Comments By JCAR Executive Director Vicki Thomas Before the Special Investigative Committee of the Ninety-Fifth General Assembly of the State of Illinois

Good morning. My name is Vicki Thomas and I'm the Executive Director of the Joint Committee on Administrative Rules. I've held that position since 1991, after serving 18 years on State Senate Staff.

Some of you are familiar with how JCAR functions, but others may not be, so I will begin my remarks today with a brief outline of who we are and what we do. Then I'll give you an overview of our working relationship with this Administration, compared to the 2 previous Administrations with which I have had personal experience. After that, I'll be happy to respond to any questions you may have.

JCAR ROLE

JCAR is part of Illinois' governmental checks and balances system. The General Assembly created JCAR in 1977 and delegated to it the responsibility of the legislative branch to ensure that the statutory laws it enacts are appropriately implemented through administrative law. The Committee is comprised of 12 legislators, 3 from each caucus. It is currently served by a Staff of 16 that includes 6 rules analysts.

IAPA

When the General Assembly enacts statutory law, it frequently leaves to an administrative agency the responsibility of filling in the details required to fully implement those statutes. The agency does this through administrative laws called rules or regulations. It is therefore incumbent on the legislature to monitor the agency's handling of the responsibilities delegated to it. In Illinois, that function of the General Assembly is exercised through JCAR's administrative review process.

The statute governing JCAR's conduct, and the conduct of State agencies in adopting and amending their rules, is the Illinois Administrative Procedure Act, or the IAPA. It is, and always has been, one of the strongest administrative review laws in the nation. In the 1980's, the procedure was further strengthened by 2 Supreme Court decisions, *Senn Park Nursing Center v. Miller*, the Director of Illinois Department of Public Aid and *Kaufman Grain Co. v. Illinois Department of Agriculture*. In short, those decisions validated the IAPA provision that any State agency policy that affects anyone outside that agency can only be expressed through rules adopted in accordance with the IAPA.

Prior to enactment of the IAPA, a State agency was allowed to file its rules with the Secretary of State for public access, if it chose to do so. For that reason, we have some rules on the books whose initiation dates back to at least the 1930's. But nothing required an agency to officially file its rules. Those rules could simply be a pile of policy statements housed in an agency

director's desk drawer. They could be amended on a whim, with no required public notice. Yet the public affected by those rules and rule changes could be held to compliance.

The basic tenets of the IAPA are that no agency policy can be enforced without first being adopted as rule, with some clearly stated exceptions; the agency's intent to adopt, amend or repeal a rule must be publicly announced, with anyone being entitled to offer comment to the agency; the agency's proposal is then, with stated exceptions, reviewed by JCAR, with a further opportunity for the public to comment to JCAR prior to its deliberations; and, upon adoption, the rules become part of the compilation of all the rules of all State agencies called the Illinois Administration Code. The Code is officially on file in the Secretary of State's Index Department, with an unofficial electronic version, maintained and updated weekly by JCAR, on the General Assembly's website. In essence, the IAPA brought daylight to the process of creating administrative law in Illinois.

JCAR REVIEW

The JCAR membership meets at least once each month to consider an agenda that has recently ranged from 30 to 60 State agency rulemakings. JCAR can expect to review in a year's time about 20,000 pages of information. The IAPA dictates that the Committee's analysis of rulemakings be based on such concerns as statutory authority and legislative intent; necessity for the regulation; economic impact on State government and the affected public; completeness and appropriateness of standards to be relied upon in the exercise of agency discretion; effect on local government and small business; adherence to statutory rulemaking requirements; etc.

Its rules review responsibilities inherently create an adversarial relationship between JCAR and the State agencies. But, on a daily basis, that relationship can be a lot less adversarial than one might expect. JCAR's ultimate goal is that Illinois government produce the most legally grounded, least onerous, least costly and most efficient and effective body of administrative law possible. Most State agencies share that goal.

The types of criticism JCAR might offer on a rulemaking range from pointing out that a sentence is missing a verb to a blatant violation of statute. JCAR offers what we call the "cold read". We are the generalists; the agency houses the experts. We are a good test of whether the policy the agency is establishing is communicated clearly and concisely, is fair to the affected public, and is well grounded in statutory law. In most cases, the agency will respond to JCAR comment by improving its proposal.

Looking at the rulemakings JCAR has considered over the past 4 years illustrates this point. Of roughly 1800 rulemakings reviewed, over 90% met with no negative JCAR action. Except for the 10% on which the Committee did take action, any issues raised were resolved through negotiation.

