas that are technologically complex, such as the

Nuclear Regulatory Commission, or that relate to especially delicate elements of our national economy, such as the Federal Reserve Board of Governors.

Professor Rao has set out several "reforms" targeted directly at constraining independent regulatory agencies. The most controversial is an argument she laid out in a series of articles that the president should have unlimited authority to remove all administrative agency heads, on the theory that Congress overstepped its constitutional bounds when it attempted to limit presidential control in the case of appointees at the independent agencies.[17] Going further, Rao suggests that unlimited removal authority is necessary to give the president greater control over how these agencies carry out their statutory missions.

In contrast to several former OIRA Administrators, Professor Rao has no apparent expertise with regard to the theory and practice of cost-benefit analysis. The views she has expressed in her writings on constitutional principles of human rights, however, could influence how she approaches the valuation of certain kinds of benefits as part of those analyses.

More recently, as co-chair of the Regulatory Policy Committee of the American Bar Association's Section of Administrative Law and Regulatory Practice, Rao helped advance the Section's controversial recommendation to then-president-elect Trump that he bring independent regulatory agencies within the centralized review process overseen by OIRA.[18] As noted above, OIRA review is a potent conduit for introducing presidential interference into agency decision-making. Consequently, this recommendation would all but defeat Congress's attempt to institutionally insulate these agencies against such politicized interference.

Another notable theme that runs throughout Professor Rao's scholarship is her conspicuous antipathy for the Consumer Financial Protection Bureau (CFPB), the agency created in the wake of the 2008 Wall Street crash to better safeguard the financial security of individuals and families. Indeed, this antipathy appears to be the main animating force behind her extensive work on the non-delegation doctrine and on independent regulatory agencies. In her articles, she posits that liberal lawmakers in Congress set out to design the CFPB to be an agency that they alone could control, knowing that they would be aided in this effort by the courts' weak enforcement of the non-delegation doctrine, as well as existing Supreme Court precedent endorsing limitations on the president's removal authority for independent regulatory agencies.[19] Other than Professor Rao, it appears that few legal scholars subscribe to this controversial theory regarding the CFPB's supposedly illegitimate origins or even to recognize analogous patterns of "congressional capture" afflicting other administrative agencies.

In contrast to several former OIRA Administrators, Professor Rao has no apparent expertise with regard to the theory and practice of cost-benefit analysis. The views she has expressed in her writings on constitutional principles of human rights, however, could influence how she approaches the valuation of certain kinds of benefits as part of those analyses. In a series of articles, she outlines her skeptical view of "dignity" as a constitutionally protected individual right.[20] Increasingly, Congress is charging

administrative agencies with developing safeguards designed to promote abstract regulatory benefits like "dignity." Because the practice of cost-benefit analysis demands all benefits be expressed in dollar and cents, agencies face a significant challenging in demonstrating that these rules pass a cost-benefit test.

For example, in passing the Prison Rape Elimination Act in 2003, Congress directed the Department of Justice to develop national prison rape prevention standards, which it issued in 2012. As part of the executive order-mandated OIRA review process, the Department of Justice developed a full-fledged cost-benefit analysis, which categorized the different types of sexual assaults that can occur in prison and then, most horrifically, attempted to assign a monetary value to their prevention. According to this analysis, for instance, preventing a rape in a juvenile facility is worth $674,316, while preventing a rape in an adult facility is worth slightly less at $480,595. Despite the agency's efforts at number crunching, these monetary values fail to capture important benefits that the rule would deliver, such as the preservation of dignity that is ultimately lost by victims of sexual assault.[21] The Obama administration addressed this challenge by directing regulatory agencies to identify regulatory benefits like dignity, equity, fairness, and distributive impacts, all of which defy efforts at quantification and monetization, and then discuss them qualitatively as part of the cost-benefit analysis.[22]

If Rao's skepticism about dignity as a constitutionally protected individual right carries over to the policies OIRA uses when reviewing new public safeguards, agencies may well reverse course and abandon the practice of conducting qualitative assessments of abstract regulatory benefits. As a result, the many rules that promote dignity and similar other abstract benefits will end up with artificially negative cost-benefit analyses that make the rules appear to be a loss for society. In turn, these artificially negative cost-benefit analyses would empower OIRA and the Trump administration to weaken these rules or abandon them altogether.

