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JUDICIAL ENFORCEMENT OF THE ILLINOIS ADMINISTRATIVE PROCEDURE ACT’S RULEMAKING PROVISIONS

ROBERT P. BURNS*

Illinois courts will soon be called upon to interpret the rulemaking procedures provided by the recently adopted Illinois Administrative Procedure Act. In so doing, the courts will have the benefit of a substantial body of case law from other jurisdictions interpreting similar provisions. In addition, the Illinois courts will be aided by the vigorous and searching debate of judges and commentators on the relative merit of different approaches. That debate has perforce touched on some of the most basic legal and philosophical issues of modern government. This is not surprising. “Because it is so directly concerned with reconciling government power and private interests, administrative law is peculiarly vulnerable to the intellectual and social pressures resulting from the juxtaposition of frayed ideals and current realities.” Technical issues concerning judicial interpretation of the IAPA’s procedural requirements for rulemaking and those concerning the scope and

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1. The Illinois Administrative Procedure Act [hereinafter referred to as IAPA or Illinois Act] was adopted by Public Act 79-1083, effective September 22, 1975. Public Act 80-1035, enacted June 29, 1977, amended the IAPA and provided that as of January 1, 1978, “in case of conflict between the provisions of this Act and the Act creating or conferring power on an agency, . . . [the IAPA] shall control.” Public Act 80-1035 § 2, ILL. REV. STAT. ch. 127, § 1002 (1977). The Act defined agency as “each State Board, commission, department, or officer, other than the Governor, legislature, or the courts, authorized by law to make rules or to determine contested cases.” IAPA § 3.01, ILL. REV. STAT. ch. 127, § 1003.01 (1977). See also Note, 1976 U. ILL. L.F. 803.

2. Although there are important exceptions, “experience has demonstrated that the analogous federal model often proves determinative” in resolving issues in Illinois administrative law. Gray, Administrative Law in Illinois: Recent Trends and Developments, 8 LOY. CHI. L.J. 511, 540 (1977).


method of substantive judicial review of agency rules are inevitably tied to these broader questions about the role of administrative law in effecting government's varied and competing goals.\(^5\) Illinois courts will be addressing these issues, most often implicitly, in an authoritative manner as they move through the "dense complexity"\(^6\) of a new era in Illinois administrative law.\(^7\)

This article will focus on the procedural requirements of section 5 of the Illinois APA.\(^8\) These procedural requirements must be viewed

\(^5\) See, e.g., J. Rawls, A Theory of Justice 70 (1971) (regarding the relationship between efficiency and justice as aims of social institutions). See also H. Hart, Punishment and Responsibility 10 (1968) (regarding the multiplicity of aims and principles of major social institutions).

\(^6\) Stewart, supra note 3, at 1813.

\(^7\) It has only been in the 1970's that administrative law has reached a point where it can justly be said that "of all the tools that government has for carrying out programs enacted by the legislative body, rulemaking procedure is rapidly becoming the dominant one." Davis, supra note 3, § 6:1 at 448.

\(^8\) This section of the IAPA provides:

(a) Prior to the adoption, amendment or repeal of any rule, each agency shall:

1. give at least 45 days' notice of its intended action. This notice period shall commence on the first day the notice appears in the Illinois Register. The notice shall include a text of the proposed rule, or the old and new materials of a proposed amendment, or the text of the provision to be repealed; the specific statutory citation upon which the proposed rule, the proposed amendment to a rule or the proposed repeal of a rule is based and is authorized; a description of the subjects and issues involved; and the time, place and manner in which interested persons may present their views and comments concerning the intended action. In addition, the Secretary of State shall publish and maintain the Illinois Register and set forth the manner in which agencies shall submit the notices required by this Act to him for publication in the Illinois Register. The Illinois Register shall be published at least once each week on the same day unless such day is an official State holiday in which case the Illinois Register shall be published on the next following business day and sent to subscribers who subscribe for the publication with the Secretary of State. The Secretary of State may charge a subscription price to subscribers that covers mailing and publication costs.

2. afford all interested persons who submit a request within 14 days after notice of the proposed change is published in the Illinois Register reasonable opportunity to submit data, views, arguments or comments, which may, in the discretion of the agency, be submitted either orally or in writing or both. The notice published in the Illinois Register of the Secretary of State shall indicate the manner selected by the agency for such submissions. The agency shall consider fully all submissions respecting the proposed rule.

(b) If any agency finds that an emergency, reasonably constituting a threat to the public interest, safety or welfare, requires adoption of a rule upon fewer than 45 days' notice and states in writing its reasons for that finding, it may proceed without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency rule. The rule may be effective for a period of not longer than 150 days but the agency's authority to adopt an identical rule under subsections (a)(1) and (a)(2) of this Section is not precluded.

(c) No action by any agency to adopt, amend or repeal a rule after this Act has become applicable to the agency shall be valid unless taken in compliance with this Section. A proceeding to contest any rule on the ground of non-compliance with the procedural requirements of this Section must be commenced within 2 years from the effective date of the rule.

(d) The notice and publication requirements of this Section do not apply to a matter relating solely to agency management, personnel practices, or to public property, loans or contracts.

(e) If any agency is required by federal law or federal rules and regulations or by an order of court to adopt a rule under conditions which preclude the agency's compli-
and interpreted as they relate to the traditional responsibility of Illinois courts to provide "substantive" review of rules to determine whether they are arbitrary, capricious, unreasonable or beyond the delegated power of the agency.\(^9\) A major benefit of the IAPA's rulemaking requirements is that they significantly enlarge the courts' repertoire of approaches to substantive judicial review of agency rules.\(^{10}\)

This article first will discuss the underlying premises of the administrative rulemaking procedure, that is, the legislative "purpose" which a court interpreting those procedures must seek to effect.\(^11\) It then will analyze the Illinois Act's specific provisions for rulemaking, comparing them to those of the federal statute\(^{12}\) and the Revised Model State Administrative Procedure Act.\(^{13}\) Next, the IAPA's requirements of notice of intended rulemaking\(^{14}\) and the "issues involved,"\(^{15}\) and of reasonable opportunity for interested persons to comment,\(^{16}\) with the agencies' corresponding responsibility to "consider fully"\(^{17}\) all such comments, will be treated. This will be followed by a short discussion of the Act's provisions for rulemaking petitions.\(^{18}\) Finally, the article will consider the relationship between the courts' enforcement of the IAPA's procedural provisions and substantive judicial review of agency rules.


\(^{10}\) See text accompanying notes 139-52 infra.

\(^{11}\) Administrative Procedure Act, 5 U.S.C. §§ 500-576 (1976) [hereinafter referred to as APA].

\(^{12}\) The 1961 Revised Model State Administrative Procedure Act §§ 1-19, 13 Uniform Laws Ann. 355 (Supp. 1979) [hereinafter cited as the Revised Model State APA].


\(^{14}\) Id.