When JCAR considers a rulemaking, it has a variety of options available under the IAPA. If it finds that a rulemaking is within its statutory authority and that no other problems exist, it issues a Certificate of No Objection. With that certificate, the agency can proceed to adopt its rule. When JCAR has outstanding issues with a rulemaking, but doesn't categorize the deficiencies as

serious, it issues a Recommendation. If it believes the issues are serious, it votes an Objection. With either a Recommendation or Objection, the agency can respond to the JCAR action by further modifying the rulemaking to abate the JCAR concern, it can abandon the rulemaking, or it can adopt the rulemaking with no changes. The option is entirely the agency's.

In instances in which the Committee finds the problems with a rulemaking to be most egregious, it can prohibit filing of a proposed rulemaking, or, with respect to an emergency or peremptory rule, which are already adopted prior to JCAR review, the Committee can suspend the filed rule. JCAR has habitually used this strongest of its actions when it believes the agency's action is in serious violation of statutory law or legislative intent.

For a 180-day period after JCAR issues a Filing Prohibition or Suspension, further discussion and negotiation with the agency can result in JCAR withdrawing its action and allowing the rulemaking to proceed, usually with modifications. Also during that time period, the General Assembly as a whole can override the JCAR action through passage of a joint resolution. If neither of these actions occurs within the 180 days, a suspended rule is automatically repealed and a prohibited rulemaking is permanently barred.

In its entire 31 year history, JCAR has issued a Filing Prohibition or Suspension only 69 times. 33 of the 69 instances have occurred during the 6 years of the current Administration. The Filing Prohibition/Suspension process has worked effectively as a mechanism for encouraging further negotiation and conflict resolution. In only 9 instances has an issue remained unresolved after the 180-day negotiation period. All but two of those unresolved situations have occurred under the current Administration.

I'd like to finish my presentation on Rulemaking 101 with one further comment. There is a general tendency to regard rules and rulemaking as a bad thing. How often have you heard someone say, "it wasn't the statute that hurt me, it was the rules that came later"? But in my tenure at JCAR, I've come to a different conclusion. Yes, rules place restrictions on how people conduct their lives and their business, as do statutes. But more importantly, they place restrictions on the bureaucracy. No one would be more in favor of writing fewer rules than the people who administer State government. Rules create parameters within which agencies must exercise their authority and their discretion. They help guarantee that all citizens have equal access to State programs and services. At JCAR, we have to guard against an agency's failure to adopt necessary rules, as well as monitoring the rules it does adopt.

CURRENT ADMINISTRATION

As you can tell from my description of JCAR functions, we are a legislative agency that works very closely with the executive branch of government. It is what we do every single working day. I personally have served in this position under the past 3 Governors. For that reason, I believe I am in a position to offer to this committee some observations on the operations of the current Administration.

When I came to JCAR in 1991, I had to seriously interact with State government bureaucracy for the first time. I found that their priorities weren't always the same ones I had observed in the

legislative branch. While most State employees understand that, ultimately, their job exists in some way to serve the citizens of Illinois, I encountered some who seemed to put a lot of energy into avoiding the public and its needs. For some, responsibility for a State function appeared to be viewed as personal power.

One of the first lessons I learned was that the Governor's office could be a great ally in dealing with problems caused by bureaucratic attitudes. Governors, like legislators, are generally sensitive to, and responsive to, the needs of the public, because they have to account for their actions at every election. Not so for the mid-level bureaucrat. Numerous times during the prior 2 Administrations, I contacted staff in the Governor's office and a problem of agency intransigence would quickly be resolved. We could be partners in making State government work better.

Based on that experience, I contacted the Governor's office multiple times early in this Administration and suggested that it assign someone as liaison to JCAR. They never responded.

Instead, a policy was reportedly established that virtually all agency rulemaking proposals had to be reviewed by the Governor's Office of Management and Budget. This virtually put a strangle-hold on rulemaking activity. JCAR has issued many procedural Objections and Recommendations over the past few years based on agencies missing statutorily mandated deadlines for program implementation, or for tardy rulemaking that resulted in an agency enforcing policy not yet in rule, in violation of the IAPA and in conflict with the Supreme Court decisions. The only reason agency personnel could offer for the tardiness was that their rulemaking proposals had gotten held up in GOMB. State employees have occasionally made statements to us that, in an attempt to comply with State or federal law, they put their jobs on the line by proceeding with rulemaking without waiting for GOMB approval.

While slowing down on rulemakings might sound like a good thing, in many cases State activity doesn't cease for lack of rules. Instead, it progresses without the public disclosures and evenhandedness that rules and the rulemaking process provide.

I would like to point out that I have no corroboration for the situation I have just described. I'm merely forwarding to you what we have gleaned from conversations with agency employees.

Another point of comparison between the current Administration and the others with which I have worked involves the flow of information. The State agencies house the experts that make State programs function. JCAR has a Staff of 8 generalists, including myself, who must evaluate the implementation of statutory law by those experts. We rely on agency staff to explain their policies, their procedures and their rulemakings to us and to back up their points with documentation when necessary.