OIRA in the Age of Trump

If implemented strictly, Executive Order 13771 would introduce some of the biggest roadblocks to new public safeguards in the last several decades.

Less than two weeks after his inauguration, President Trump signed an audacious and controversial executive order on "Reducing Regulation and Controlling Regulatory Costs,"[23] which could dramatically change OIRA's role in the federal regulatory system. If implemented strictly, Executive Order 13771 would introduce some of the biggest roadblocks to new public safeguards in the last several decades. First, it creates a regulatory "pay-go" system under which an agency must commit to repealing at least two existing regulations for each new "significant" regulation it wishes to issue. Second, it establishes a regulatory "budget" system that caps the total amount of additional regulatory costs an agency can impose in any given fiscal year by issuing new regulations. For fiscal year 2017, the order sets a regulatory budget of $0 in new incremental regulatory costs. In other words, through September 2017, the costs imposed by any new significant rules that an agency issues must be fully offset by the cost savings that are achieved through the elimination of the existing regulations under the order's regulatory pay-go system.

To ensure agencies comply with these requirements, Executive Order 13771 grants the Director of OMB considerable oversight powers. Consistent with past practice on executive orders affecting regulatory policy, though, these powers have been further delegated to the OIRA Administrator. Acting OIRA Administrator Dominic Mancini has already begun issuing guidance and memoranda for agencies on how to comply with the order's requirements.

The most significant of the OMB Director's powers under the order is the authority to set individual agencies' annual regulatory budgets. The order authorizes the OMB Director to determine for each agency the "total amount of incremental costs" they will be permitted to impose for a given fiscal year, which an agency would be prohibited from exceeding. Thus, before an agency can issue a new rule that would exceed its cap for that year, it must find ways to eliminate or weaken at least two existing regulations so that they would produce large enough costs savings to bring the agency back under its cap.

The order also gives the OMB Director potentially groundbreaking new power to dictate agencies' rulemaking priorities. Agencies must seek OMB approval during an annual budget review to list regulatory and deregulatory actions on the Unified Regulatory Agenda. This power to control the rules in an agency's regulatory pipeline is significant because past regulatory executive orders placed OIRA's gatekeeper function midway through the rulemaking process – giving OIRA substantial control over what rules go public but not much power over agency leaders' decisions to begin the years-long process of gathering information, analyzing it, and assessing opportunities to create new safeguards. With Executive Order 13771,

however, the OMB Director (or the OIRA Administrator, should this power be delegated) becomes the gatekeeper for agencies' entire regulatory programs and priorities. As a backstop to ensure that agencies come to heel, the order prohibits agencies from issuing any rule unless it appeared in its most recent Unified Regulatory Agenda.

Executive Order 13771 also empowers the OMB Director to exercise broad and largely unchecked discretion over how its requirements are implemented in practice. For example, the order authorizes the OMB Director to decide whether certain categories of regulations should be exempted from its pay-go or budgeting requirements.

For all the seismic changes that Trump's order is likely to make to federal regulatory policy, it is conspicuously light on specifics. To remedy this problem, the order repeatedly calls on the OMB Director to fill in many considerable gaps by issuing guidance. Specifically, the order requests guidance to address the implementation challenges involved with the regulatory pay-go system – such as the "processes for standardizing the measurement and estimation of regulatory costs" and "standards for determining what qualifies as new and offsetting regulations" – and those of the order's regulatory budget system.