\(^{16}\) Id.

\(^{17}\) Id.

Judge J. Skelly Wright has identified the specific kind of "fairness" which should characterize a rulemaking procedure in contrast to that germane to adjudication. In the typical adjudication, whether criminal, civil, or administrative, the tribunal must primarily decide which version of the relevant facts is true. The parties' versions of the facts are usually framed in terms of a largely preexisting legal standard: one party attempts to demonstrate certain relevant facts, and the opposing party either argues that the first party has failed to bear his burden of proof or he attempts to demonstrate another version. In adjudication, then, fairness is largely equivalent to accuracy; the traditional assumptions of Anglo-American jurisprudence are that accurate factfindings will most likely emerge from an adversary proceeding, conducted according to evidentiary and procedural rules calculated to make effective the rights of confrontation and cross-examination.

As Judge Wright argues, the distinctive kind of "fairness" appropriate to administrative rulemaking cannot be assimilated to the concept of accuracy. A "rule allocates benefits and penalties among large classes of individuals according to a specific normative standard, and the fairness of such an allocation is ultimately a political or philosophical question." Nonetheless, there is a kind of fairness distinctive to administrative rulemaking which should characterize a rulemaking procedure in contrast to that germane to adjudication. In the typical adjudication, whether criminal, civil, or administrative, the tribunal must primarily decide which version of the relevant facts is true. The parties' versions of the facts are usually framed in terms of a largely preexisting legal standard: one party attempts to demonstrate certain relevant facts, and the opposing party either argues that the first party has failed to bear his burden of proof or he attempts to demonstrate another version. In adjudication, then, fairness is largely equivalent to accuracy; the traditional assumptions of Anglo-American jurisprudence are that accurate factfindings will most likely emerge from an adversary proceeding, conducted according to evidentiary and procedural rules calculated to make effective the rights of confrontation and cross-examination.

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rulemaking:

Put simply, the *public* is treated unfairly when a rulemaker hides his crucial decisions, or his reasons for them, or when he fails to give good faith attention to all the information and contending views relevant to the issues before him. To this notion of fairness—that rulemaking must be openly informed, reasoned, and candid—there is a two-fold logic. First, if administrators rule in obscurity, [the legislature] cannot intelligently delegate power or police the exercise of power already delegated. Second, although the ‘public interest’ cannot be objectively defined, one can safely conclude that administrators who ignore relevant facts and who take the counsel of blind prejudice will serve the ‘public interest’ only by the operation of chance. Therefore, although a rulemaker’s decisions cannot be ‘accurate’ in the conventional sense, and although regulated parties have no fundamental ‘right’ to participate in rulemaking, the administrator owes a duty to the public to give serious consideration to all reasonable contentions and evidence pertinent to the rules he is considering.25

Judge Wright argues that the APA rulemaking procedures26 are designed directly to enforce the administrator’s duty to give “good faith consideration” to serious contentions and to avoid “the counsel of blind prejudice.” The major part of the judicial function in relation to agency rulemaking is thus to give the APA’s rulemaking provisions a “properly expansive reading”27 which ensures that the required dialogue between agency experts and members of the public occurs. A court will thus upset an agency rule promulgated with “no reasons, or merely conclusory reasons, for adopting the rule or for rejecting evidence, criticism, or alternatives submitted by outsiders.”28 Remand of the rule would also be necessary, for example, “when the agency has relied on important findings, assumptions or techniques not made pub-

26. Judge Wright’s reference is to section 553 of the federal APA, 5 U.S.C. § 553 (1976), which governs “informal” rulemaking, as does section 5 of the IAPA, ILL. REV. STAT. ch. 27, § 1005 (1977). *See* text accompanying notes 31-50 *infra*, for a comparison of these statutes.
28. The basis for such a reversal according to Judge Wright, could be the violation of the “procedural” requirement in the federal APA, 5 U.S.C. § 553 (1976), that “[a]fter consideration of the relevant matter presented” the agency must “incorporate in the rules adopted a concise and general statement of their basis and purpose.” Wright, *supra* note 3, at 380, 396. Such an agency failure would also violate what he takes to be the “substantive” standard of judicial review, that the agency show “good faith consideration” to all relevant factors. Wright, *supra* note 3, at 380, 396. In his view, however, if it were determined that the agency were acting within the scope of its authority the judicial function would be exhausted once it was decided that, as a matter of psychological fact, the agency actually considered such factors. Wright, *supra* note 3, at 380, 396. It would seem, however, that judicial review of agency rules under an “arbitrary, capricious, unreasonable or not in accordance with law” standard would require some scrutiny of the relative weight given such factors. *See* text accompanying notes 139-52, *infra*. 
lic prior to the rule's promulgation” because this would violate the APA's notice provision, and strike at the heart of rulemaking procedure.

There is a residual judicial function not exhausted by enforcement of rulemaking procedures, even rulemaking procedures such as those in the IAPA which explicitly require that an agency give “full consideration” to comments. But it is surely true that the contribution which courts will make in the area of administrative rules and rulemaking will be, to a great extent, the enforcement of those requirements.

**Rulemaking Under the Illinois Administrative Procedure Act**

Section 3.09 of the IAPA defines “rule” as:

> each agency statement of general applicability that implements, applies, interprets or prescribes law or policy, but does not include (a) statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency, (b) informal advisory rulings issued pursuant to section 9, (c) intra-agency memoranda or (d) the prescription of standardized forms.

It is to such “rules” that the rulemaking provisions of section 5 and 29. Wright, supra note 3, at 396.

30. Judge Bazelon of the United States Court of Appeals for the District of Columbia Circuit has been the foremost advocate of the view that courts should limit their efforts in the area of informal rulemaking to purely procedural questions: both enforcing the literal requirements of the APA and imposing procedural devices, such as cross-examination, on informal rulemaking which go quite far beyond the Act's provisions, even expansively interpreted. See International Harvester Co. v. Ruckleshaus, 478 F.2d 615, 651-52 (D.C. Cir. 1973); Ethyl Corp. v. E.P.A., 541 F.2d 1, 66-68 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976). This approach provoked an extreme reaction to judicially mandated procedural innovations in informal rulemaking in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 542-48, (1978) (dicta). (For varying assessments of the Vermont Yankee case and its likely effects, see Davis, supra note 3, §§ 6:35-6:37, and Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.: Three Perspectives, 91 Harv. L. Rev. 1804 (1978) (series of three commentaries by Stewart, Byse, and Breyer)). See also Dunlop v. Bachowski, 421 U.S. 560, 572 (1975) (statement of reasons in informal action required, although not literally mandated by the APA, to facilitate judicial review and to “assure careful administrative consideration.”) Judge Wright's “full consideration” standard of substantive judicial review represents an incomplete advance over purely procedural “tinkering” with rulemaking procedure in that it insulates from judicial scrutiny even the most irrational normative judgments made by agencies in rulemaking. See Davis, supra note 3, § 6:6. For a discussion of the limited situations in which cross-examination should be judicially required in informal rulemaking see Davis, supra note 3, § 6:20 at 547-51. For attempts to delineate the circumstances in which courts should intervene, on substantive grounds, in informal rulemaking see note 139, infra.

