Testimony of Sally Katzen

before

The Committee on the Judiciary

Subcommittee on Commercial and Administrative Law

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on the

"Administrative Conference of the United States"

Chairman Cohen, Members of the Subcommittee. Thank you for inviting me to testify today about ACUS -- the Administrative Conference of the United States.

As you know, I have spent the greater portion of my professional life over the last four decades in the field of administrative law. I was in private practice, as an associate and then a partner, at Wilmer Cutler & Pickering, here in Washington, specializing in communications law. During the Carter Administration, I was the General Counsel and then Deputy Director of the President's Council on Wage and Price Stability. I then returned to Wilmer Cutler & Pickering, continuing my practice in administrative and regulatory law. In 1988, I became the Chair of the American Bar Association's (ABA) Section on Administrative Law and Regulatory Practice. In 1993, I was confirmed by the Senate to be the Administrator of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB), where I served for over five years as the person responsible for developing and implementing the Clinton Administration's regulatory policy. I then served as the Deputy Assistant to the President for Economic Policy and Deputy Director of the National Economic Council, and then as the Deputy Director for Management of OMB until January 20, 2001. After leaving the federal government, I taught administrative law and related subjects at the University of Michigan Law School, George Washington University Law School, George Mason University Law School, and the University of Pennsylvania Law School, and I also taught seminars in American Government to undergraduates at Smith College, Johns Hopkins University, and the University of Michigan in Washington Program.

More relevant to today's hearing is my experience with ACUS. I was first appointed a Public Member in 1988 while I was in private practice. I served on several of the ACUS committees, eventually chairing the Committee on Judicial Review. As a result of my committee

membership, I was actively involved in the preparation and presentation of various ACUS reports and recommendations in the late 80's and early 90's. In l993, President Clinton appointed me as one of the five government members of the Council (the governing board of ACUS) and designated me as the Vice Chairman. I served in that capacity (and for a time as Acting Chairman) until ACUS was closed in 1995.

I was privileged to testify before this Committee on April 21, 1994, in my capacity as Acting Chairman in support of reauthorization of ACUS. [A copy of that testimony was reprinted in 8 Admin.L.J.Am.U.649(1994)] I testified here again on ACUS on June 24, 2004, applauding this Committee's efforts -- which were ultimately successful -- in securing the reauthorization and then appropriations for ACUS. And I was honored to be asked to Chair a briefing on ACUS for Congressional staff and other interested individuals, which was convened by this Committee on April 15, 2009.

There is a most extraordinary group of people who are testifying today about the importance of ACUS, the significant substantive contributions it made during its first incarnation (both jurisprudentially and in terms of increasing the efficiency of administrative processes without decreasing fairness for the participants), and the array of contributions it can make in the future. Rather than dwell on those matters, I thought I could speak, with some credibility, to a question that has been asked from time to time: Why do we need ACUS to do what it does? Or, more pointedly, aren't there other entities that can do what ACUS does, if not in the federal government, then in the private sector?

Based on my experience in the private sector, the public sector and the academy, I firmly believe that no other entity can do what ACUS can do. I am not simply saying that no other entity can do it as well or as efficiently; I am saying that no other entity can do it period. To understand why there is no real alternative to ACUS, it may be helpful to set out, in some detail, how ACUS was structured and how it operated, on the assumption -- which I believe to be the case – that the past will be the model for the newly reconvened ACUS in most significant respects.

As you have heard from others, ACUS consisted of a Chairman (nominated by the President and confirmed by the Senate), supported by a very small staff, a Council (similar to a board of directors), and an Assembly. Both the Council and the Assembly included government officials and so-called Public Members drawn from the private sector. The government officials were typically high-level agency political appointees with responsibility for their agencies'

administrative programs and senior career civil servants (professional staff) who had first-hand experience with, and institutional knowledge of, their agencies' processes and procedures. The Public Members were private practioners (including those from the public interest community) and scholars in the field of administrative law from the best universities.

The composition of the Council and the Assembly meant that a relatively modest amount of taxpayer funding (less than $3 million annual appropriations) was leveraged by the far greater contributions in kind by practicing lawyers and academics; in other words, it was a very good deal for the taxpayers and, as others have testified, the federal funds were more than paid back by the savings generated by implementing ACUS recommendations. But more importantly from my perspective was the benefit that the mix of government officials and private sector representatives brought to the deliberative process that produced ACUS recommendations. The officials from the agency or agencies that were the subject of the recommendation(s) saw the process from the inside; the practioners saw it from the outside; and those from the academy (who usually did not have hands-on experience with the program(s)) had the ability (and the time) to do in-depth thorough studies and evaluations, including empirical research on difficult (entrenched or systemic) problems. The latter was critically important because while agency staff and/or practioners had the facts, they simply lacked the time (or inclination) for thoughtful reflections and comparisons among different agencies. Finally, the contributions of other government officials could not be overstated. I remember several occasions when a proposal to address an agency-specific problem was debated in the Assembly and an official from another agency would say "actually, we tried that [in this context] and it worked" or "we tried that and it didn't work because . . .." These exchanges, among people who came from and brought with them varied perspectives, were invaluable in reaching a sensible recommendation.

