



# AMERICAN BAR ASSOCIATION

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**STATEMENT OF**  
**THE AMERICAN BAR ASSOCIATION**  
**to the**  
**SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW**  
**of the**  
**COMMITTEE ON JUDICIARY**  
**of the**  
**UNITED STATES HOUSE OF REPRESENTATIVES**  
**concerning its hearing on**  
**“H.R. ---, THE REGULATORY IMPROVEMENT ACT OF 2007”**

**SEPTEMBER 19, 2007**

Madam Chairwoman, Ranking Member Cannon, and Members of the Subcommittee:

The American Bar Association, with more than 410,000 members nationwide, appreciates the opportunity to present this statement to the Subcommittee regarding today's hearing on "H.R. ---, the Regulatory Improvement Act of 2007" and the need to reauthorize and fund the Administrative Conference of the United States (ACUS). We ask that this statement be included in the official record of today's hearing.

The ABA strongly supports renewed reauthorization and adequate funding for ACUS, which was previously reconstituted and reauthorized by the enactment of the "Federal Regulatory Improvement Act of 2004" (P.L. 108-401, formerly H.R. 4917). Once ACUS is newly reauthorized and provided with the very modest funding that it needs to restart its operations, it can begin addressing the many important tasks that may be assigned to it by Congress, including for example, assessing and recommending possible administrative reforms within the Department of Homeland Security ("DHS") and its Federal Emergency Management Agency ("FEMA").

#### **BACKGROUND AND RECENT DEVELOPMENTS REGARDING ACUS**

ACUS was originally established in 1964 to serve as the federal government's permanent in-house advisor on, and coordinator of, administrative procedural reform. It enjoyed bipartisan support for over 25 years and advised all three branches of government before being terminated in 1995. ACUS was a bargain. It employed a permanent staff of just a few people while also retaining a number of academic consultants, on an as-needed basis, who received very modest payment for engaging in massive research tasks. ACUS also leveraged the volunteer efforts of a large number of administrative law luminaries—government officials, private lawyers, judges, and academics—who served in a variety of capacities and attended the bi-annual meetings for no compensation (other than travel reimbursement). Yet as more fully discussed below, ACUS had a stellar track record of

initiating government improvements and saving both the government and private sectors large sums of money.

In 2004, Congress held several hearings on ACUS reauthorization, and during those hearings, all six witnesses—including Supreme Court Justices Stephen Breyer and Antonin Scalia—praised the work and cost-effectiveness of the agency. The written statements of Justices Breyer and Scalia are available online at [http://www.abanet.org/poladv/documents/acusfunding\\_resources.pdf](http://www.abanet.org/poladv/documents/acusfunding_resources.pdf).

Following those hearings in 2004, H.R. 4917 was introduced by Rep. Chris Cannon (R-UT)—then-Chairman of this Subcommittee and now its Ranking Member—for the purpose of reauthorizing and resurrecting the agency. That bipartisan legislation ultimately garnered 35 cosponsors—including the current Chairman and Ranking Member of the House Judiciary Committee, Reps. John Conyers (D-MI) and Lamar Smith (R-TX), before being approved unanimously by the House at the end of the 108<sup>th</sup> Congress. The Senate companion bill, S. 2979, was cosponsored by the current Chairman of the Senate Judiciary Committee, Sen. Patrick Leahy (D-VT), and by Sen. Orrin Hatch (R-UT), and it was approved in the Senate by unanimous consent. President Bush then signed the legislation into law on October 30, 2004 as P.L. 108-401.

Although ACUS was reauthorized with overwhelming bipartisan support with the passage of P.L. 108-401, that statute only reauthorized the agency through fiscal year 2007. Therefore, the ABA supports H.R. ---, the “Regulatory Improvement Act of 2007,” which would renew ACUS’ reauthorization through fiscal year 2011.

### **BENEFITS OF REAUTHORIZING ACUS**

The ABA believes that a reauthorized and adequately funded ACUS would provide many benefits to the American people at minimal cost. At the request of Rep. Cannon, the Congressional Research Service (“CRS”) prepared two studies in October 2004 and September 2005 describing the prior successes of ACUS and the many benefits that could be realized once the agency is

reconstituted.<sup>1</sup> As CRS explained in those studies, ACUS proved to be an extremely useful agency for many years, and once it receives the modest funding that it needs to resume its operations, it will provide many valuable benefits to the American people, including the following.