While rules review is inherently an adversarial process, it has classically had game rules by which both sides abide. My staff needs to ask the right questions. If they do, it is incumbent on agency employees to give them truthful answers, presented in an understandable format. Both sides should understand that the other has a position to defend or advocate, but requests for factual information should not be affected.

While still observed by many agencies, these game rules seem to have been set aside by others. In some agencies, even the simplest request for purely factual information that JCAR needs with respect to noncontroversial rulemakings must be cleared by an agency's legal counsel. Rules liaisons are virtually not allowed to respond to JCAR without permission, when interaction with JCAR is at the heart of their job. For example, it can take weeks to get information from the Department of Public Health, even when JCAR is facing a meeting deadline. This situation is new with this Administration.

A prime example of restricted information flow is the Department of Healthcare and Family Services, where, again, simple factual answers can be held up for weeks, or permanently.

Mostly, these delays and lack of simple communication are to the agency's detriment. Instead of providing information that would allay JCAR concerns early in the review process, the agency makes its policy suspect through its reticence.

This Administration has also exhibited a failure to propose adequate and timely rules. For example, the Department of Juvenile Justice, in spite of numerous urgings by JCAR, has never adopted a single rule governing its procedures and programs. The Department of Veterans' Affairs proposed rules for a grant program based on revenue from a special lottery. Both the veterans' organizations and JCAR questioned DVA's plan to transfer the bulk of the funds to HFS to support veterans' health insurance, to the detriment of the other statutorily eligible programs, PTSD treatment, homelessness, disability benefits and long-term care. JCAR adopted a Recommendation that DVA further justify this approach. DVA responded that it would do so, but needed more time. That was in August of 2006; DVA has provided no further response and has adopted no rules for this program. In October 2008, the Governor issued a press release stating that DVA has awarded over $4.7 million in grants based on the special lottery revenues. It would appear DVA has done so in violation of the IAPA.

Rules governing State grant programs are especially important to JCAR. In a situation in which the General Assembly appropriates a lump sum or sets up a revenue stream for grants, then authorizes an agency to distribute those grants, it is extremely important that all eligible entities be given fair notice of the availability of, and equal access to, those grants. The standards the agency will use in awarding or denying an application need to be specified in rule. Since the 2006 episode with the Department of Public Health's handling of stem cell grants, JCAR has continually pressed agencies awarding grants to adopt rules. Many agencies do so; others are resistant.

FAMILYCARE PROGRAM

These are examples of undue impediments to effective creation of administrative law that JCAR has observed over the past few years. The most egregious example would have to be the Department of Healthcare and Family Services' handling of the FamilyCare issue.

FamilyCare is the program that provides medical assistance to responsible adult relatives of children in the KidCare program whose family incomes are above the 133% FPL cap that would entitle them to regular medical assistance.

KidCare is the program created under the federal State Children's Health Insurance Program, or SCHIP, and State statute. States whose programs are approved by the federal government get a 65-35 federal match on their expenditures. While designed to provide medical care to children, in 2002 State statute and a federal Medicaid waiver allowed adults responsible for participating children, whose family incomes exceeded the Medicaid cap but were under 185% FPL, to also receive healthcare coverage under KidCare. HFS has now endowed that adult coverage with the name FamilyCare.

The problem began in late 2007 when the 5-year federal waiver expired. The State statutory authorization was tied to the federal waiver, so it also expired. HFS had a reported 15,000 to 20,000 FamilyCare participants who would lose State healthcare coverage unless the State decided to pick up the full cost.

HFS decided to do so, but additionally opted to increase the 185% FPL ceiling that existed under the federal waiver to 400%. The State would not only assume the costs of the former SCHIP adults, but a major portion of the cost for thousands of additional adults as well.

HFS voiced this policy in an emergency rule that was considered at JCAR's November 2007 meeting. While JCAR had some questions about the rulemaking's statutory authority and its cost, it addressed its action to the Department's use of emergency rulemaking. This is a process in which an emergency rule is adopted without prior public or JCAR scrutiny and lasts only 150 days. JCAR reviews the rule after adoption. While the pick-up of the SCHIP adults who were about to lose their existing coverage could reasonably be characterized as an emergency situation, the Department was not able to successfully justify the expansion of FamilyCare to those with up to 400% FPL as being an emergency. JCAR voted an Objection and Suspension based on the use of emergency rulemaking and further recommended that HFS split the 2 policies and adopt another emergency rule affecting just the SCHIP pick-up.

HFS chose not to split the 2 issues and, by its own admission, proceeded to sign up over 3,000 FamilyCare participants under the new 400% cap. It did so without first adopting rule, in violation of the IAPA and the Supreme Court findings in *Senn Park* and *Kaufman Grain*. This blatant lack of adherence to law is virtually unheard of in my experience.