31. IAPA § 3.09, Ill. Rev. Stat. ch. 127, § 1003.09 (1977). Section 9 of the IAPA, Ill. Rev. Stat. ch. 127, § 1009 (1977), allows each agency to “provide by rule for... disposition of petitions for declaratory rulings” on the applicability of statutes, regulations or agency orders and makes such rulings unappealable.

32. IAPA § 5, Ill. Rev. Stat. ch. 127, § 1005 (1977). In addition to agency action excluded
the other IAPA provisions concerning rules apply.33 This definition is clearly very broad, and the IAPA rulemaking provisions thus govern a larger percentage of agency action than does the federal Act, which excludes, most significantly, an agency’s interpretations of the statutes it administers, so-called interpretive rules.34

The IAPA provides only one general procedure for the adoption of agency rules,35 although the organic statutes under which agencies

by the definition of “rule,” section 5 of the IAPA specifically excludes from rulemaking provisions “a matter relating solely to agency management, personnel practices, or to public property, loans or contracts.” IAPA § 5(d), ILL. REV. STAT. ch. 127, § 1005(d) (1977). The comparable subsection in the federal Act excludes “a matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts.” 5 U.S.C. § 553(a)(2) (1976). The Illinois rulemaking provisions thus apply to those “public . . . grants [and] benefits” which the federal Act excludes. See Bonfield, Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits or Contracts, 118 U. PA. REV. 540 (1970). The Revised Model State APA contains no comparable exclusion of rulemaking from notice and comment procedures beyond that excluded by the definition of “rule,” which is in some ways slightly less, and in other ways slightly more, inclusive than the Illinois definition. Compare IAPA § 3.09, ILL. REV. STAT. ch. 127, § 1003.09 (1977) with REVISED MODEL STATE APA, supra note 13, § 1(7).

The IAPA treats ratemaking as a separate agency function, subject neither to the provisions controlling rulemaking nor to those controlling contested cases. IAPA §§ 3.08, 17, ILL. REV. STAT. ch. 127, §§ 1003.08, 1017 (1977). For an analysis of the danger of “secret systems of law” growing up under the guise of the “intra-agency memoranda” exception to the definition of rule, see Davis, supra note 3, § 1:11 at 39. In Illinois the Joint Committee on Administrative Rules, whose function is delineated by the IAPA at ILL. REV. STAT. ch. 127, §§ 1007.02-1007.10, has acted to reduce this sort of abuse.

33. This article will focus on section 5 of the IAPA and its relationship to judicial review of rules and rulemaking. Other sections of the IAPA concerning rules require each agency to adopt rules of practice for formal hearings, IAPA § 4(a)(1), ILL. REV. STAT. ch. 127, § 1004(a)(1) (1977); require rules describing agency organization, id., § 1004.01(a)(1); approved procedures for public access to information and rules for submitting requests to the agency, id., § 1004.01(a)(2); require the creation by rule of tables of contents and indices to the agency’s current rules and of descriptions of the agency’s rulemaking process, id., § 1004.01(a)(3). All of these rules may be adopted without notice and comment, id., § 1004.01(b). Each agency is also required to prescribe the forms and procedures for petitions for the adoption of rules by the public, id., § 1008. The IAPA provides for filing of final rules with the Secretary of State, id., § 1006, and for their publication in the Illinois Register, id., § 1006(b).

34. Professor Davis seems unsure of the wisdom of imposing notice and comment requirements on interpretive rules, since doing so may discourage agencies from issuing them. Davis, supra note 3, § 1:11 at 42. For a discussion of the history of judicial attempts to define “rule,” usually in contradistinction to “order,” see Bonfield, The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process, 60 IOWA L. REV. 731, 824-26 (1975) [hereinafter cited as Bonfield]. Bonfield’s article, written on the occasion of Iowa’s enactment of a variant of the Revised Model State APA, is so “comprehensive and penetrating” that it should be useful in all jurisdictions. Davis, supra note 3, § 1:10 at 37. Bonfield catalogues the previously existing literature, relatively small in light of the importance of the subject. Bonfield, at 745 n.50.

35. The Act permits an agency to adopt an emergency rule upon a finding, supported by written reasons, that “an emergency, reasonably constituting a threat to the public interest, safety or welfare, requires adoption of a rule upon fewer than 45 days’ notice.” IAPA § 5(b), ILL. REV. STAT. ch. 127, § 1005(b) (1977). Such a rule may remain in effect for no longer than 150 days. Id. If the rule is to remain in effect beyond that period, the agency is required to submit it to regular notice and comment procedure as a proposed (permanent) rule. Because the IAPA does not contain the general provision of the federal Act allowing an agency to exempt rules from the notice
function may require fuller procedures. This is in sharp contrast to the federal Act, which creates two distinct procedures for rulemaking. Section 553 of the federal Act sets out the requirements for "informal rulemaking," that is, the "notice and comment" procedure similar to that which the Illinois Act provides. Sections 556 and 557 of the federal Act set forth the more demanding requirements for rules which the agency's organic statute requires to be made "on the record," that is, after a trial-type proceeding and hearing. These requirements include, inter alia, the right to cross-examine witnesses, a guarantee that the decision be based solely on the results recorded, including transcript and exhibits, a clear requirement that the hearing officer issue "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record." These procedures for "formal rulemaking" clearly are not favored in the federal system. Congress has not required any agency to follow such procedures in more than ten years. In its landmark decision, United States v. Florida East Coast Railway, the United States Supreme Court held that a statute requiring rulemaking after a "hearing" could and comment procedure when it "for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest," 5 U.S.C. § 553(b)(3) (1976), Illinois courts should strictly construe the requirement that an "emergency" exist before an agency is allowed to dispense with the notice and comment procedure. Otherwise, the emergency rule exception easily could be used to dilute the statutory mandate that the notice and comment procedure be available prior to the adoption, amendment, or repeal of any rule. Accord, Wagner Elec. Corp. v. Volpe, 466 F.2d 1013, 1020 (3d Cir. 1972).

Perhaps the most striking example in Illinois is the procedural framework of the Environmental Protection Act, ILL. REV. STAT. ch. 111, §§ 1001-1051 (1977), described in Currie, Rulemaking Under the Illinois Pollution Law, 42 U. CHI. L. REV. 457, 469-73 (1975) [hereinafter cited as Currie]. For a small sample of the variety of such procedures in federal statutes, see Davis, supra note 3, § 6:10 at 488-94.


Id., §§ 556-557.

Id., § 556(d).

Id., § 556(e).

Id., § 557(c).