First, a reactivated and operational ACUS could objectively review and assess the relationship between DHS and FEMA and recommend possible administrative reforms designed to help both agencies better prepare for and respond to future terrorist or natural disaster incidents. As CRS noted in its September 15, 2005 memorandum, “the Katrina catastrophe has raised a number of questions as to the organization, authority and decision-making capability of...FEMA.” Although FEMA previously existed as an independent, cabinet-level agency, the agency was folded into DHS when the Department was created in 2002. As part of that process, FEMA was made subordinate to DHS and lost certain functions and resources. These and other administrative operating deficiencies contributed to ineffective planning and responses by Federal, State and local officials with regard to Katrina and other natural disasters. Therefore, CRS concluded, “a reactivated and operational ACUS could be tasked with reviewing, assessing and making recommendations with respect to FEMA’s role, where it should play that role [e.g., within DHS, as an independent agency, etc.], and the authorities it needs to fulfill that role.”

Second, a newly-reconstituted ACUS could provide urgently needed resources and expertise to assist with difficult administrative process issues arising from the 9/11 terrorist attacks against the United States as well as other new administrative issues. In response to the 9/11 attacks, Congress created DHS in November 2002 by consolidating all or part of 22 existing federal agencies. As CRS noted in its September 15, 2005 memorandum, “each of the agencies transferred to DHS had its own special organizational rules and rules of practice and procedure...(and) many of the agencies

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<sup>1</sup> The CRS Memorandum dated October 7, 2004 and titled “Points in Support of H.R. 4917, Bill to Authorize Appropriations for the Administrative Conference of the United States,” is available at [http://www.abanet.org/poladv/documents/acus\\_crs\\_7oct04.pdf](http://www.abanet.org/poladv/documents/acus_crs_7oct04.pdf). CRS also issued an updated memorandum on the merits of ACUS on September 15, 2005, which is available at: [http://www.abanet.org/poladv/documents/acus\\_crs\\_15sep05.pdf](http://www.abanet.org/poladv/documents/acus_crs_15sep05.pdf).

transferred have a number of different types of adjudicative responsibilities.” Unfortunately, the statute creating DHS is silent as to how these agencies’ adjudicatory programs should be combined and all of the transferred agencies have their own statutory and administrative rulemaking requirements that still need to be integrated. As a result, CRS concluded in its memorandum that the ongoing “process of integration and implementation of the various parts of the [DHS] legislation...is likely to need administrative fine tuning for some time to come...(and) ACUS has a clear role to play here.” As the debate over the current 9/11 Commission implementation legislation has shown, these issues remain problematic.

Third, a revived ACUS also could provide valuable analysis and guidance on a host of other administrative issues. In addition to helping DHS and FEMA to work more effectively, CRS noted in its September 2005 memorandum that ACUS could provide useful guidance on a number of other important administrative law issues. These include public participation in electronic rulemaking, the peer review process, agency avoidance of notice and comment rulemaking through the use of “non-rule rules,” possible codification of the process of presidential review of rulemaking instead of using executive orders, and possible refinements to the Congressional Review Act. A reauthorized and fully-funded ACUS could effectively address these and myriad other issues involving administrative process, procedure, and practice at a cost that is minimal when compared to the benefits that are likely to result.

Fourth, a reconstituted ACUS would continue to enjoy the strong bipartisan support and cost-effectiveness that all observers agree characterized the original agency. CRS noted in its September 2005 memorandum that “ACUS’ past accomplishments in providing non-partisan, non-biased, comprehensive, and practical assessments and guidance with respect to a wide range of agency processes, procedures, and practices is well documented.” ACUS was unique in that it brought together senior representatives of the federal government with leading practitioners and scholars to

work together to improve how our government functions. That collaboration has been sorely missed in many ways, as was so clearly brought out in the hearings.