Even before Professor Rao was nominated to be OIRA Administrator, the office had begun developing guidance documents related to the order. In early February, for example, Mancini issued an Interim Guidance on Implementing Section 2 of the Executive Order.[24] He later followed up that document by issuing a memorandum that provides additional detailed directions for agencies on how to implement the order's regulatory "pay-go" and regulatory budget requirements for the remainder of Fiscal Year 2017.[25] The second memorandum fleshes out the vague framework for implementing Executive Order 13771 laid out in the Interim Guidance, providing additional specifics that build on, and in some cases supersede, those included in the earlier document.

In addition to Executive Order 13771, Trump has issued a second executive order on the subject of "Enforcing the Regulatory Reform Agenda."[26] Executive Order 13777 is intended to ensure that agencies fully implement several previous executive orders related to regulatory policy, including Executive Orders 12866 and 13771 described above, as well as Executive Order 13563, which was issued by President Obama and directs agencies to subject their existing regulations to a systematic regulatory review process. Among other things, this second Trump order directs each agency to appoint a Regulatory Reform Officer who will coordinate efforts to roll back the protections that American communities and families rely upon. Executive Order 13777 further directs the Regulatory Reform Officer to assemble a Regulatory Reform Task Force and review that agency's existing regulations to find those that should be weakened or eliminated.

Agencies and Rao's OIRA, Working Hand-in-Hand to Undermine Public Safeguards

As OIRA Administrator, Professor Rao will spend the next several years working with her counterparts in the various administrative agencies to fulfill the Trump administration's assault on public safeguards. OIRA is likely to pursue three broad tactics as part of this effort: stifling the enforcement of new public protections; rolling back existing safeguards; and instituting cross-cutting reforms aimed at defeating the public interest.

Stifling New Safeguards

Throughout its history, and regardless of presidential administration, OIRA has operated with a consistent bias against bold policymaking, though the fervor with which it has tried to rein in the EPA, the FDA, and other public interest agencies has varied somewhat according to the particular policy preferences holding sway in the Oval Office. One key expression of those policy preferences has been the president's choice for OIRA Administrator. When under the leadership of Administrators who are more skeptical of regulation – for example, John Graham, Susan Dudley, and Cass Sunstein – OIRA has tended to operate more aggressively in its gatekeeping role. In contrast, under the leadership of Administrators who were generally more sympathetic to the legitimacy of regulation for advancing policy goals – for example, Sally Katzen and Howard Shelanski – OIRA's gatekeeping has tended to be less aggressive. Professor Rao would appear to fall in the former category, based on her consistent record of positions that would minimize the role of regulatory agencies in serving the public interest.

During the Trump administration, OIRA is likely to continue playing the role of regulatory gatekeeper, though with some important twists.

During the Trump administration, OIRA is likely to continue playing the role of regulatory gatekeeper, though with some important twists, as explained below. Two interrelated factors in particular are likely to transform how this role is performed over the next several years. One is Trump's appointment of anti-regulatory zealots to run key executive agencies and departments, such as the EPA and the Department of Energy. The other is Trump's two new executive orders, which together make deregulation a top policy priority for the administration.

While Trump is not the first president to install individuals hostile to the public interest missions of the agencies they would run – Presidents Ronald Reagan and George W. Bush took the same approach years ago – his picks are poised to take the strategy to a new extreme. For example, Scott Pruitt used his position as Attorney General of Oklahoma to challenge at least 14 of the EPA's regulations in recent years, including a Clean Air Act rule to limit power plant pollution that crosses state lines, a Clean Water Act rule meant to clarify which small waterbodies and wetlands receive automatic protections under the statute, and the Clean Power Plan, the agency's signature action to limit existing power plant emissions of climate-changing

greenhouse gases.[27] Then Trump gave him the job of running EPA. And Trump's pick to lead the Energy Department, former Texas Governor Rick Perry, once famously declared his intention to abolish the department during his failed presidential run – or at least tried to before the agency's name temporarily escaped his memory.[28]

With leaders like Pruitt and Perry at the helm, it is unimaginable that agencies created to work in the public interest will pursue a robust regulatory agenda during the next few years, leaving OIRA with fewer protective safeguards to delay and water down as part of its traditional gatekeeper function. Instead of OIRA standing in their way, the agencies themselves are likely to become the primary locus of regulatory obstruction, as the new leadership at the agencies is likely to disregard the statutory missions that Congress has set out for them. Trump's political appointees may also seek to formalize this new system of bureaucratic foot-dragging by instituting internal policies and practices that they will characterize as methodological improvements, when in fact, they are carefully tailored to undermine any remaining efforts to carry out their agencies' statutory missions in a timely and effective manner.