Corn Prods. Co. v. Department of HEW, 427 F.2d 511 (3d Cir.), cert. denied, 400 U.S. 957 (1970) upheld a rule prescribing the percentage of peanuts which peanut butter was required to contain. The trial-type rulemaking proceeding lasted nine years. Id. at 513, n.5. It produced a voluminous transcript, and was perhaps the most striking example of the clumsiness of strict trial-type procedure for rulemaking.

be satisfied by the written notice and comment procedures of section 553.45 Only statutes which specifically required that rules be made "on the record" would be construed as requiring trial-type rulemaking procedures.46

The notice and comment procedures of section 5 of the IAPA are designed to give "adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses."47 Thus, judicial interpretation of those procedures should "promote decisions based on proper and adequate reasons supported by rulemaking findings . . . in a manner which not only insures fairness to participants in the rulemaking process and protects the role of the courts on review, but which also preserves the off-the-record flexibility of informal rulemaking."48 Section 5 procedures are designed to create a "framework for principled decision-making"49 through a "genuine dialogue between agency experts and concerned members of the public."50 It should be interpreted to accomplish these ends. Fortunately there is a substantial body of law to guide Illinois courts.

ADVANCE PUBLIC NOTICE

The IAPA51 requires that, "prior to the adoption, amendment or repeal of any rule, each agency shall" publish a notice of its intended action in the Illinois Register.52 This notice must be published forty-five days before the agency's intended action and must include the precise text of the proposed rule, the new and the superseded material in a proposed amendment, or the text of the material to be repealed.53 This requirement is far more specific than that of the federal Act, which requires "either the terms or substance of the proposed rule or a

45. Id. at 227-28.
46. For the distinction between rulemaking "on the record" and the newer concept of rulemaking "on a rulemaking record" see Davis, supra note 3, § 6:4 at 458. The latter notion is discussed in the text accompanying notes 97-112 infra.
48. Verkuil, supra note 3, at 234.
50. Wright, supra note 3, at 381.
52. The Secretary of State has general responsibility to maintain and publish the Illinois Register, which is to be published at least once each week on the same day and mailed to subscribers. Id.
53. Id.
description of the subjects and issues involved," and which does not specify any particular period of time to elapse between the publication of a notice of intended action and the adoption of a rule. The IAPA also provides that the agency must publish a citation to the specific statutory premise upon which the rulemaking is based and authorized, "a description of the subjects and issues involved," and the "time, place and manner in which interested persons may present their" comments concerning the proposed action. Further, the notice must state whether the agency, "in [its] discretion," has decided to accept only written comments, only oral comments, or both. The detailed requirement of the Illinois Act and particularly the requirement that the text of the proposed rule be published, will doubtless reduce the amount of litigation concerning the adequacy of notice. This requirement of adequate notice of rulemaking is closely related to the purposes of a rulemaking procedure. It is also related to a reviewing court's minimal obligation to insure that all interested persons receive sufficient advance notice of the proposed rule's contents so that they can decide whether to intervene in the proceedings. In light of these considerations, it is important that the notice requirement be vigorously enforced.

It should be noted that section 5 of the IAPA requires, in addition to the text of the proposed rule, a statement by the agency of the "subjects and issues involved." The requirement, taken from the Revised Model State APA (which does not, however, require the text of the proposed rule to be made public), and absent from the federal Act, should be read so as to aid reviewing courts in assessing the agency's consideration of the factors relevant to a particular rulemaking. Perhaps more importantly, the requirement so interpreted would impose a productive discipline on the agency's own thought processes. Thus, under the "issues involved" requirement of the notice provision, an

55. 5 U.S.C. § 553(d) (1976) requires publication of the rule as adopted, thirty days before its effective date, with stated exceptions. The parallel section of the IAPA makes final rules effective ten days after filing with the Secretary of State, unless: the rule itself specifies a later date; or the agency, which has complied with the requirements of section 5(b), designates the rule an emergency rule, in which case the rule becomes effective upon filing with the Secretary. IAPA § 6, ILL. REV. STAT. ch. 127, § 1006 (1977).
58. See text accompanying notes 19-30 supra.
59. 1 F. COOPER, STATE ADMINISTRATIVE LAW 193 (1965).
61. REVISED MODEL STATE APA, supra note 13, § 3(a)(1).
agency could be required to state "for the record" what it initially believed to be "at issue" in a particular rulemaking:63 the questions it asked and the answers it gave in devising a particular rule. Such a statement would reveal the breadth or narrowness of the agency's initial considerations, (surely an element of their "reasonableness"). It would also allow a reviewing court to focus on agency treatment of those comments which presented data or considerations that the agency had not already taken into account in proposing the rule. In this regard then, the Illinois APA specifically provides for an element of the initial notice that would enhance internal agency decisionmaking processes and would greatly aid a reviewing court in determining if a particular rule was the result of "fair and reasoned decisionmaking."64

As Judge Wright has observed, however, recent cases in the federal system, even without the textual support afforded by the "subjects and issues" provision of the Illinois Act, have put "useful teeth" into the notice provision of the federal Act. For example, "[i]f an agency's empirical predictions constitute a substantial basis for its rule, the methodology of prediction should be made public so that interested parties have an opportunity to study and criticize it."65 Where there is to be a flat rate for allocating costs between two services, "the agency should specifically inform the public of this result, and not merely report that some method of allocation is contemplated."66 In Wright's view, "It is the common spirit of such decisions that the agency must make continuous disclosure of the facts and assumptions on which it intends to rely in promulgating its rule."67 The House Judiciary Committee Report accompanying the original federal APA used the following terms, equally applicable to the Illinois APA, to describe the federal Act's notice provisions:

Notice must fairly apprise interested persons of the issues involved, so that they may present relevant data or argument. The required specification of legal authority must be done with

63. See Anaconda Co. v. Ruckelshaus, 482 F.2d 1301, 1307 (10th Cir. 1973) (Lewis, J., concurring). This initial proposed rule should be the result of the agency's "considered judgment," and should not merely an opening gambit to serve as a "bait for discussion. . ." Id.

64. Verkuil, supra note 3, at 230.


66. Wright, supra note 3, at 380 (citing Mobil Oil Corp. v. Federal Power Comm'n, 483 F.2d 1238, 1251 n.39 (D.C. Cir. 1973)). Of course, ratemaking is excluded from section 5 procedures under the IAPA and the IAPA requirement that the text of the proposed rule be published should serve to render Wright's stricture largely academic. See IAPA § 17, ILL. REV. STAT. ch. 127, § 1017 (1977).

