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August 1, 2007

The Honorable Robert C. Byrd
Chairman
Committee on Appropriations
United States Senate
Washington, D.C. 20510

The Honorable David Obey
Chairman
Committee on Appropriations
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Thad Cochran
Ranking Member
Committee on Appropriations
United States Senate
Washington, D.C. 20510

The Honorable Jerry Lewis
Ranking Member
Committee on Appropriations
U.S. House of Representatives
Washington, D.C. 20515

Re: Funding the Newly Reauthorized Administrative Conference of the United States for Fiscal Year 2008

Gentlemen:

On behalf of the American Bar Association (“ABA”) and its more than 415,000 members nationwide, I write to express our strong support for funding the Administrative Conference of the United States (“ACUS”) for fiscal year 2008 at the level of \$3.3 million. In particular, as Congress moves toward final action on the Financial Services and General Government Appropriations bill (or any of the other appropriations bills that you may deem suitable), we urge you to provide adequate funding for ACUS, which was reconstituted and reauthorized in the 108th Congress by the enactment of the “Federal Regulatory Improvement Act of 2004” (P.L. 108-401, formerly, H.R. 4917). Once ACUS is provided with this very modest funding, the agency will be able to restart its operations and 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”).

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. 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 testimony of Justices Breyer and Scalia is available at http://www.abanet.org/poladv/documents/acusfunding_resources.pdf.

Following these hearings, H.R. 4917 was introduced by Rep. Chris Cannon (R-UT)—then-Chairman of the House Judiciary Subcommittee on Commercial and Administrative Law and now the panel’s 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 108th 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.

At the request of Rep. Cannon, the Congressional Research Service (“CRS”) prepared two studies in October 2004 and September 2005 describing the many benefits of ACUS.¹ 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:

- 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.”

- 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 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.

¹ 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. 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.

● 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 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.

● ACUS enjoys strong bipartisan support and all observers agree that it has been extremely cost-effective. 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 of the private sector 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 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.”

● 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.” CRS 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.

● ACUS’ role in the regulatory process has been, and will continue to be, totally 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

OIRA², 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.

In sum, now that Congress has expressed its bipartisan support for ACUS by enacting legislation reconstituting the agency, ACUS should be provided with the very modest resources that it needs to restart its operations without unnecessary delay. To accomplish this goal, we urge you to provide at least \$3.3 million in funding for ACUS for fiscal year 2008.

Thank you for considering the views of the ABA on this important issue. If you would like to discuss the ABA’s views in greater detail, please feel free to contact the ABA’s senior legislative counsel for administrative law issues, Larson Frisby, at (202) 662-1098, or the Chair of the ABA Administrative Law Section, Daniel Troy, at (202) 736-8304.

Sincerely,



Denise A. Cardman
Acting Director

cc: The Honorable Richard J. Durbin
The Honorable Sam Brownback
All other members of the Senate Committee on Appropriations
The Honorable Steny H. Hoyer
The Honorable Jose Serrano
The Honorable Ralph Regula
All other members of the House Committee on Appropriations
The Honorable Patrick J. Leahy
The Honorable Arlen Specter
The Honorable Charles Schumer
The Honorable Jeff Sessions
The Honorable John Conyers, Jr.
The Honorable Lamar S. Smith
The Honorable Linda Sanchez
The Honorable Chris Cannon

² 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.