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Trump's executive orders are likely to reinforce this slowdown in regulatory progress within agencies – or at least provide the new agency leaders with a convenient excuse for slamming the brakes on carrying out their respective statutory missions. In particular, complying with Executive Order 13771's "pay-go" and budget requirements will be enormously time-consuming and resource intensive. As explained below, the practical effect is to transform every rulemaking into three (one for the new rule, and two more for the existing rules that are to be weakened or eliminated). Administrative law scholars have thoroughly documented the problem of regulatory ossification, which already makes it nearly impossible for agencies to issue complex rulemakings in a timely fashion.[29] Executive Order 13771 will triple the morass. With each rulemaking consuming more and more of the agency's scarce resources (which are set to be even scarcer under future budgets), the inevitable result will be that fewer rulemakings will be initiated. In particular, agencies may see nearly any discretionary rule (and perhaps some non-discretionary ones) as not worth the trouble and forgo pursuing it altogether.

Accordingly, some may wonder if there will be any regulatory "gate" to "keep" during the Trump administration. Yes, there will. As much as they might like to, Trump's team will not be able to completely close off the regulatory pipeline. Many hazards are so pressing that Congress wrote statutes demanding regulation, and in many cases, Congress has taken the additional step of specifying the date by which rules must be proposed or completed. The recalcitrant agency leaders might begrudgingly direct their staffs to undertake these actions or, failing that, be compelled to do so through court orders obtained by public interest organizations. Work will

also continue on more mundane regulatory actions that, while essential to the effective implementation of existing laws, may not attract the attention of the agency's political leaders.

Given Trump's desire to subvert public safeguards disfavored by business leaders, we expect OIRA to use its power of centralized review to protect industries from compliance costs while leaving Americans exposed to avoidable risks. As in the past, OIRA's course will be swayed by political consultants and lobbyists.[30] Voices from everyday Americans will be rare. Unlike higher-profile agencies like the Department of Housing and Urban Development (HUD) or the EPA, whose activities grab headlines, OIRA's quiet adjustments will go unnoticed by many. But, in ways large and small, they will matter.

Rolling Back Existing Safeguards

As they attempt to meet President Trump's regulatory budget and pay-go demands, agencies will have to follow the same convoluted rulemaking process to abandon regulatory protections as they would when they institute new regulations in the first place. In other words, agency heads can't just order staff to delete standards and safeguards from the Code of Federal Regulations or to rewrite entire rules without going through the standard, years-long regulatory process. Instead, the Administrative Procedure Act (APA) requires that they follow the standard notice-and-comment rulemaking process for these actions.[31]

Significantly, OIRA's gatekeeping role will have a role to play in this process, albeit one that differs considerably from how this gatekeeping role is traditionally deployed. That's because agencies will have to submit their draft proposed and final deregulatory actions for OIRA review, just as they would for actions that institute new protective safeguards. Rather than using its centralized review authority to stifle or undermine as it would for new public protections, though, we think OIRA could try to switch gears and deploy its review process in a manner designed to facilitate and reinforce these deregulatory rulemakings.

