

BUSINESS DAY | **TRUMP RULES**

Neomi Rao, the Scholar Who Will Help Lead Trump's Regulatory Overhaul

By **STEVE EDER** JULY 9, 2017

WASHINGTON — When George Mason University changed the name of its law school last year to honor Antonin Scalia, the late conservative Supreme Court justice, the tribute rankled many liberal faculty members and students. That the naming was tied to a multimillion-dollar donation from the conservative Charles Koch Foundation only heightened concerns.

One outspoken advocate for the name change was Neomi Rao, an associate law professor who had come to know Mr. Scalia while serving as a clerk for Clarence Thomas, another conservative member of the court. Ms. Rao, a Republican, publicly celebrated the legacy of Mr. Scalia and praised the Koch donation as “game changing” for the law school.

But quietly, Ms. Rao also worked to win over liberal critics.

In a public relations coup, she helped secure an endorsement for the name change from Ruth Bader Ginsburg, one of the Supreme Court's most liberal justices and a longtime friend of Mr. Scalia. Justice Ginsburg described the school's renaming as “altogether fitting.”

Ms. Rao's ability to work both sides of the ideological divide, emblematic of her career in academia and government, is about to be tested anew. On Monday, the Senate is expected to approve Ms. Rao's nomination to lead an obscure but

powerful White House agency called the Office of Information and Regulatory Affairs — placing her at the heart of President Trump's politically contentious agenda to overhaul government rules and regulations.

The office, created during the Carter administration, approves government data collections and determines whether agencies have sufficiently addressed problems during rule-making. In the end, the administrator accepts regulations or sends them back to be reworked, a decision that can expedite rules or effectively neutralize them by imposing extensive delays.

Ms. Rao, 44, who has served in all three branches of the federal government, brings to the position knowledge of Washington, a lengthy Republican contacts list and scholarly credentials from the ideologically charged field of regulatory study.

She is the founder of the Center for the Study of the Administrative State at George Mason, which is affiliated with the law school and has been a beneficiary of the donation from the Charles Koch Foundation. Ms. Rao started the center two years ago at a time of growing scholarly intrigue about the regulatory process and the authority of federal agencies to set and enforce rules, a section of the law that rose to prominence during the New Deal era.

Regulatory decisions under President Barack Obama, who was among the most prolific authors of major regulations in presidential history, heightened the interest among conservative academics, who questioned whether agencies had overstepped their constitutional bounds.

Ms. Rao was an easy pick for Republicans for the White House role, but she also won the backing of a bipartisan group of eight former administrators of the Office of Information and Regulatory Affairs.

“I have a lot of concerns about what this administration is going to do in regulatory areas,” said one of them, John Spotila, who led the office during the Clinton administration. But, he said, “I don't start with the conviction that Neomi is bad, and anybody Trump picks is going to be horrible and we are doomed.”

He added, "Maybe Neomi will surprise us."

Even before Ms. Rao begins, the regulatory rollback is well underway. Mr. Trump has issued a series of executive orders mandating a reduction of regulatory burdens on everyone from bankers and energy companies to small businesses and farmers. Federal agencies have been busy too: The Environmental Protection Agency is already taking steps to undo more than 30 environmental rules.

A sizable part of Ms. Rao's new job might involve helping the Trump administration stay within the law as it pursues the changes. "Trump has made some big claims about what he will do, and I think he needs a good lawyer," said Susan Dudley, who headed the regulatory office under President George W. Bush and now directs the George Washington University Regulatory Studies Center.

Previous administrators have also pushed back against the White House they worked for. Cass Sunstein, who led the office during Mr. Obama's first term, opposed various rules, including one by the Environmental Protection Agency to tighten standards for ozone pollution.

Some progressive advocates are skeptical Ms. Rao will intervene to curb deregulation.

"I don't think her background should lead anybody to expect her to stand up to Donald Trump, Steve Bannon and the 'deconstruction of the administrative state,'" said Amit Narang, a regulatory policy advocate with the liberal-leaning organization Public Citizen. "Her background makes me think she's going to fast-track all of that."

The White House and Ms. Rao declined to comment for this article, as her nomination was still pending.