In February 2008, the proposed, or permanent, version of the same rulemaking proposal came before JCAR. With the question of the use of emergency rulemaking off the table, the Committee focused more on the substance of the rulemaking. It extensively questioned the Department on its statutory authority for, and the cost of, the Expansion. The Department's response, offered repetitively, was simply that it believed it had both the authority and the money. It continued to claim that the funds were available, in spite of recent statements from the Comptroller about current medical assistance backlogs. Instead of explaining what cost savings HFS was experiencing, or other services it planned to cut to free up money for the Expansion,

Department personnel refused to say more than that the Department believed it had both the authority and the money.

JCAR issued an Objection and Filing Prohibition to the proposed rule, to the extent that it expanded medical assistance to persons other than those affected by the lapsed SCHIP waiver. The Committee found that the budgetary impact on the State was likely to be significant. It believed that an expansion of this magnitude should not be initiated without a specific legislative determination that adequate financial resources are, and will continue to be, available. The General Assembly did not include expanded FamilyCare during its formulation of the FY08 budget. Further, the General Assembly did not pass any substantive statutory authority for such an expansion.

HFS again refused to separate the issue of the SCHIP pick-up and the FamilyCare Expansion. In response to the JCAR action, and again in violation of the IAPA, HFS continued to take new applicants into the expanded FamilyCare.

Following the emergency rule, Richard Caro, joined by Ronald Gidwitz and Gregory Baise, filed suit against the FamilyCare Expansion. The Circuit Court issued a temporary restraining order against HFS' implementation of the Expansion. HFS filed a peremptory rule to tie FamilyCare to some requirements of the TANF laws. JCAR suspended the peremptory rule because it violated the IAPA. The IAPA's requirements for use of peremptory rulemaking are very strict. It can be used to implement a court order, but, in this instance, the court did not order that the agency adopt court dictated rules.

The Appellate Court upheld the action of the Circuit Court. Again, HFS filed a peremptory rule it maintained implemented the Court's order. JCAR again found this to be an unlawful use of peremptory rulemaking because the court did not order HFS to adopt any rules. JCAR suspended the second peremptory on the basis that it violated the IAPA.

The Supreme Court, based largely on HFS' claim that the TRO could be interpreted to threaten Medicaid payments to a half million people, stayed the TRO pending appeal by the Administration.

CONCLUSION

This concludes my remarks on some of JCAR's experiences with the current Administration. I hope I've laid the background for any issues you'd like to pursue in more detail. I'm happy to address any questions you might have.

JCAR VOTING HISTORY FOR FAMILYCARE EXPANSIONS UNDER CIRCUMSTANCES SIMILAR TO CURRENT EXPANSION

Part 120.30: Pre-expansion coverage – parents covered to flat MANG C standard
22 Ill. Reg.19875 - Effective Date: 10-30-98
Statutory Authority: Public Aid Code
Federal Funding Authority: Title XIX State Medicaid Plan
JCAR Vote: No Objection; December 15, 1998
JCAR Members in Attendance: Sen. Bradley Burzynski (R), Sen. Beverly Fawell (R), Sen. Steve Rauschenberger (R), Sen. Jim Rea (D), Rep. Philip Novak (D), Rep. Coy Pugh (D), Rep. Tom Ryder (R), Rep. Dan Rutherford (R)

Part 120.32: Expanded coverage above Part 120.30 levels 49% FPL
26 Ill. Reg. 15051 – Effective Date 10-01-02
Statutory Authority: Public Aid Code/Illinois Children's Health Insurance Program Act
Federal Funding Authority: Title XXI* Per HIFA waiver until 9/30/07, TXIX SPA pending for coverage beginning 10/1/07
JCAR Vote: No Objection; November 19, 2002
JCAR Members in Attendance: Sen. Bradley Burzynski (R), Sen. Lisa Madigan (D – current Illinois Attorney General), Sen. Barack Obama (D – current President-elect), Sen. Steve Rauschenberger (R), Rep. Steve Davis (D), Rep. Dan Rutherford (R), Rep. Art Tenhouse (R)

Part 120.32: Expanded coverage above Part 120.30 levels to 90% FPL
27 Ill. Reg. 10793 – Effective Date: 7-18-03
Statutory Authority: Public Aid Code/Illinois Children's Health Insurance Program Act
Federal Funding Authority: Title XXI* Per HIFA waiver until 9/30/07, TXIX SPA pending for coverage beginning 10/1/07
JCAR Vote: No Objection; August 12, 2003
JCAR Members in Attendance: Sen. Bradley Burzynski (R), Sen. Maggie Crotty (D), Sen. Steve Rauschenberger (R), Sen. Dan Rutherford (R), Rep. Brent Hassert (R), Rep David Leitch (R), Rep. Rosemary Mulligan (R)