TESTIMONY
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Thank you for the opportunity to present testimony before you today. I have been asked to comment on the rule-making authority of the chief executive in Illinois and about rule-making in the area of the health care programs and policies which have been promoted by the Governor. I will focus on the case of the attempt to expand the FamilyCare program through "emergency rule making"

In 1975, the Illinois General Assembly enacted the Illinois Administrative Procedures Act (IAPA) to create a procedure through which administrative agencies would exercise the authority delegated them by the legislature to create administrative law through the adoption of agency regulations. In 1977, the IAPA was amended to add a process by which the General Assembly would oversee the exercise of this delegated authority through the Joint Committee on Administrative Rules (JCAR), a service agency of the

General Assembly.

Rules of administrative agencies are valid and enforceable only after they have been through the rule-making process prescribed by IAPA. Rules are for the purpose of interpreting or implementing provisions of a statute and should not actually expand or limit the scope of the statute

The premise underlying the Administrative Procedures Act and JCAR reflects the fundamental division of governmental power at the federal and state levels into three branches – a separation that is designed to provide an effective check and balances against excesses by any single branch.

Most Illinois residents don't pay much attention to JCAR and its function. But, this panel into the spotlight when Governor Blagojevich's unilaterally attempted to expand eligibility for state-subsidized health insurance , which represented a first step toward his goal of providing universal health care in Illinois. JCAR decided to block this attempt.

As already alluded to, the Governor sought an "emergency" change in the eligibility rules for his "FamilyC0are" program so that people earning as much as 400 percent of the federal poverty level ($92, 600 for a family of four– would be eligible for the Program. Currently, the eligibility standard is 185 percent of poverty level of $32,803 for a family of four. This represents a

component of the 2.1 billion dollar health care program envisioned by the Governor which was not passed by the legislature.

It was in November of 2007 that the Governor filed an "emergency order" that would have allowed 147,000 parents and other care-takers to buy discounted insurance through the States FamilyCare program. The order said that the move qualified as a " crisis" because these individuals lack "access to affordable health insurance"

As you know, JCAR voted 9-2 to reject this change stating that this was not an emergency ; it would only be under an "emergency" that the Governor would be able to unilaterally introduce such a change which is why the

The Governor, then, ordered the Department of Health and Family Services to start enrolling people at the higher income levels despite JCAR's "rebuff".

As we think about this case, lets remind ourselves what the role of JCAR is. The panel's job is to review all rules that state agencies want to adopt to make sure that every proposal accurately carries out what the legislature intended when it creates a program. JCAR is the watchdog for the General Assembly charged with overseeing the implementation of the laws made by the legislative branch.

If JCAR prohibits a rule – as it did with Governor Blagojevich's health

proposal—the state agency in question may not enforce the rule. Hence, the Governor's order to Health and Family Service in-take workers is highly problematic because the ban is permanent until the agency revises the proposed rule to JCAR's satisfaction.

Given the Governor's stance in this important health care case, there are a set of interesting and revealing questions that should be posed:

A. Would a FamilyCare in-take worker be committing welfare fraud in enrolling someone for state-subsidized health insurance whose income exceeded the legal limit established by the rule the Governor sought to change?

B. If a doctor treated that person and then billed the state, would he/she be party to welfare fraud? Would the bill even be paid?

C. If the state refused to pay a medical bill, would the patient then face an unexpected medical cost , potentially leading to action by a collection agency and an unfavorable credit rating?

D. If the state were to decide to cover these medical bills – projected to be more than 200 million, where would the money come from?

Ultimately, in my judgment, what was done here represents a real problem for the Governor. He was trying to dramatically increase eligibility without

legislation or spending authority . This leads one to the inevitable conclusion that the Governor was either going to try to force the legislature into passing more funding or simply fund program changes without appropriations, claiming that he has the authority to do so. Either one of these interpretations raise serious questions about the Chief Executive's exercise of appropriate authority

In my judgment these actions are irresponsible, not consistent with appropriate constitutionally provided checks and balances, and they are very problematic. Our constitution provides that spending can only occur on programs designated by the General Assembly or through delegated power by the Executive. That delegated authority is relatively small and primarily allows for a program to be supported if it ends up costing more then expected, NOT simply because the Governor does not agree or because he has different priorities from the General Assembly.

