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# One Year After Loper: Congress Must Step Up

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Subcommittee chair Senator James Lankford holds hearing on The Future is Loper Bright, July 30, 2025 SENATE HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

In the year since the Supreme Court in *Loper Bright v. Raimondo* ended four decades of judicial deference to federal agencies' interpretations of their statutory authority, courts are **invalidating more** administrative rules, and the executive branch is reviewing and **considering repealing** regulations that may be contrary to the decision. Congress is weighing its response, too. Last week the Senate Homeland Security and Government Affairs Subcommittee on Border Management, Federal Workforce and Regulatory Affairs held a hearing titled "**The Future is Loper Bright: Congress's Role in the Regulatory Landscape.**" I was honored to testify at the hearing, which Chairman James Lankford (R-OK) held to "chart a clear path forward on what Congress must do."

My testimony noted that while legislators will no longer be able to pass ambiguous laws with the expectation that agencies' interpretations will get deference, Congress will not necessarily have to write statutory language that is detailed and prescriptive. Laws that delegate broad authority could defer to agency fact-finding and policy expertise, as long as they do so unambiguously.

I suggested that an important step in writing less ambiguous law would be to more clearly distinguish between questions of fact (such as, does a chemical show adverse effects in laboratory experiments?), questions of policy (what restrictions should be placed on that chemical?), and questions in between (such as, how to extrapolate the findings from high-dose animal experiments to low-dose human exposure). Participants at a **National Academy of Sciences workshop** observed that recognizing that all those factors are essential to sound policy and encouraging agencies to be transparent about how each inform their decisions would contribute greatly to statutory clarity. To that end, I offered four recommendations.

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First, legislation should recognize that while scientific facts are a necessary element of good policy design, they are almost never sufficient. Many regulatory decisions involve what noted physicist Alvin Weinberg called "trans-science," factors relating to questions that science can inform but not answer. Statutes can allow agencies to "fill up the details," while requiring them to be **transparent** about the studies, assumptions, models, and other trans-science factors they rely on.

Second, Congress should provide agencies with clear guidance on how they should weigh competing considerations. For example, new legislation could embrace longstanding executive requirements for regulatory impact analysis, including benefit-cost analysis, to ensure that agencies consider tradeoffs transparently and systematically. Statutes like the Safe Drinking Water Act, which explicitly authorize agencies to balance tradeoffs, have proven more effective and less acrimonious than laws (like sections of the Clean Air Act) that seem to preclude such analysis. Law Professor Chad Squitieri, another witness at the hearing, reiterated that Congress could clarify that terms like "appropriate" are intended to permit the consideration of such tradeoffs.

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Third, to better inform reauthorizations and promote a culture of learning, Congress should require agencies to evaluate their regulations periodically to determine how effective they are at achieving legislative goals, and to identify needed revisions both to the regulations and the underlying statutory authority. Such feedback loops would ensure that policies evolve with new evidence and changing circumstances.

Fourth, to support these efforts, Congress itself needs more resources, a point emphasized by witness Allyson Schwartz, a former member of Congress and Senior Fellow at the Bipartisan Policy Center, which published a **report** on "Legislating After Loper." A dedicated congressional regulatory

office—a counterpart to the Office of Information and Regulatory Affairs as the Congressional Budget Office is to the Office of Management and Budget—could help lawmakers draft clearer statutes and better understand the legal and policy implications of proposed legislation.

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Members at the hearing recognized the challenges going forward. Senator Maggie Hassan (D-NH) said Congress "needs to make its intent clear when passing legislation so federal agencies can effectively deliver government services." Ranking Member John Fetterman (D-PA) observed that the Loper decision represented a huge change and said, "the pressure is on us now; we need to be more active in legislating." Chairman Lankford put it more bluntly, saying Congress needs to "suck it up and do our job." He asked witnesses to identify ambiguous words that legislation should avoid.



The new legal landscape places greater responsibility on Congress to write less ambiguous statutes that more clearly recognize the different considerations—legal, scientific and policy—that go into writing effective rules. By requiring agencies to lay out their judgments and assumptions transparently, explicitly authorizing them to weigh important tradeoffs, and requiring better ex-post evaluation, Congress can ensure that regulatory decisions are more transparent, accountable and grounded in both sound science and legitimate policy judgment.

