THE GEORGE WASHINGTON UNIVERSITY

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Prepared Statement of Susan E. Dudley
Founder and Distinguished Professor of Practice

REGULATORY STUDIES CENTER
TRACHTENBERG SCHOOL OF PUBLIC POLICY AND PUBLIC ADMINISTRATION

Hearing on

The Future is Loper Bright: Congress's Role in the Regulatory Landscape

U.S. Senate Homeland Security and Governmental Affairs Subcommittee on Border Management, Federal Workforce and Regulatory Affairs

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THE GEORGE WASHINGTON UNIVERSITY
REGULATORY STUDIES CENTER
805 21ST ST. NW, SUITE 600
WASHINGTON, DC 20052
202-994-7543
RegulatoryStudies@gwu.edu
www.RegulatoryStudies.gwu.edu

Chairman Lankford, Ranking Member Fetterman, and Members of the Subcommittee:

Thank you for the opportunity to testify today on the implications of the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo* and *Relentless v. Department of Commerce*[1] (hereafter, *Loper*). I am Susan E. Dudley, founder of the George Washington University Regulatory Studies Center, distinguished professor of practice in the Trachtenberg School of Public Policy and Public Administration, and former administrator of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

I have studied regulatory policy and practice for more than 40 years from positions in government, the private sector, and academia. I also recently served on two committees related to this topic: on a National Academies of Sciences, Engineering, and Medicine committee organizing a workshop exploring the implications of recent Supreme Court decisions for agencies responsible for protecting public health and the environment,[2] and on a Bipartisan Policy Center (BPC) working group contributing to a report, *Legislating After Loper: Practical Solutions for a Post-Chevron Congress.*[3]

The Supreme Court's 2024 decision in *Loper* overturned the 40-year-old *Chevron* doctrine that directed judges to defer to agencies' interpretations of ambiguous statutes. As it is further interpreted by Courts, this decision could have significant ramifications for the practice of regulation and the role of bureaucratic expertise, but perhaps not as dramatic as either proponents or opponents suggest. While judges may give less weight to agencies' interpretations of what regulatory actions their authorizing statute allows, other aspects of agency expertise will still likely receive significant deference.

My written testimony begins with a review of what the *Loper* decision might mean for judicial deference to agencies, and then offers recommendations for how Congress can reduce statutory ambiguity while still respecting and engaging the expertise executive agencies provide.

Loper's effect on agency decision making

When developing and justifying new regulations, agencies must 1) work within their statutory authority, 2) examine and translate factual and technical information to identify approaches to addressing the statutory goals, and 3) make policy judgments regarding which regulatory approach will best meet their statutory obligations and serve the public interest. For the last four decades,

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[1] Loper Bright v. Raimondo, 144 S.Ct. 2244, 2267 (2024).

[2] National Academies of Sciences, Engineering, and Medicine. 2025. Implications of Law, Policy, and Federal Agency Decision-Making Under a New Judicial Standard: Proceedings of a Workshop—in Brief. Washington, DC: The National Academies Press. https://doi.org/10.17226/29169.

[3] Bipartisan Policy Center. Working Group on Congress, Courts, and Administrative Law. 2025. https://bipartisanpolicy.org/report/final-report-and-recommendations/

agencies have enjoyed considerable deference in all these areas on the grounds that their expertise and their accountability to the people through the elected president of the United States made them well suited to act in the public interest. The *Loper* decision last year overturned deference to agencies' interpretations of what their statutes authorize, holding that courts are in the best position to decide "what the law is." However, nothing in that decision is likely to alter the deference courts give to agencies in the other two areas—factual expertise and policy judgment.

Just as no one predicted the impact of the *Chevron* decision 40 years ago, no one knows how the different branches will respond in the long run to the *Loper* decision. In the short term, a recent survey found that, while lower courts across the country vary in the specifics of how they are responding to the decision, they are "invalidating [new administrative rules] almost 84 percent of the time."[4] The executive branch is also responding. An April 2025 presidential memorandum directed federal agencies to review existing regulations that may be contrary to the *Loper* decision and consider repealing them.[5]

As for Congress, legislators will no longer be able to pass ambiguous laws with the expectation that agencies' interpretations will get deference in subsequent litigation; however, I do not think statutory language will have to be detailed and precise. Statutes that delegate broad authority could give deference to agency expertise, as long as the statutory language is not ambiguous.