Slices With Scalia

Neomi Rao's rise to the most influential regulatory post in the Trump administration followed a path that took her to the Supreme Court, Capitol Hill

and the White House.

The daughter of immigrant doctors from India who settled in suburban Detroit, she graduated from Yale and earned a law degree at the University of Chicago before entering the upper echelons of Republican Washington.

In addition to clerking for Justice Thomas, she was counsel to the Senate Judiciary Committee under Senator Orrin G. Hatch of Utah and associate counsel and special assistant to President George W. Bush during his second term.

Ms. Rao's year with the Supreme Court gave her proximity to some of the leading conservative legal minds, including Justice Scalia, who took her and other clerks to A. V. Ristorante Italiano in Washington, where she found common ground with him on legal interpretation — and also on anchovies as a pizza topping.

“In the back room of that storied pizzeria with Justices Scalia and Thomas and my co-clerks, we shared many hours of good conversation about life and the law,” Ms. Rao wrote in a tribute after Mr. Scalia's death last year.

Over the past decade, Ms. Rao established herself as a legal scholar on the law school faculty at George Mason in Fairfax, Va., just outside Washington. She has written papers on a number of topics, including Congress's delegation of authority to federal agencies, her view that so-called independent agencies — like the Consumer Financial Protection Bureau — should answer to the president, and that dignity under the law is best derived from freedom and individualism, not government intervention.

She has also taught courses on constitutional law, as well as legislation and statutory interpretation, while recently pairing with Justice Thomas to teach a class that was listed in the school's course schedule as History and Foundation of the Administrative State.

At the law school, Ms. Rao has a reputation for her earnestness, said David Rehr, senior associate dean. Her approach was not typical to Washington, where

there is “a lot of ideological fencing going on,” Mr. Rehr said. “With Neomi, it’s a real, ‘Let’s hear each other out and figure out where we can work together.’ And it’s authentic.”

As her academic profile grew, Ms. Rao became increasingly sought-after for her views on constitutional law. In 2009, she was called as a witness for Senate Republicans at the confirmation hearings of Justice Sonia Sotomayor to the Supreme Court. During her testimony, Ms. Rao discussed her own deference for a strict interpretation of the law while asserting Ms. Sotomayor’s approach from the bench lacked objectivity.

“In our constitutional democracy,” she said, “the rule of law should prevail over the rule of what the judge thinks is best.”

Scrutinizing Regulators

In recent years, Ms. Rao’s leadership of the Center for the Study of the Administrative State gave her a particularly strong voice in the growing conservative movement looking to curb the regulatory powers of federal agencies.

The center opened in 2015 as pockets of George Mason’s campus were becoming increasingly conservative, in large part because of donations from Charles G. Koch, the billionaire businessman who contributes to many Republican causes, and his influence as a board member on various programs at the university.

Foundations affiliated with Mr. Koch have donated at least \$50 million to George Mason, a public university, over the past decade, helping to fund his favored projects and underwrite scholarships at a time when the university’s growth has outpaced state funding increases.

Ms. Rao’s center benefited from those contributions.

Last year, in connection with renaming the law school, George Mason received a \$20 million gift from an anonymous donor plus \$10 million from Mr. Koch’s foundation. According to university documents, the agreement called for bolstering

Ms. Rao's center. Henry Butler, the dean of the law school, wrote that the gift would be used to aid various programs, including to "increase support for faculty research" through Ms. Rao's center.

Mr. Rehr said that Ms. Rao's center was "going to happen anyway" as there was already considerable intellectual interest in the administrative state and the regulatory process. But the donation "made it easier."

"It accelerated the viability and visibility of the center," Mr. Rehr said, adding that Mr. Koch has not exerted any influence over the center.

The donation alarmed George Mason's faculty senate, which in a statement said the naming of the law school for Justice Scalia would reinforce the branding of the university as a "conservative institution" while also celebrating a polarizing figure. Further, the faculty raised concerns that the school officials had "failed to disclose the terms of the gifts" that required the university to allocate funding for additional staff, and support for the Ms. Rao's center, among other things.

During the uproar, Ms. Rao helped gather support for the name change — including by obtaining the statement from Justice Ginsburg, which was detailed in emails among public documents posted online by BuzzFeed. She also spoke out publicly, telling *The Washington Post* that the donation would help bring in new students who could not afford a legal education, and it would "help build out our faculty and improve the quality and reach of the law school."