67. Wright, supra note 3, at 380-81.
particularity. Statements of issues in the general statutory language of legislative delegations of authority to the agency would not be a compliance with the section. Prior to public procedures agencies must conduct such nonpublic studies or investigations as will enable them to formulate issues. . . . Summaries and reports may also be issued as aids in securing public comment or suggestions.68

Courts have viewed the notice requirement as a serious one, since failure to give adequate notice can thwart "genuine dialogue" in the rulemaking process from the outset. Thus, "[a]n argument attacking the adequacy of the notice on the ground that the enacted rule is outside the scope of the proposed rulemaking notice will be scrutinized on review precisely because the function of review is to determine if the agency considered all relevant comments prior to rulemaking."69

Cases remanding agency rules for want of adequate notice fall into several categories. Notice has been held to be inadequate where the final rules adopted went beyond the notice of rulemaking in significant ways, either by extending regulation to matters not mentioned in the notice of rulemaking,70 or by regulating in greater detail or precision than the original notice71 would reasonably have led interested persons to expect.72 Conversely, the agency should be entitled to develop its final rule in response to comments made during the rulemaking procedure; a showing based on the rulemaking record that this indeed occurred would ordinarily defeat a challenge to the adequacy of notice.73 When such changes are significant, however, the agency should consider, and a reviewing court might require, a further comment period, before or after adoption of the final rules.

When a rule is being promulgated to comply with the requirements imposed by a statute, the public is entitled to notice of the statute with which the proposed rules are designed to comply.74 This allows comparison of the rules with the statute.

69. Verkuil, supra note 3, at 235.
70. American Frozen Food Inst. v. Train, 539 F.2d 107, 135 (D.C. Cir. 1976) (final rule added a pollutant not mentioned in the notice of rulemaking).
71. Mobil Oil Corp. v. Federal Power Comm'n, 483 F.2d 1238, 1257 (D.C. Cir. 1973) (notice of FPC's intention to issue a general statement extending its jurisdiction over a new area not adequate as notice of specific ratemaking in that area).
72. Adequacy of notice should be measured by its ability to inform the general public, not only experts in the field, of the proposed agency action, and the issues it involves. Wagner Elec. Corp. v. Volpe, 466 F.2d 1013, 1019-20 (3d Cir. 1972).
The notice requirement also has been held to require notice of important reports or studies on which the agency intends to rely or which are directly relevant to the rulemaking, such as the report of an advisory committee. When such a report becomes available so long after the notice of proposed rulemaking that the public is unable to submit comments in light of the report, the notice may be held inadequate.\footnote{Synthetic Organic Chem. Mfr. Ass'n v. Brennan, 506 F.2d 385, 388 (3d Cir. 1974), cert. denied, 420 U.S. 973 (1975). If such a research document is not cited in the Notice of Rulemaking, a reviewing court may not permit the agency to include it in the rulemaking record or to rely on it for support for the rule's rationality.}

Actual notice of pending rulemaking procedures or the contents of a proposed rule probably does not bar an individual who has received such notice from contesting a rule for inadequate notice.\footnote{IAPA § 5(c), ILL. REV. STAT. ch. 127, § 1005(c) (1977) provides: No action by any agency to adopt, amend or repeal a rule after this Act has become applicable to the agency shall be valid unless taken in compliance with this Section. A proceeding to contest any rule on the ground of non-compliance with the procedural requirements of this Section must be commenced within 2 years from the effective date of the rule. The statutory limitation period would seem to apply to affirmative actions to invalidate a rule for procedural defects. It is not apparent whether such a limitation period would apply to the assertion of the procedural invalidity of a rule as a defense in an enforcement proceeding brought either before or after two years. See Wood Acceptance Corp. v. King, 18 Ill. App. 3d 149, 309 N.E.2d 403 (1974) (counterclaims under the federal "Truth in Lending" Act, 15 U.S.C. §§ 1601-1665 (1976), may be asserted in an action initiated by a creditor to recover under the defective contract, without regard to the one-year limitation period for affirmative actions, 15 U.S.C. § 1640(e) (1976)); Bonfield, supra note 34, at 874-75. Where the procedural defect is a serious failure of notice it is questionable whether a limitation period would apply to either affirmative actions or defenses. Isabell v. Department of Pub. Aid, 18 Ill. App. 3d 868, 310 N.E.2d 742 (1974). See Wood Acceptance Corp. v. King, supra note 34; 5 U.S.C. § 553(b) (1976).}

The Illinois Act requires general notice of proposed rulemaking to be published in the Federal Register, "unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with the law."\footnote{5 U.S.C. § 553(b) (1976).}

Since the Illinois Act contains no such "unless" clause in section 5, agency failure to publish the notice in the Illinois Register would seem to be a claim which even those with actual notice may assert.\footnote{The IAPA forbids a defense on claim of invalidity by a person with actual notice thereof based on the agency's failure to file an adopted rule with the Secretary of State or failure to make the rule available for public inspection. IAPA § 4(c), ILL. REV. STAT. ch. 127, § 1004(c) (1977). The absence of such a provision in section 5 together with the contrast with the federal APA noted in the text, lends support to the proposition that violations of the notice provision of section 5 may be asserted even by those with actual notice.}

The Right to Comment and the Rulemaking Record

The Illinois Act provides that each agency shall "afford all interested persons . . . reasonable opportunity to submit data, views, argu-
ments or comments" before the adoption, amendment or repeal of any rule. To preserve this right, an interested person must submit a request within fourteen days after notice of the proposed change is published in the Illinois Register. The phrase “interested person” literally means anyone who wants to do so. No requirement of standing exists. The federal APA gives interested persons an opportunity to participate in the rulemaking through the submission of written material, “with or without opportunity for oral presentation.” By contrast, the Illinois APA provides that data, views, arguments or comments “may, in the discretion of the agency, be submitted either orally or in writing or both.” Thus the Illinois Act apparently gives the agency discretion to provide that all submissions be oral, and that written materials will not be received. In light of the usefulness of written submissions, however, it is unlikely that any agency would prohibit their use in any rulemaking procedure. A more difficult question involves the use of oral testimony in rulemaking. The Revised Model State APA mandates oral presentation of each rulemaking involving “substantive rules” and if twenty-five persons, a government unit or agency, or an association with twenty-five or more members requests it. There may be situations, for example, where the proposed rule primarily involves poor or relatively under-educated persons for whom written submissions are not a realistic option and where specific facts and questions are of some significance. In such a case, a “reasonable opportunity” for interested persons to participate in the rulemaking would require oral presentations; agency failure to provide this opportunity would constitute an abuse of discretion.

The federal Act also provides that “after consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.” The Revised Model State APA requires the agency, if requested by an interested person either before or within thirty days after the rule’s adoption, to “issue a concise statement of the principal reasons for and against its

80. Id.
81. Bonfield, supra note 34, at 852.
82. 5 U.S.C. § 553(c) (1976).
83. IAPA § 5(a)(2), ILL. REV. STAT. ch. 127, § 1005(a)(2) (1977). The text of the Revised Model State APA, is ambiguous as to whether the agency may choose to receive only oral comments. See REVISED MODEL STATE APA, supra note 13, § 3(a)(2).
84. REVISED MODEL STATE APA, supra note 13, § 3(a)(2).
87. 5 U.S.C. § 553(c) (1976).
adoption, incorporating therein its reasons for overruling the considerations urged against its adoption."  

