

Opening statement, of Senator James Lankford
“Examining the Role of Judicial Review in the Federal Rulemaking Process”
April 28, 2015

Good morning. This is the second in a series of hearings this Subcommittee will hold examining the issues and solutions surrounding federal regulations. I want to welcome our witnesses.

We are fortunate today to have two witnesses who are experts in the field of administrative law. I thank you for your thoughtful written testimony and I look forward to speaking with both of you.

Today’s hearing will focus on the role of the judiciary in the federal rulemaking process.

Since the founding of this country, Article III courts have served as the final guardians of our Constitution, providing independent judgment applying law to the facts of the case before them.

In the landmark decision of *Marbury v. Madison*, Chief Justice John Marshall articulated the role of judicial review declaring “it is emphatically the province and duty of the judicial department to say what the law is.”¹

From that moment forward it has been established the courts are entrusted with the duty to invalidate laws that are incompatible with our Constitution.

However, as the administrative state has expanded, the courts have deferred more and more to agencies – substituting agency judgment for their own.

As a result, the modern administrative state has blurred the lines that once separated the Legislative Branch, the Executive Branch, and the Judicial Branch.

For example, with more and more frequency we see examples of an Executive Branch agency that creates rules, interprets the meaning of those rules, and enforces those rules according to their own interpretation. We must ask fundamental questions about the constitutionality of such a scheme.

In the realm of administrative law, Congress clearly intended for the courts to review delegated agency action. The Administrative Procedure Act requires the courts to “decide all relevant questions of law” and “interpret constitutional and statutory provisions.”

¹ 5 U.S. 137 (1803).

Today, we have an opportunity to consider these and other issues in an effort to examine the proper role and duty of the courts in the federal rulemaking process.

I look forward to discussing these issues with our members and witnesses today.