Let me conclude by stating that the Governor's health care goals are laudatory and they are designed to address critical access and afford ability problems facing Illinois and the nation. However, the way in which exercised rule making far exceeded his authority and the actions are highly problematic.

Testimony – Principles of Administrative Law Overview

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Thank you for the opportunity to address the committee. I am a law professor at the University of Illinois, where I teach Administrative Law. In addition, much of my research concerns administrative law topics.

Administrative rulemaking is a key part of state government in Illinois and every state in the union. Properly done, administrative rulemaking enables governments to function by allowing the legislature to delegate to executive branch agencies the task of creating the detailed procedures and rules that implement the policies embodied in legislation. If legislatures had to consider every detail of the rules necessary to put policies into effect before passing legislation, it would be virtually impossible for the state to act. To give you a sense of the volume of rulemaking, the Illinois legislature's Joint Committee on Administrative Rulemaking or JCAR reports that it reviews approximately 20,000 pages of rules each year.

Rulemaking generally operates as follows: an agency proposes a rule implementing legislation and the public is given an opportunity to comment. After the agency reviews the public comment, it determines whether the comments warrant a revision of the rule and then issues a final version of the rule. Agencies can also issue emergency rules, which take effect immediately.

In Illinois since 1977, proposed agency rules or adopted emergency rules are then submitted to the Joint Committee on Administrative Rules. JCAR has 12 members, divided equally among the two parties and two houses of the legislature. JCAR review also includes opportunities for additional public input as well as for JCAR and the agency to agree to changes in the proposed rules. In some cases, JCAR issues recommendations to agencies, suggesting changes to proposed rules. JCAR can also issue a formal objection to a rule. Agencies must respond to such objections, but are not required to change the rule in response to the objection.

Finally, JCAR has the authority to review rules issued by agencies to determine whether the rules are a threat to the public interest, safety or welfare. If 8 of the 12 members vote to reject a rule on these grounds, a proposed rule may not be made effective and an emergency rule is repealed. Gov. Blagojevich challenged the constitutionality of JCAR in November 2007 when he refused to accept JCAR's veto of proposed rules extending the FamilyCare program to additional individuals without seeking a change in the underlying statute.

For the delegations of power from the legislature to executive branch agencies necessary to allow state government to function to have democratic legitimacy, the legislature must have powers of review over the details implemented through rulemaking. Without such oversight, the executive branch would be able to exercise legislative powers it is forbidden to exercise by the principles of separation of powers embodied in every state's constitution, which Florida State Univ. Law Prof. Jim Rossi termed a "bedrock principle" in all 50 state constitutions. Moreover,

administrative agencies not subject to legislative review are not readily accountable to the public for their actions. Individual agencies may also suffer from 'tunnel vision,' focusing on their particular missions at the expense of broader state policy. Legislative review of agency rulemaking can ensure both that executive branch officials are accountable to the public and that an appropriate balance is struck among the many policy priorities of the state government. Most importantly, legislative review of agency rulemaking ensures that fundamental policy choices are made by elected representatives of the people, not unelected officials serving at the pleasure of the governor.

Thirty eight states, including Illinois, have official mechanisms for legislative review of administrative rules created by the executive branch, 22 states, including Illinois, have legislative rule review committees, and 18 states, including Illinois, allow the legislature to veto a rule by resolution of one or both houses. Such mechanisms have a long historical pedigree, dating back to at least 1939 when Kansas adopted the first state legislative review mechanism. Illinois' practice is also consistent with British practice, under which rules are laid before Parliament and are subject to its veto. However, federal efforts to provide legislative veto provisions for Congress have been held unconstitutional by the Supreme Court under the federal constitution as violating the Presentment and Bicameralism Clauses of the Constitution. That decision has been heavily criticized as excessively formalistic.

While there have been legitimate questions raised about the constitutionality of the JCAR process under the Illinois Constitution, those questions should be resolved through the courts. Moreover, JCAR is an important and integral part of the Illinois Administrative Procedure Act, and it is unlikely that it could be readily severed from the rest of the Act. Thus if JCAR is unconstitutional, it likely means that the entire rulemaking process would need to be rewritten. Gov. Blagojevich's actions in 2007 in unilaterally rejecting the JCAR process alone attempted to sever one check from the set of checks and balances embodied in the state administrative process, shifting a significant degree of power from the legislature to the executive branch.

Thank you.