There is no such explicit requirement in the Illinois APA. On the other hand, the IAPA requirement that “[t]he agency shall consider fully all submissions respecting the proposed rule” is couched in stronger language than is the federal requirement that the agency afford “consideration of the relevant matter presented.” If Illinois courts are to discharge their responsibility of enforcing the “full consideration” requirement, an agency statement of “the significant issues faced by the agency and . . . the rationale of their resolutions” is indispensable. Such a statement merely makes public, in a manner consonant with the purposes of a rulemaking proceeding, the agency’s actual consideration of the comments submitted and allows the public, or a reviewing court, to determine whether the agency has complied with the “full consideration” requirement of section 5. In the federal system, the judicial requirement that the agency publish reasons for adopting the rule or for rejecting the comments has been alternatively based on the rather limited textual support of the “concise general statement” provision or on the federal requirement of agency “consideration of relevant matter presented.” The more demanding requirement of the Illinois Act that the agency “fully consider” all submissions should be similarly interpreted.

Many of the most important developments surrounding notice-and-comment rulemaking are incomprehensible without the notion of the “rulemaking record.” Such a record is a necessary precondition for the mandated judicial enforcement of the rulemaking procedure of section 5. This informal rulemaking record would include, under the Illinois Act, the agency’s proposed rules, its statement of the “issues” raised by the rulemaking, tentative empirical findings, important expert advice, a description of the critical experimental and methodolog-

88. REVISED MODEL STATE APA, supra note 13, § 3(a)(2).
90. 5 U.S.C. § 553(c) (1976).
91. IAPA § 5(c), ILL. REV. STAT. ch. 127, § 1005(c) (1977). An agency’s statement of reasons is equally important to a court making the “substantive” decision as to the rule’s rationality.
93. See text accompanying notes 19-29 supra.
94. Wright, supra note 3, at 396.
96. In Kencott Cooper Corp. v. EPA, 462 F.2d 846 (D.C. Cir. 1972), the court recognized and exercised its common law authority to require the administrative agency to explain the basis of a rule made pursuant to the notice and comment procedure. 462 F.2d at 850. See also Natural Resources Defense Council, Inc. v. EPA, 478 F.2d 875, 881 (1st Cir. 1973).
97. See text accompanying notes 60-68 supra.
cal techniques on which the agency intends to rely, and written or oral responses given by interested parties. Further, it would lay out the final rule. An accompanying statement should both justify the rule and explain its normative and empirical predicates by referring to those parts of the record generated by the earlier proceedings. "Consequently, a proper record must reflect all of the relevant views and evidence considered by the rulemaker, from whatever source, and—like a mini-history—it must reveal if and how the rulemaker considered each factor throughout the process of policy formation." The strong movement toward requiring that an identifiable rulemaking record be before the agency when final rules are issued and allowing judicial review only on that record stems ultimately from the simple perception that full consideration of relevant factors requires agency specification of what those factors are. This minimally requires, practically speaking, that a "bundle of paper [be] brought together in one place." This movement, begun largely by the federal decisions that review of agency informal rulemaking be based on the "full administrative record," has been accepted and developed by Congress in a number of recent statutes granting agency rulemaking authority. In Illinois, the sophisticated rulemaking procedures of the Illinois Environmental Protection Act are part of the same movement, and offer courts a model of the kind of procedures which may be judicially applied to other agencies as part of its duty to enforce the "full consideration" requirements of section 5. As Professor Davis

98. Wright, supra note 3, at 395.
100. Davis, supra note 3, at § 6:10 at 488.
101. Davis, supra note 3, at § 6:10 at 488.
102. See Stewart, supra note 3, at 1781-84.
103. Davis, supra note 3, § 6:10 at 491.
105. The Clean Air Act Amendments of 1977, 42 U.S.C.A. § 7607(d)(6)(A)-7607(d)(6)(B) (1978), for example, provide:

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.
(6)(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.
107. The notion that the review of agency rules created pursuant to informal rulemaking procedures is "on the rule-making record" has already begun to appear in Illinois. See note 112 infra.
has argued:

Although a statute which by its terms applies only to Agency A obviously does not apply to Agency B, still when both legislators and judges are groping on difficult problems of creating a good system of rulemaking, an idea expressed in a statute that pushes out the frontier of understanding is obviously available for use in any context by judges or administrators or legislators.

The further development of rulemaking procedure is so vital that all minds that may contribute ideas should be encouraged to do so. Judicial minds clearly should be free to go anywhere for new ideas, including statutes applying to single agencies, and they should be encouraged to add what they can to those ideas, with a view to perfecting a mechanism that can be fair and effective.108

It is not suggested that a court should transfer all the procedures which a statute requires of one agency to the rulemaking procedure of another. Other statutes, however, may provide guidance to a court seeking to interpret the IAPA. It should be noted at this point that the concept of a “rulemaking record” does not in any way transform informal rulemaking, “one of the greatest inventions of modern government,”109 into adjudication110 or impose Procrustean formalities on rulemaking. With the qualifications noted below, the agency may still bring its expertise to bear on particular problems. “[T]here still is room for agency expertise to roam. All that is required is for the agency to say where it has been.”111

The notion of an informal rulemaking record is the background for the major “procedural” questions to be addressed by Illinois courts in interpreting the IAPA’s requirements of “reasonable opportunity to submit data, views, arguments or comments” and the agency’s obligation to “consider fully all submissions respecting the proposed rule.”112

108. DAVIS, supra note 3, § 6:11 at 494-95.
110. The distinctions between trial procedure for rulemaking and informal rulemaking have been catalogued. See DAVIS, supra note 3, § 6:4 at 459-60.
111. Verkuil, supra note 3, at 248.

The shared assumption of those decisions is that the “reasonableness” of an administrative rule is to be assessed on the basis of the rulemaking record. The cases differ in the degree and
One such issue is whether the IAPA mandate of full consideration requires the agency to respond to comments submitted by "interested persons." Although it would be impractical, at least where many submissions were received, to "discuss in detail every item of fact or opinion included in the comments submitted to it,"\(^{113}\) it is impossible to conclude that full consideration was given to submissions unless the agency has responded to at least those comments which raise crucial factual, legal, or policy considerations.\(^{114}\) In *Portland Cement Association v. Ruckelshaus*,\(^{115}\) for example, the court remanded the case to the agency largely because of the latter's failure to respond carefully to submissions which criticized the standards for industrial pollution contained in proposed rules.

Another issue which the existence of a rulemaking record will present to Illinois courts concerns factual support for the rule. Even obviously "legal" questions such as the statutory authority to issue particular rules will often turn on the existence of particular facts,\(^{116}\) and the "arbitrariness" of rules may be a partially factual question.\(^{117}\) Two distinct yet related questions arise in this context: whether regulations must be supported by facts and, if so, whether such facts must appear in the "rulemaking record" before the agency or be presented for the first time before a reviewing court.