According to a series of landmark Supreme Court decisions, the APA requires agencies to offer the same kind of reason-based defense for such deregulatory rulemakings as would be required for the original rules that are being weakened or eliminated. In its 1983 decision in *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*[32], the Court struck down a Reagan administration rulemaking that would have eliminated an existing earlier auto safety rule due to the administration's failure to explain, given the available evidence, why the earlier rule was no longer needed. The Court later clarified in the 2009 case of *FCC v. Fox Television Stations*[33] that the APA does not require an agency to provide a "better" policy rationale for the changed regulation than was offered in support of the original one – only one that is valid under the relevant

authorizing legislation. The majority opinion did note, however, that certain policy changes may require agencies to take additional analytical steps that might not be required for an original rulemaking. For example, the agency might need to account for any factual findings used to support the newer regulation that are inconsistent with factual findings used to support original one.

Accordingly, OIRA could reorient how conducts its gatekeeping role for these deregulatory rulemakings so that provides a "quality control check" on the legal and economic rationales that agencies have devised to support the actions. As part of the review, OIRA could work with the agencies to strengthen these policy rationales in anticipation of the likely legal challenges that will be brought by public interest organizations. In some cases, OIRA may even be able to identify ways that a deregulatory rule can be revised to expand its deregulatory effect and then work with the rulemaking agency to devise a *post hoc* rationalization to support the necessary changes. This reoriented approach to OIRA's regulatory review process could become one of the most influential aspects of the office's antiregulatory work during the Trump administration and, indeed, could come to dominate the office's overall workload.

OIRA could coordinate broad executive branch-wide efforts to provide regulatory relief to certain favored industrial sectors.

Carrying Out More Systematic Efforts to Defeat the Public Interest

OIRA is also poised to contribute to the Trump administration's assault on our safeguards in ways that go well beyond being a gatekeeper for both new safeguards and deregulatory actions.

- OIRA could coordinate broad executive branch-wide efforts to provide regulatory relief to certain favored industrial sectors. This coordinating role might be especially relevant to efforts to deregulate specific industrial sectors, such as chemical manufacturing or oil refining, that are the subject of complex interlocking regulatory programs implemented by multiple federal agencies.

  One tool at OIRA's disposal that could be used to coordinate such efforts is the so-called "prompt" letter.[34] First introduced during the George W. Bush administration, prompt letters are supposed to provide OIRA with a mechanism for encouraging agencies to undertake particular regulatory actions that they might not otherwise initiate. For example, John Graham, Bush's first OIRA Administrator, issued one prompt letter to OSHA encouraging the agency to consider a rulemaking that would require employers to provide automatic external defibrillators in certain workplaces and another to the FDA encouraging it to regulate the presence of trans fatty acids in foods. When issuing these prompt letters, Graham typically pushed for regulatory actions with a supposedly strong cost-benefit ratio, rather than use them to urge action in response to pressing public crises.

Prompt letters could provide OIRA with a powerful tool for coordinating administrative-wide deregulatory efforts. OIRA is institutionally well suited to facilitate broad deregulatory efforts benefitting particular industries that cross several agencies because so much of the federal regulatory process goes through the OIRA chokepoint.

- OIRA could continue to add to the existing anti-regulatory policy infrastructure that it has created within the rulemaking process. For example, OIRA could revise Circular A-4 on "Regulatory Analysis," its 2003 guidance document for agencies on how to prepare cost-benefit analyses to support their pending rulemakings.[35] These changes could be aimed at helping agencies justify the deregulatory rulemakings required by Executive Order 13771, or conversely at discouraging them from pursuing more protective safeguards, by requiring methodologies that lead to overestimates of regulatory costs or underestimates of regulatory benefits. For example, OIRA could prohibit agencies from including in their cost-benefit analyses any accounting for "co-benefits," or those benefits that a rule produces beyond those that it was specifically designed to produce.[36] At the same time, OIRA could direct agencies to make a fuller accounting of various "indirect costs," including the measurement of indirect employment effects through an unreliable methodology known as "whole economy modeling."[37] With this combination of systematically excluded indirect benefits, such as co-benefits, and systematically included indirect costs, OIRA could push agencies to produce cost-benefit analyses that are even more skewed against stronger public protections.