With that in mind, I offer several recommendations for Congress to express their policy objectives more clearly (though not necessarily more prescriptively) going forward. At the National Academies workshop on recent Supreme Court decisions, I chaired a panel of former OIRA administrators, and we encouraged Congress to identify ambiguities in existing statutes and be clearer about its intentions, providing agencies with principles and factors to guide their regulations. While allowing agencies to "fill up the details"[6] Congress should 1) require them to be transparent regarding the factors they rely on, 2) specifically authorize the consideration of tradeoffs, including through regulatory impact analysis, and 3) encourage learning and evaluation. I agree with the 2025 BPC observation that Congress will likely need more resources to accomplish this.

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[4] Craig, R. K. (2025). *The impact of Loper Bright v. Raimondo: An empirical review of the first six months*. Minnesota Law Review, 109(6), 2679–2702. Retrieved from https://minnesotalawreview.org/wp-content/uploads/2025/06/4Craig_Online.pdf

[5] Trump, D. J. (2025, February 19). Executive Order 14219: Ensuring lawful governance and implementing the President's "Department of Government Efficiency" deregulatory initiative. The White House. Retrieved from https://www.whitehouse.gov/presidential-actions/2025/04/directing-the-repeal-of-unlawful-regulations/

[6] 23 U.S. (10 Wheat.) 1 (1825)

Legislation should require agencies to be transparent about their assumptions and choices.

While there may be general agreement that judges are best suited to decide what the law is, that agency staff are better qualified to understand technical matters and do fact finding, and that legislators and executive branch policy officials are more accountable for policy choices than the courts, it is often not clear what aspects of regulatory decisions fall into each category.

The challenge of distinguishing questions of law, from questions of fact and technical expertise, from questions of policy is implicit in Justice Kagan's dissenting opinion in *Loper*,[7] and in the illustrations she offered there and in oral argument in the *Relentless* case. As Justice Jackson noted in the same oral argument, "I think the reason why [Kagan's] examples are hard or why they're ambiguous or whatever is because, at bottom, they're not asking legal questions; they're asking policy questions."[8] Justice Barrett also acknowledged the challenges. Referring to Justice Kagan's examples, she wondered "whether we could say that the definition of dietary supplement or drug might be something that's a question of statutory interpretation in the context of the statute, but which category any one thing fell in might be a question of policy for the agency."[9] She asked, "Where is the line between something that would be then subject to arbitrary and capricious review and something that's a question of law?"[10]

Under Chevron, agencies could (and did) change interpretations of their legal authority to comport with their preferred policy outcomes. With such changes less viable, they may rely more heavily on claims of technical expertise to justify preferred policies. While that may seem desirable on its face, it may obscure the real reasons for decisions.[11]

As noted physicist Dr. Alvin Weinberg pointed out in a seminal 1972 essay, "many of the issues which arise in the course of the interaction between science or technology and society—e.g., the deleterious side effects of technology, or the attempts to deal with social problems through the procedures of science—hang on the answers to questions which can be asked of science and yet which cannot be answered by science."[12] Choices related to "trans-science" issues—such as which

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[7] Loper Bright v. Raimondo, 144 S.Ct. 2244, 2294 (2024) (Kagan, J. dissenting); Transcript of Oral Argument, Relentless, Inc. v. DOC No. 22-1219 (2024).

[8] Transcript of Oral Argument at 26, Relentless, Inc. v. DOC No. 22-1219 (2024).

[9] Transcript of Oral Argument at 31, Relentless, Inc. v. DOC No. 22-1219 (2024).

[10] Transcript of Oral Argument at 30, Relentless, Inc. v. DOC No. 22-1219 (2024).

[11] Bipartisan Policy Center (BPC). 2009. Improving the Use of Science in Regulatory Policy. Washington (DC): Bipartisan Policy Center. Available at: http://www.bipartisanpolicy.org/sites/default/files/BPC%20Science%20Report%20fnl.pdf

[12] Weinberg, Alvin M. *Science and Trans-Science*, 10 MINERVA 209 (1972). Weinberg coined "the term trans-scientific for these questions since, though they are, epistemologically speaking, questions of fact and can be

studies to rely on to inform the analysis or what dose-response function is most representative—can have very large effects on assessments of risk.[13] Yet statutes often delegate decision making to agencies on the pretense that they can be made with positive (factual, scientific) inputs alone, without acknowledging the trans-science assumptions and judgments involved.[14]

When policy choices are characterized as resolvable with factual inputs alone, true reasons for those choices are not transparent (something Wagner called the "science charade").[15] It is almost inevitable that when staff convey their expertise, their policy views and unconscious biases are embedded in their models, assumptions, and recommendations. As a 2009 BPC report on *Improving the Use of Science in Regulatory Policy* observed, "some disputes over the 'politicization' of science actually arise over differences about policy choices that science can inform, but not determine."[16]