Neither question can be given an unqualified answer. The older view, now in decline in federal administrative law, held that "where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches form of the scrutiny to be given the record. In *Shell Oil* and *United States Steel* the court was content merely to assure itself that the rulemaking process had been conducted in a thorough and procedurally adequate way. In *Commonwealth Edison*, the court conducted a much more demanding review of the evidence in the informal rulemaking record. Even the *Shell Oil* court indicated that where the agency's technical expertise was not a significant factor in the rulemaking, the court's review of the rulemaking record should be more searching, "analogous to that of an appellate court reviewing a trial court's decision." 37 Ill. App. 3d at 271, 346 N.E.2d at 218.

\(^{113}\) General Tel. Co. v. United States, 449 F.2d 846 (5th Cir. 1971).

\(^{114}\) See *Davis*, supra note 3, at § 6:26 at 581, which points out that the federal Department of Energy Organization Act, 42 U.S.C. § 7191(d) (1976), and the Clean Air Act Amendments, 42 U.S.C. § 7607(d)(7) (1976), specifically require such response. Such provisions are in accord with the historical pattern in administrative law, and with the federal APA itself, by which common law is codified by the legislature.


\(^{117}\) Currie & Goodman, supra note 116, at 42-43.
alike to statutes, to municipal ordinances, and to orders of administrative bodies." Furthermore, it was assumed that any facts which a challenger might present to demonstrate the invalidity of a rule would be presented for the first time in the reviewing court.

The court in *Portland Cement Association v. Ruckelshaus* expressed the more recent thinking on both points. That court stated:

It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data or on data that, [to a critical degree, is known only to the agency. . . . Information should generally be disclosed as to the basis of a proposed rule at the time of issuance.

Judicial review on factual matters normally is limited to subjects raised by aggrieved parties in the administrative proceedings. In a significant number of federal cases agency regulations have been remanded for failure to have crucial factual support within the rulemaking record. "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."

On the other hand, a reviewing court's reluctance to engage in large-scale factfinding probably should not become an absolute rule prohibiting any factfinding by a court reviewing an agency's rules. Minimally, a litigant should be permitted to introduce evidence on matters which were not relevant to the rulemaking procedure, but which may be significant to the review thereof, e.g., his standing to sue.

Both the doctrine that administrative rules must have factual support and the requirement that such support appear in the rulemaking record are in a state of development. Thus, their exact confines are

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119. See Davis, supra note 3, § 6:13, at 507.
121. Id. at 393-94.
124. See Currie & Goodman, supra note 116, at 41-61. The Illinois Administrative Review Act, ILL. REV. STAT. ch. 110, §§ 264-279 (1977) [hereinafter referred to as the IARA], which provides for review on an exclusive administrative record, id. § 272(c), probably does not apply to pre-enforcement review of administrative regulations. United States Steel Corp. v. Pollution Control Bd., 64 Ill. App. 3d 34, 380 N.E.2d 909 (1978). See also note 139, infra.
125. See Currie & Goodman, supra note 116, at 50. For an illuminating exchange on the appropriate record on which judicial review of rulemaking should be conducted compare Auerbach, Informal Rule Making: A Proposed Relationship Between Administrative Procedures and Judicial Review, 72 NW. L. REV. 15 (1977), with Davis, supra note 3, § 6:33 at 600-01.
difficult to identify. The question as to when rules must be supported by facts may, for the present, only be answered in vague, almost tautological, terms. There is a major difficulty in requiring all the factual premises, however general, to be stated explicitly in the rulemaking record: even the best decision makers are never fully conscious of all the elements of a problem and its solution that they actually consider when framing a rule. This seems to be a general characteristic of human intelligence, even in its scientific applications. On the other hand, a court may be more vigorous in demanding that the record indicate consideration of central, relatively specific, facts.

**Petitions for the Adoption of Rules**

Section 8 of the IAPA provides another important mechanism for public participation in agency rulemaking: the right of "[a]ny interested person" to petition for the promulgation, amendment, or repeal of a rule. "Interested person" should be given the same meaning it has in section 5, implying no limitation on the right of any individual or legal entity. The Revised Model State APA explicitly requires the agency either to initiate rulemaking proceedings within a specified period or to deny the petition in writing "giving reasons for the denials." In this regard the IAPA is similar to the federal APA which

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127. See generally id., § 6:17.
129. IAPA § 8, ILL. REV. STAT. ch. 127, § 1008 (1977), provides:

> Any interested person may petition an agency requesting the promulgation, amendment or repeal of a rule. Each agency shall prescribe by rule the form for petitions and the procedure for their submission, consideration and disposition. If, within 30 days after submission of a petition, the agency has not initiated rule-making proceedings in accordance with Section 5 of this Act, the petition shall be deemed to have been denied.

The importance of the availability of such a mechanism is discussed in Bonfield, supra note 34, at 892. The device may be especially important for the immediate future, since the bulk of existing agency rules have not been adopted pursuant to notice-and-comment, but were merely filed with and certified to the Illinois Secretary of State pursuant to section 6, ILL. REV. STAT. ch. 127, §§ 1006, 1007.01 (1977). Interested parties thus, almost never had an opportunity to comment on those rules before they were promulgated. Normally, of course, the existence of the right to petition does not relieve the agency of its obligation to publish proposed rules and consider comments before the promulgation of these rules as final. Wagner Elec. Corp. v. Volpe, 466 F.2d 1013, 1020 (3d Cir. 1972).

130. IAPA § 3.07, ILL. REV. STAT. ch. 127, § 1003.07 (1977) defines "person" as "any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than an agency."

131. Revised Model State APA, supra note 13, § 6. The full text of this section is as follows:

> An interested person may petition an agency requesting the promulgation, amendment, or repeal of a rule. Each agency shall prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition. Within 30 days after
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states, "Each agency shall give an interested person the right to petition for the issuance of amendment, or repeal of a rule." Federal agencies have been required to state their reasons for denying a petition under the latter provision, and it seems appropriate to require Illinois agencies to do the same. Whether Illinois courts will impose such a requirement is largely dependent on how they interpret the somewhat enigmatic last sentence of section 8. The question is whether that sentence allows agencies not to respond to petitions, suggesting perhaps that such action is not subject to judicial review, or whether the sentence simply provides finality to such inaction for purposes of further proceedings. The latter interpretation would, of course, imply no agency discretion not to respond to a petition, and, by strongly implying a right to judicial scrutiny of denials, suggest that the agency must respond. This interpretation seems to be the better one for several reasons. In those instances where the drafters of the IAPA wished to preclude judicial review of agency action, they did so explicitly. For example, section 9 of the Act makes agency declaratory rulings unreviewable. Furthermore, several states have explicitly made petitions for the adoption or change of rules unreviewable. The absence of such a provision in section 8 strongly suggests no legislative intent to preclude review. On the other hand, such review, for abuse of discretion, should probably be limited to an agency's refusal to adopt, amend, or repeal a rule which seriously jeopardizes basic statutory purposes. Of course, when the petitioner asserts a constitutional or statutory right to the adoption, amendment, or repeal, closer scrutiny is warranted.

submission of a petition, the agency shall either deny the petition in writing (stating the reasons for the denials) or shall initiate rulemaking proceedings in accordance with Section 3.