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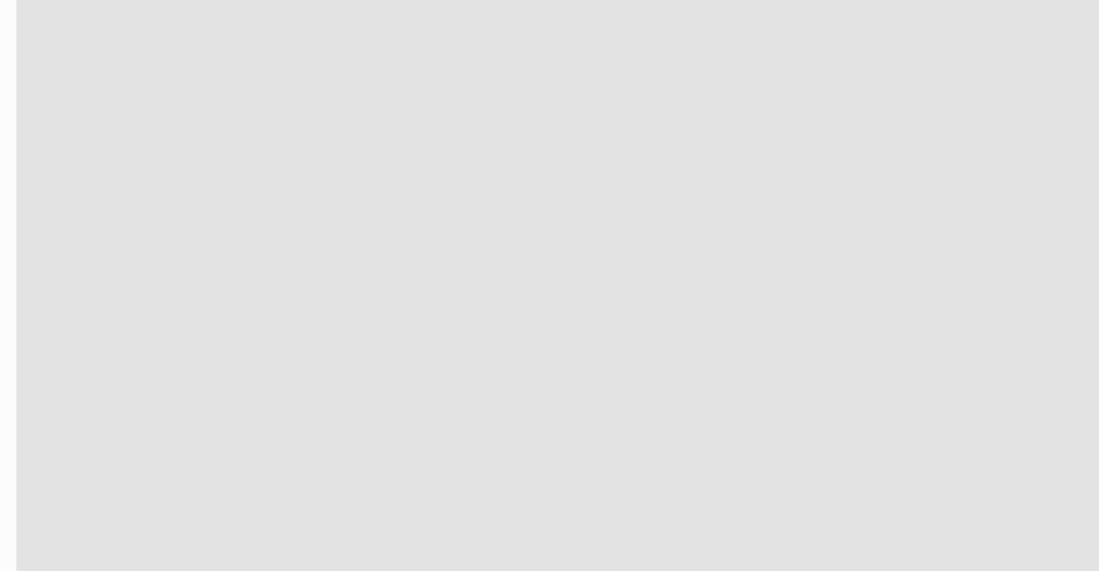