  Similarly, OIRA could revise other influential policy documents such as its 2007 Final Bulletin on Agency Good Guidance Practices, which establishes onerous procedures that agencies must satisfy before issuing certain kinds of guidance documents, including those that involve novel policy questions or that could potentially have a large impact on regulated businesses.[38] In particular, OIRA might seek to create additional obstacles that would make it even more difficult for agencies to issue these kinds of guidance documents.

However OIRA ultimately contributes to the Trump administration's assault on our safeguards, its activities will likely raise many of the same policy and legal concerns associated with OIRA's traditional regulatory gatekeeping role.

However OIRA ultimately contributes to the Trump administration's assault on our safeguards, its activities will likely raise many of the same policy and legal concerns associated with OIRA's traditional regulatory gatekeeping role. For instance, its efforts to assist agencies in developing *post hoc* rationalizations for their deregulatory rulemakings risk defeating the opportunities for meaningful public participation that the federal rulemaking process was designed to provide. Similarly, many of the coordinating efforts that OIRA undertakes to orchestrate cross-agency deregulatory campaigns would likely take place behind closed doors in the White House, thereby undermining the public's interest in a transparent policymaking process.

Although it often flies below the radar, OIRA has the capacity to do great harm. By helping to coordinate and facilitate agency action, OIRA could well

lead the Trump administration's charge to weaken or eliminate many of the safeguards that Congress called for in public interest laws like the Clean Water Act, the Federal Food, Drug, and Cosmetic Act, the Occupational Safety and Health Act, and many others.

Gauging OIRA's Contributions to the Trump Assault on Public Safeguards

With its gatekeeping role likely to be diminished in importance, OIRA's contributions to the administration's assault on our safeguards may well manifest themselves in other ways. OIRA's role will likely involve a more diverse and broader range of activities, some of which may be difficult to monitor due to their novelty or relative subtlety.

Accounting for OIRA's role in a regulatory system constrained by President Trump's executive orders and extremist agency leaders requires a fresh approach. It will still be important to track OIRA's use of its gatekeeping role to interfere in individual rulemakings. But with the gatekeeping role likely to be diminished in importance, OIRA's contributions to the administration's assault on our safeguards may well manifest themselves in other ways. OIRA's role will likely involve a more diverse and broader range of activities, some of which may be difficult to monitor due to their novelty or relative subtlety. With these challenges in mind, answers to the following questions will be useful indicators of OIRA's performance over the next several years:

- Have OIRA's budgetary and staffing resources substantially increased?
- What roles and responsibilities have been delegated to OIRA for overseeing and ensuring agency compliance with Executive Order 13771? What specific actions, such as the issuance of guidance documents, is OIRA taking to fulfill these roles and responsibilities?
- As part of its reviews of deregulatory actions, what role, if any, does OIRA play in helping the rulemaking agencies construct statutory or economic-based policy rationales in support of their actions?
- Has OIRA facilitated agencies' deregulatory rulemakings in other ways, such as by subjecting them to significantly shorter review periods as compared to those for rulemakings that would affirmatively protect the American people?
- Has OIRA issued any new policy documents or revised existing ones in ways that would inhibit agencies from instituting new or stronger protective safeguards?
- How active has OIRA been in using prompt letters to demand that agencies promulgate rules weakening or eliminating existing protections?
- How transparent is OIRA? Does it provide the media and the public with the information it needs to determine what role the office is playing in crafting and recrafting regulations during the Trump administration?

Conclusion

The Trump administration has promised to carry out a devastating assault on our safeguards. The nature and intensity of these attacks are certain to be unlike anything we have seen since the modern regulatory system was first put into place. In all likelihood, the Trump administration will succeed in rolling back at least some critical safeguards for our health, safety, and the environment, safeguards upon which we have come to depend. With Professor Rao as its next administrator, OIRA will likely play a key role in that effort, perhaps even becoming a focal point in the battles that will undoubtedly ensue.

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