134. See note 129 supra.
137. See, e.g., N.C. Gen. Stat. § 150A-16 (Supp. 1977). In light of the federal cases, Professor Davis's judgment is that "[a] court is unlikely to refuse to consider whether a denial of a petition is unreasonable." Davis, supra note 3, § 6:28.
The IAPA and the Courts: Implications for the Review of Rules

Even in the absence of a statutory provision for judicial review of rules the relationship of Illinois courts to the rulemaking function of administrative agencies will be considerably altered by the adoption of the rulemaking provisions of the Illinois APA. Illinois courts will continue to overturn agency rules which are arbitrary, capricious, unreasonable, or beyond the scope of the agency’s delegated authority. Those “standards of review” will continue to serve quite nicely, supplemented with the enforcement of the procedural requirements of section 5. Nonetheless, the context in which they are applied is likely to be changed.

There will remain an area of “substantive” review which judicial scrutiny of the agency’s adherence to the “procedural” requirements of section 5 will not exhaust. However, a court, by ensuring that administrative rules were developed within the “framework for principled decision-making” which a “properly expansive reading” of section 5 provides, will promote reasoned and balanced policy-making. An agency which has given notice of its proposed rules, of the facts on


The Illinois Administrative Review Act, ILL. REV. STAT. ch. 110, §§ 264-279 (1977), does not, by its own terms, apply to rulemaking, and its purpose is quite clearly to provide for judicial review of agency adjudication. Id. §§ 264-269. A stated exception to the IARA’s inapplicability to regulations makes it applicable to regulations “involved in a proceeding.” Id. § 264. The exception allows a party involved in agency adjudication reviewable under the IARA to raise as an issue in the adjudication the validity of the underlying regulation. Id. § 264. It would be a strained reading indeed which would find the Act applicable to a pre-enforcement challenge to an agency rule on the ground that the rule was a product of a rulemaking “proceeding.” Such a construction was decisively rejected in United States Steel Corp. v. Pollution Control Bd., 64 Ill. App. 3d 34, 380 N.E.2d 909 (1978) despite ambiguous language in the Illinois Environmental Protection Act, ILL. REV. STAT. ch. 111 1/2, §§ 1001-1051, 1029, 1041 (1977). The IARA’s provision for an exclusive administrative record, and that limiting parties in judicial review to those who participated in the administrative proceeding are particularly inappropriate for the review of regulations.

140. See United States Steel Corp. v. Pollution Control Bd., 64 Ill. App. 3d 34, 40, 380 N.E.2d 909, 913 (1978) and the cases cited therein.

141. IAPA § 5(c), ILL. REV. STAT. ch. 127, § 1005(c) (1977).


143. See Wright, supra note 3, at 380.
which it has relied in formulating them, and its perception of the crucial issues involved, and which, having given interested parties the opportunity to comment, fully considers and carefully responds to the important comments is less likely to fall victim to "blind prejudice or . . . inattention to crucial evidence." It may well be true in this sense that "courts can more competently assess the rationality of the rulemaking process than the merits of the resultant rules."

If the ripeness doctrine does not prove a barrier to pre-enforcement review of administrative rules, the focus of Illinois courts will almost inevitably shift in part to the rulemaking process in assessing the "rationality" or "arbitrariness" of a rule. Illinois courts searching for the "appropriate balance between skepticism and deference," may be inclined to ask whether the requirements of section 5, expansively interpreted, have been met as a first step in the inquiry as to whether a rule is arbitrary. "The paramount objective is to see whether the agency, given an essentially legislative task to perform, has carried it out in a manner calculated to negate the dangers of arbitrariness and irrationality in the formulation of rules for general application in the future."

Illinois courts should be receptive to actions brought pursuant to section 5(c) of the IAPA to contest rules under an expansive reading of the requirements of adequate notice, reasonable opportunity to comment, and full consideration suggested above since agency adherence to such "procedural" requirements may, in some cases, obviate the need for "substantive" judicial review.

It would be extremely naive, on the other hand, to credit the power of purely procedural devices to achieve substantive fairness or to suggest that the boundaries of judicial review under the "arbitrary and capricious" standard should be coterminous with even an expansive

144. Id. at 393.
145. Id.
146. Illinois courts generally maintain that Illinois law is completely in accord with Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), which held that pre-enforcement review of regulations was permissible where "the impact of the regulations . . . is sufficiently direct and immediate as to render the issue appropriate for judicial review. . . ." Id. at 152. See Shell Oil Co. v. Pollution Control Bd., 37 Ill. App. 3d 264, 268, 346 N.E.2d 212, 224 (1976); Gromer Supermarket, Inc. v. Pollution Control Bd., 6 Ill. App. 3d 1036, 1043, 287 N.E.2d 1, 6 (1972). This liberal rule of ripeness does not extend to rules which have only been proposed, and not yet promulgated as final. Roth-Adam Fuel Co. v. Pollution Control Bd., 10 Ill. App. 3d 756, 295 N.E.2d 321 (1973).
147. See Verkuil, supra note 3, at 205.
148. Wright, supra note 3, at 395.
150. IAPA § 5(c), ILL. REV. STAT. ch. 127, § 1005(c) (1977).
reading of section 5. It is true that procedural and “substantive” modes of review may tend to merge. For example, a court convinced that an agency has promulgated a rule which frustrates an important statutory purpose may find that the agency could not possibly have fully considered a comment which so argues. Nonetheless, such judicial maneuvers may be needless, and often disingenuous, shuffles, leading to endless remands. Judge Wright is correct in saying that review of agency rules must be “substantive,” that is, it must not routinely engrain new procedural requirements, such as cross-examination, onto notice-and-comment rulemaking. But judicial review of agency rules under the arbitrary and capricious test in many circumstances requires a court to do more than merely assess, as a matter of empirical psychological fact, whether administrators “fully considered” factors contained in comments submitted. Such an inquiry would exclude from judicial scrutiny questions of the weight which should be reasonably given the various factors considered.151 The latter may be merely a question of scientific or technical judgment, deserving greater deference on the court’s part. It may be a political or ethical question, primarily assigning benefits and burdens to various groups or it may be a legal question, determining the primary purpose of a statute. Judges and commentators are just beginning to articulate the factors which should be relevant in deciding how much a court should defer to an agency’s judgment on the many competing considerations involved in rulemaking.152

151. See Stewart, supra note 3, at 1781-84.