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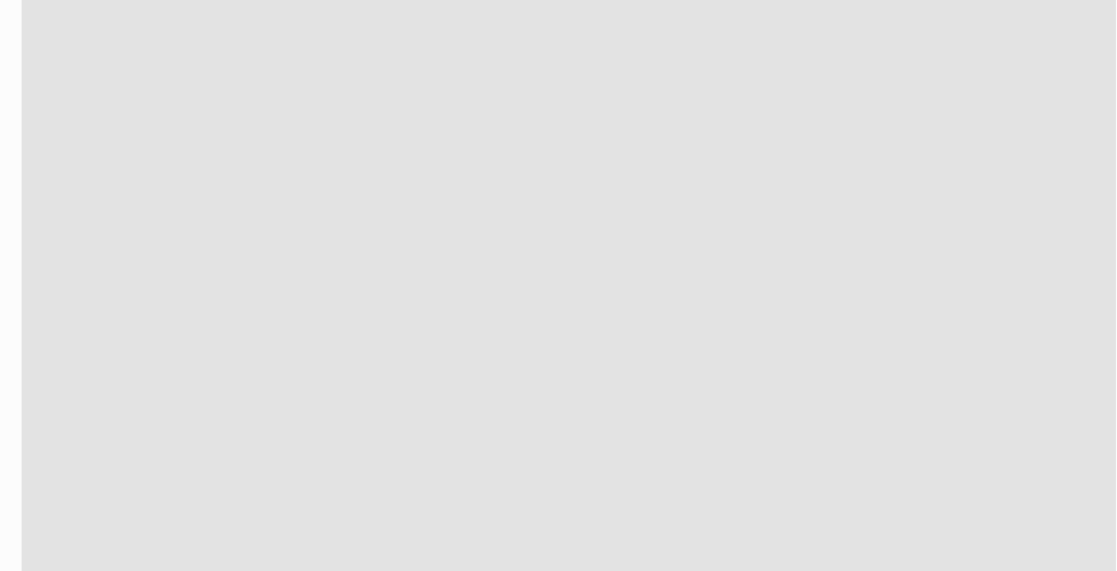
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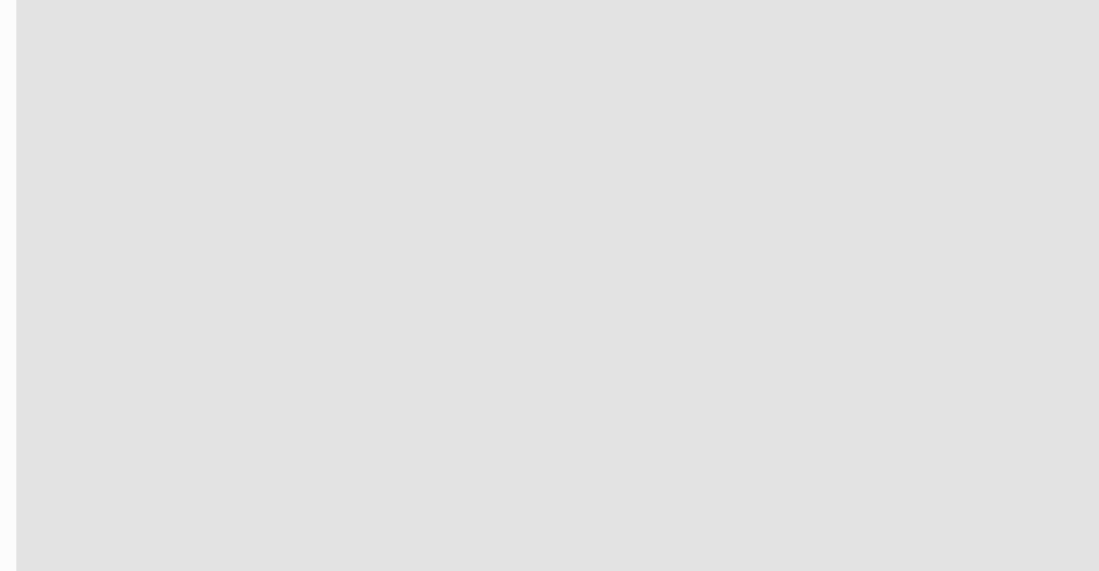