As CRS also explained in its October 2004 memorandum, ACUS produced over 180 recommendations for agency, judicial, and congressional actions over the years, and approximately three-quarters of these reforms were adopted in whole or in part. Because ACUS achieved these impressive reforms with a budget of just a few million dollars per year, CRS noted that “all observers, both before and after the demise of ACUS in 1995, have acknowledged that the Conference was a cost-effective operation.” Once it is reconstituted, ACUS will continue to provide these same benefits.

Fifth, ACUS has a proven track record of success that the new agency will be able to expand and build upon. Before it was terminated in 1995, ACUS brought about many significant achievements. In addition to providing a valuable source of expert and nonpartisan advice to the federal government, ACUS also played an important facilitative role for agencies in implementing changes or carrying out recommendations. In particular, Congress gave ACUS facilitative statutory responsibilities for implementing a number of statutes, including, for example, the Equal Access to Justice Act, the Congressional Accountability Act, the Government in the Sunshine Act, the Administrative Dispute Resolution Act, and the Negotiated Rulemaking Act.

In addition, ACUS’ recommendations often resulted in huge monetary savings for agencies, private parties, and practitioners. For example, in its October 2004 memorandum, CRS cited testimony from the President of the American Arbitration Association which stated that “ACUS’s encouragement of administrative dispute resolution had saved ‘millions of dollars’ that would otherwise have been spent for litigation costs.” CRS also noted that in 1994, the FDIC estimated that “its pilot mediation program, modeled after an ACUS recommendation, had already saved it \$9 million.” ACUS also produced numerous reports and recommendations on a wide variety of national

security, civil liberties, information security, organizational, personnel, and contracting issues. A listing and description of 28 such reports is attached to the September 2005 CRS study as Appendix A. A reconstituted ACUS will continue to build on these earlier successes.

**ACUS' ROLE IN THE REGULATORY PROCESS IS SEPARATE AND DISTINCT  
FROM THAT OF OIRA**

In the past, some have suggested that ACUS' activities perhaps may duplicate some of the activities of OMB's Office of Information and Regulatory Affairs ("OIRA"). This reflects a misunderstanding of the roles that ACUS and OIRA play in the regulatory process.

As CRS explained in its detailed August 3, 2005 memorandum regarding the differing roles of ACUS and OIRA<sup>2</sup>, there are fundamental differences between the agencies with respect to their structures, missions, and "the nature and manner of their respective assessments of agency performance in the administrative process." CRS noted that while ACUS always had been "an independent, objective entity that was tasked with the unique role of assessing all facets of administrative law and practice with the single goal of improving the regulatory process," OIRA is "responsible for effectuating a given administration's regulatory agenda." For these and other reasons outlined by CRS, the activities of a reconstituted ACUS would not be duplicative of those conducted by OMB or OIRA.

**CONCLUSION**

The ABA has long supported ACUS and the role it played in advancing administrative procedural reform. In our view, ACUS proved itself to be highly-effective in promoting efficiency in government for over 25 years, and it was able to do so at a minimal cost. Now that the reauthorization for the agency is set to expire at the end of the current fiscal year, we urge you to support the pending legislation that would reauthorize the agency thorough fiscal year 2011. In

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<sup>2</sup> The detailed August 3, 2005 CRS memorandum comparing and contrasting the respective duties and objectives of OIRA and ACUS is available online at [http://www.abanet.org/poladv/documents/acus\\_crs\\_3aug05.pdf](http://www.abanet.org/poladv/documents/acus_crs_3aug05.pdf).

addition, once ACUS is reauthorized, we urge all members of the Subcommittee to support full funding for the agency, beginning with an appropriation of \$1 million for fiscal year 2008.<sup>3</sup>

Thank you for considering the views of the American Bar Association. If you have any questions regarding the ABA's views on these issues or need more information, please feel free to contact R. Larson Frisby of the ABA Governmental Affairs Office at (202) 662-1098 or [frisbyr@staff.abanet.org](mailto:frisbyr@staff.abanet.org).

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<sup>3</sup> The "Regulatory Improvement Act of 2007" would authorize \$1 million of start-up funds for ACUS for fiscal year 2008. The draft legislation also would authorize an additional \$3.3 million for fiscal year 2009, \$3.4 million for fiscal year 2010, and \$3.5 million for fiscal year 2011.