Legislation should recognize that trans-science is necessary for translating factual inputs into actionable, policy-relevant information, but require a "transparent presentation of the underlying data, assumptions, and models relied on to draw conclusions."[17] Statutes should require agencies to lay out the assumptions involved in the trans-science inputs they use and present decision makers with ranges of estimates based on different reasonable assumptions, models, etc.[18]

Legislation should recognize the need to weigh competing policy objectives

Directives that a regulation be "science based" often do not acknowledge not only the trans-science factors needed to apply scientific inputs, but the tradeoffs involved in making sound regulatory decisions. and can lead to opaque and poorly justified decisions. Wagner observed that "legislative mandates that make science the basis for standard-setting … provide legal incentives for agencies to engage in the science charade or at least indulge the agencies' inclination to overstate the

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stated in the language of science, they are unanswerable by science; they transcend science... Scientists have no monopoly on wisdom where this kind of trans-science is involved...."

[13] Dudley, Belzer, Blomquist, Brennan, Carrigan, Cordes, Cox, Fraas, Graham, Gray, Hammitt, Krutilla, Linquiti, Lutter, Mannix, Shapiro, Smith, Viscusi and Zerbe. (Dudley, Belzer et. al) 2017. "Consumer's Guide to Regulatory Impact Analysis: Ten Tips for Being an Informed Policymaker." Journal of Benefit-Cost Analysis. 2017;8(2):187-204. doi:10.1017/bca.2017.11 https://www.cambridge.org/core/journals/journal-of-benefit-cost-analysis/article/consumers-guide-to-regulatory-impact-analysis-ten-tips-for-being-an-informed-policymaker/

[14] Dudley, Susan E. & Marcus Peacock. 2018. Improving Regulatory Science: A Case Study of the National Ambient Air Quality Standards, 24 SUP. CT. ECON. R. 49 (2018).

[15] Wagner, Wendy.1995. *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. R. 1613, 1629 (1995).

[16] Bipartisan Policy Center. 2009;10.

[17] Dudley, Belzer, et al. 2017.

[18] Gray GM, Cohen JT (2012) Policy: Rethink chemical risk assessments. *Nature*. 489(7414):27-8.

scientific grounding of a proposed protective standard."[19] By removing flexibility for interpreting the law, the *Loper* decision may increase those incentives.

For example, the authors of the Clean Air Act knew that the question of what level of air quality was "requisite to protect public health" was one that could not be answered by science alone, yet they proceeded with the fiction that EPA could set national ambient air quality standards without considering non-science (including economic) tradeoffs.[20] As a result, these standards are contentiously debated, with proponents and opponents asserting their preferred levels are supported by "the science."[21] This is not constructive. As the 2009 BPC report observed, "the first impulse of those concerned with regulatory policy should not be to claim 'the science made me do it' or to dismiss or discount scientific results, but rather to publicly discuss the policies and values that legitimately affect how science gets applied in decision making."

Congress should recognize that bureaucratic expertise, while an essential input into policy decisions, is not sufficient to set policy. Good policy must be informed by expertise in science, engineering, and other technical disciplines, but normative questions of how to respond to social problems (except in rare cases) are not resolvable by scientific and technical inputs alone. Legislation should provide clear guidance on how agencies should weigh competing considerations. The 2009 BPC report recommended that federal agencies "explicitly differentiate, to the extent possible, between questions that involve scientific judgments and questions that involve judgments about economics, ethics and other matters of policy."

Building on the BPC's 2025 recommendations to provide clearer "guidance and direction regarding statutory interpretation and congressional purpose," Congress should consider codifying longstanding bipartisan requirements for regulatory impact analysis, including benefit-cost analysis, to ensure that agencies consider tradeoffs transparently and systematically.[22] Statutes, like the Safe Drinking Water Act, that acknowledge that risk management requires normative judgments and consideration of tradeoffs and that explicitly authorize agencies to consider balancing factors have been more effective and less acrimonious than statutes (like the Clean Air Act) that seem to preclude those considerations.[23]

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[19] Wagner. 1995.

[20] Schoenbrod, David. 2003. "Politics and the Principle that Elected Legislators Should Make the Laws." *Harvard Journal of Law and Public Policy* 26:239–80.

[21] Dudley & Peacock, 2018.