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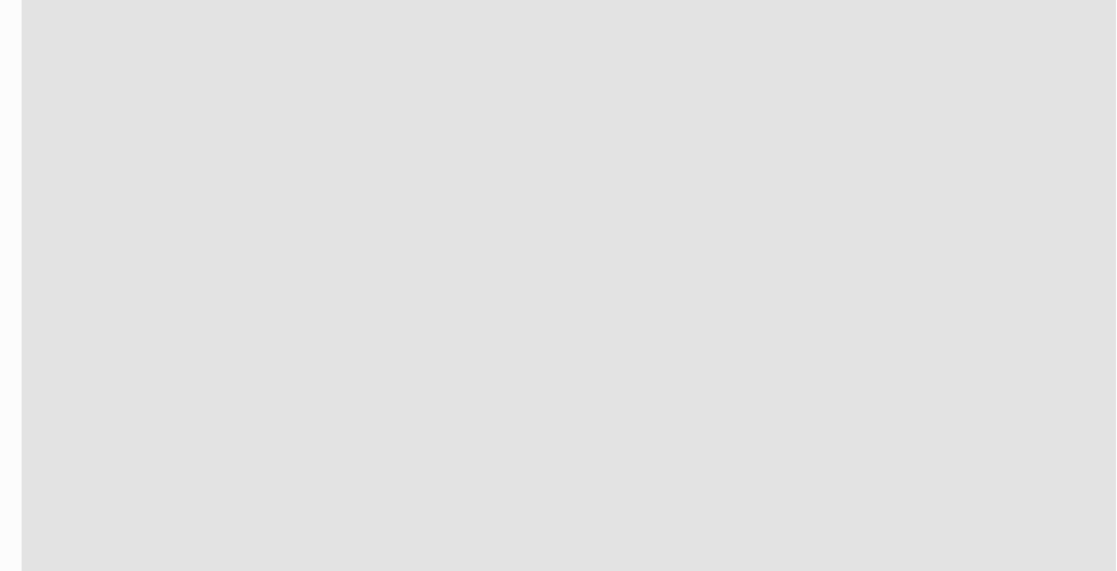
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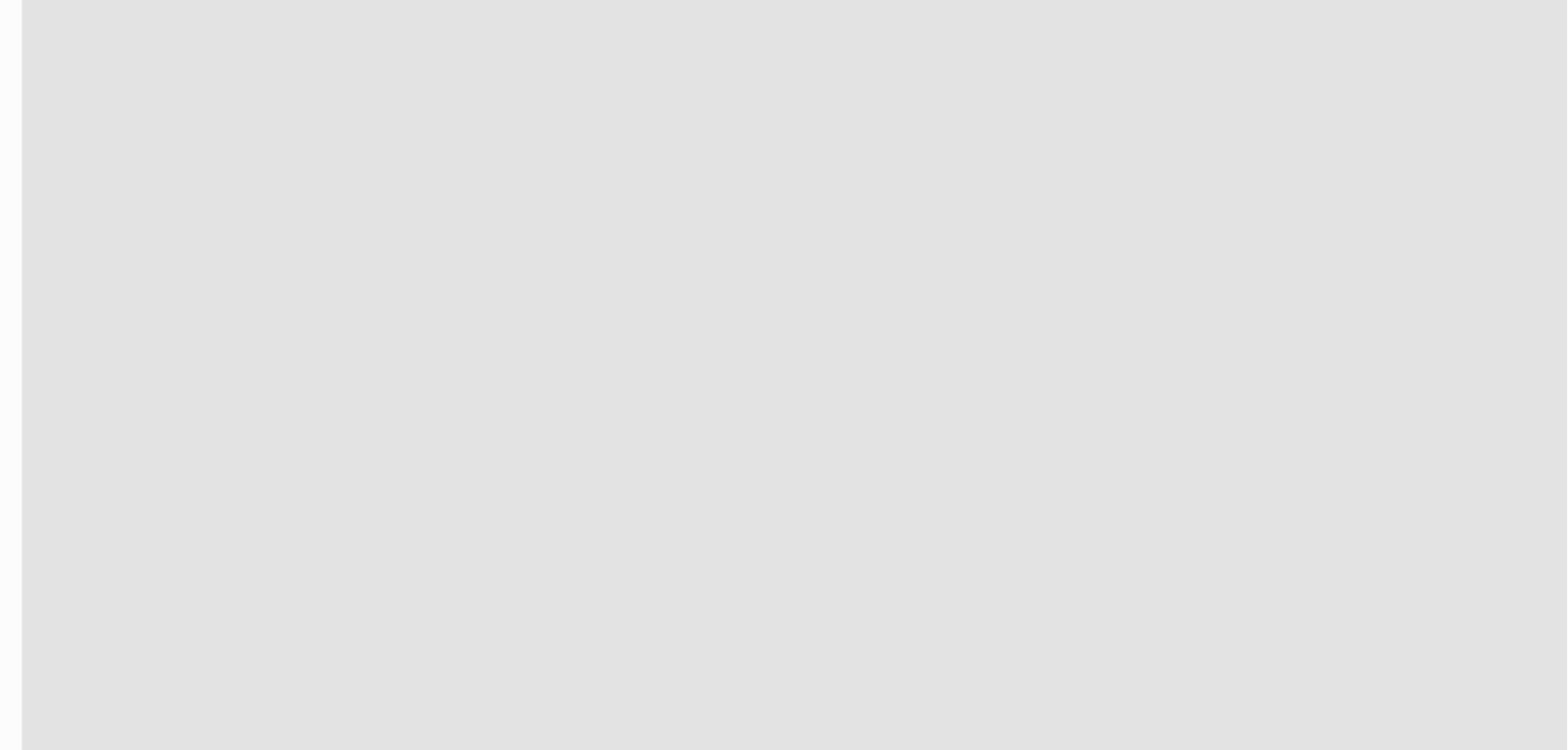


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