Ms. Rao's center, one of a number of such programs at universities, has tapped into a heightened interest in the administrative state. Conservatives say the concern goes well beyond the regulatory offensive of the Obama administration, and follows a series of opinions from conservative members of the Supreme Court, as well as other significant writings — like Philip Hamburger's book, "Is Administrative Law Unlawful?" — that raise questions about whether too much power has been given over to federal agencies.

Liberal scholars have actively engaged in the debate, too, arguing that federal agencies need the authority to regulate and enforce rules that protect against

health and environmental hazards that the bottom-line interests of businesses and industries often minimize or ignore.

At the center of the debate is a legal principle known as Chevron deference, named for the legal case in a 1984 Supreme Court decision that held that federal judges should defer to the expertise of federal agencies. The newest member of the Supreme Court, Justice Neil Gorsuch, expressed opposition to that doctrine during his confirmation process.

“It is the most interesting time in administrative law in a generation,” said Adam White, a fellow at the conservative-leaning Hoover Institution, who has worked closely with Ms. Rao and will succeed her as director at the George Mason center. He described the center’s work as an “effort to consider how we regulate the regulators.”

“I don’t think that means shutting down the government,” he said. “Administrative agencies are inventing new rules every day for businesses or people. We just want to impose some rules and order on them.”

Lisa Heinzerling, who served at the Environmental Protection Agency during the Obama administration and spoke on a panel at Ms. Rao’s center this year, said that the center and others like it “can sound like an echo chamber” in a conservative campaign against government oversight.

“There is a palpable hostility to regulation,” said Ms. Heinzerling, now a law professor at Georgetown.

Where Regulations Die

The first substantive question Ms. Rao faced during a Senate confirmation hearing last month struck at a hot topic on Capitol Hill: How did she view an order by Mr. Trump to eliminate two regulations for every new one, and how should it be carried out?

As she answered, Ms. Rao measured her words, calling the policy “an

important step” in broadly reducing regulatory burden. “It can work,” she said. “The way I think it will work in practice is that agencies will identify regulations to eliminate. And those regulations might be ineffective ones or excessively burdensome. And those regulations will have to meet a cost-benefit analysis for deregulation before they’re going to impose any new regulatory burdens.”

As her testimony continued, she went so far as to give Democrats a nod that her cost-benefit analysis would go beyond simply calculating financial costs to industry — agreeing that non-monetary benefits, to health and the environment, for example, “can play a role.”

One fact working in Ms. Rao’s favor, as she begins her new job, is that there is consensus among politicians and voters of all political stripes that Washington should do a better job streamlining regulations.

But the divide is deeply partisan once the discussion moves to how much regulation is necessary to keep things orderly, safe and fair — and what is deemed a reasonable cost to make that happen. In simple terms, conservatives say the price of red tape has grown too steep, citing a study suggesting that rules cost the economy more than \$2 trillion. Liberals say the figures ignore benefits to society.

“Most people do not appreciate the benefits of regulation,” said Sally Katzen, a former administrator of the regulatory office under Mr. Clinton and professor at New York University School of Law. “When asked, they may say they want to get rid of regulations. But which regulations? The stoplight at the intersection? Airbags? Safety barriers at subway stations?”

The regulatory office, commonly known in Washington as OIRA, was created in 1980 as a check on the rules set by regulatory agencies and as a safeguard against ill-conceived regulation. It has usually been staffed with administrators from various corners of academia and the law.

During Mr. Obama’s time in office, some liberals became so infuriated at the slow pace at which regulations moved through the office that they urged abolishing it, calling it the place where “regulations go to die.”

An administrator under President Ronald Reagan, Christopher DeMuth, said special care was needed in weighing regulations, given that there are often “few facts” that decisively predict outcomes. “There are huge uncertainties about what we are doing,” said Mr. DeMuth, now a fellow at the Hudson Institute, a conservative-leaning think tank.

“You think you know what good policy is, but you have to be careful how you do it,” he said. “You can’t just be there ripping out the wiring willy-nilly, or you won’t succeed. You lose the public.”

Nicholas Fandos contributed reporting.

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