[22] Executive Order 12866, which presidents with very different policy preferences have embraced for more than 30 years, would provide a nonpartisan framework for such legislation. Clinton, W. J. (1993). Executive Order No. 12866: Regulatory planning and review. 3 C.F.R. 638. https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf

[23] Dudley & Peacock, 2018.

Congress should embrace a learning agenda

The 2025 BPC report recommends "enhanc[ing] the ability of Congress to work productively with regulatory agencies by updating laws, particularly agencies' authorizing statutes." To better inform legislation, Congress could require agencies to evaluate their regulations periodically to determine how effective they are at achieving legislative goals, detect unintended consequences, and identify needed revisions both to the regulations and the underlying statutory authority.

No one denies the importance of systematic retrospective analysis for evidence-based policymaking, but retrospective analysis of regulation is not as prevalent as it is for on-budget government programs.[24] Congress could require that, when first developing regulations, agencies establish clear performance metrics for regulations, commit to a plan for retrospective review, and then use the results of that review to reassess the regulation.[25] Designing regulations from the outset in ways that allow variation in compliance (such as different compliance schedules in different regions, or small-scale pilots) is essential for determining whether regulatory actions are yielding the desired outcomes.[26]

To incentivize more robust evaluation along the lines identified above, authorizing statutes could require agencies to test the validity of their *ex-ante* regulatory impact predictions before commencing new regulation. Congress and OMB could reallocate resources from *ex-ante* to *ex-post* analysis to allow agencies to gather the information and evaluation tools necessary to validate *ex-ante* predications. Shifting resources from *ex-ante* analysis to *ex-post* review would not only help with evaluation, but would improve agencies' *ex-ante* hypotheses of regulatory effects.[27]

Congress would benefit from more resources

Congress needs the resources to do this. The 2025 BPC report contains several recommendations for "expand[ing] the resources available to Congress for drafting legislation, crafting clear language, and understanding constitutional and legal dynamics around proposed bills." The former

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[24] Aldy, J. (2014). Learning from experience: An assessment of the retrospective reviews of agency rules and the evidence for improving the design and implementation of regulatory policy. A report for the Administrative Conference of the United States. https://www.acus.gov/report/retrospective-review-report; Susan E. Dudley & Jerry Ellig, 2025. "Regulatory Reform: Results and Challenges." Journal of Benefit-Cost Analysis. 2025;16(S1):44-59. doi:10.1017/bca.2024.31

[25] Senators Lankford, Sinema, and Heitkamp have introduced bills to this end in prior congresses. For example, https://www.lankford.senate.gov/news/press-releases/lankford-sinema-introduce-regulatory-reform-bills/

[26] Coglianese, C. (2012). *Measuring regulatory performance: Evaluating the impact of regulation and regulatory policy* (Expert Paper No. 1). OECD. https://www.oecd.org/gov/regulatory-policy/1_coglianese%20web.pdf; Greenstone, M. (2009). Toward a culture of persistent regulatory experimentation and evaluation. In D. Moss and J. Cisternino (Eds.), *New perspectives on regulation*. The Tobin Project.

[27] Dudley & Peacock, 2018.

OIRA administrators who spoke at the National Academies workshop in April agreed that, to identify ambiguities in statutes and be clearer about its intentions, Congress would benefit from a dedicated Congressional regulatory office—a counterpart to OIRA like the Congressional Budget Office is to OMB.[28]

Conclusions

The *Loper Bright* decision represents a return to constitutional first principles. It reaffirms that it is the role of the legislature—not the executive—to write the law, and the role of the judiciary—not the executive—to interpret the law. At the same time, it recognizes the valuable role the executive branch plays in applying factual and policy expertise to faithfully execute the law.

Recognizing that judges, not agencies, will be interpreting statutory language, legislative drafters will need to express their policy objectives more clearly. While that will not require prescriptive detail on how a rule is to be designed or implemented, authorizing language should give agencies clear guidelines on what factors to consider. To write less ambiguous law, Congress should more clearly distinguish between questions of fact (e.g., does a chemical show adverse effects in controlled experiments), questions of policy (e.g., what restrictions should be placed on that chemical), and questions in between (e.g., how to extrapolate the findings from high-dose animal experiments to low-dose human exposure) when delegating agencies' authority to issue regulations.

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—required to develop effective regulations. By requiring agencies to lay out their judgments and assumptions transparently, explicitly authorizing them to weigh important tradeoffs when managing risk, and requiring them to evaluate regulatory outcomes, Congress can ensure that regulatory decisions are more transparent, accountable, and grounded in both sound science and legitimate policy judgment.

Thank you again for the opportunity to testify on this important matter.

[28] NASEM, 2025.