Another critically important feature of ACUS was the long-standing and time-honored tradition of appointing members of both the Council and the Assembly (and committee membership) across party and philosophical lines. ACUS was thus one place where Democrats and Republicans worked together, regardless of which party controlled the White House. We might have disagreed (strenuously) on the threshold question of whether there should (or should not) be a government program in an area – but if, in the wisdom of Congress, there was to be such a program, we could all agree that it should be conducted fairly and efficiently – whether in rule making, or licensing, or adjudication.

Invariably, administrations change, and with each new administration there are some bright new ideas about how to conduct or carry out administrative processes. Some of these ideas are fresh and productive and welcome. Some, however, may sound good or appear simple at first look, but they have in fact been tried before and failed or are seriously flawed for one reason or another. What ACUS provided was a forum for those who worked and wrote in the field – those who were in the current administration and those who had been in past administrations, and those who had never been in government service and may never have aspired to government service - to discuss, evaluate, provide constructive suggestions and eventually reach consensus. In short, ACUS was unique in both its structure and its approach to its mandate, and this was, and will be, its strength.

So returning to the question: why can't another entity do what ACUS does? First, look at the Executive Branch. Having spent considerable time there in various capacities, I am convinced there is no other agency that can undertake the necessary analysis, debate the merits of the resulting proposal, and reach considered consensus informed by real life experience but not influenced by partisan politics.

Surley, an individual agency cannot address in such a constructive way the issues that might arise from its own administrative procedures or practices. Apart from the fact that the agency may have an investment in the way it designed its programs and may well be reluctant to concede that it did not do it right in the first instance, an agency has limited discretionary resources and agency officials are understandably reluctant to commit those resources to looking back and studying how the agency does its business, whatever the criticisms that might arise from interested parties appearing before the agency. Instead, agency officials generally are focused, as they should be, on advancing the agency's mission (whether it be pro-regulatory or deregulatory) and in anticipating or reacting to the problems within its jurisdiction that get traction with the administration or the public. Moreover, senior officials at one agency rarely have any experience with how other agencies conduct their business and are therefore not well suited to make any cross-agency comparisons.

An agency that has been mentioned as a possible alternative to ACUS is OMB, and specifically OIRA. As a former Administrator of OIRA, I can attest to its unsuitability for such an assignment. It does not have the staff, the resources, or the time to devote to in-depth study of agency administrative practices – let alone undertake any empirical research -- even with respect

to those practices that are demonstrably problematic and contributing to less than optimal decision-making by the agencies. OIRA also does not have the first-hand experience that agency staff has with the problems that plague various programs, nor does OIRA have the real life experience of those practicing before the agency. Another oversight agency that gets mentioned as a possible alternative to ACUS is the Department of Justice (DOJ). While I have not worked at DOJ (since the summer following my freshman year in law school), I do not know of any natural home (Division or Office) for such a function at DOJ or any reservoir of expertise in the types of administrative law issues that have been the staple of ACUS recommendations. Also, I cannot imagine that DOJ (or even OMB for that matter) could command the attention and resources of other Executive Branch agencies (let alone, the independent regulatory commissions whose representation on ACUS is statutorily mandated) or of people in the private sector (either private practioners or academics) to help it understand and address these issues. And OMB or DOJ or any other Executive Branch agency will surely be seen as reflecting the policies and preferences of the President, rather than a bi-partisan or non-partisan consensus.

So let's turn to the private sector, where there are academic institutions, think tanks and bar associations familiar with – indeed, engaged in studying and commenting on -- administrative practices. To be sure, these entities work on these issues from time to time, but they are often self selected projects chosen on the basis of considerations other than administrative efficiency or fairness; for example, academics may choose subjects they think are likely to lead to publishable articles – the coin of their realm -- and think tanks may undertake projects that reflect the preferences of their contributors. In any event, while those associated with universities and think tanks can do in-depth studies (including empirical research), they do not have guaranteed access to the underlying data, the practical experience of those at the agencies, or the ability to secure the attention or involvement of other government officials.

With respect to bar associations, the most likely candidate would be the ABA Section on Administrative Law and Regulatory Practice, which I Chaired in the late 1980's. The Ad law Section has a mandate similar to ACUS and includes among its members those with government experience, private practioners and administrative law professors. It is a volunteer organization, and while members of the Section devote their time and talents, it is rare that any are able to make the extended contributions necessary to conduct empirical studies or do a thorough analysis of the subject matter being considered. Also, despite aggressive outreach over the years, the Section

has only a limited number of government officials, and it has no means (other than courtesy and/or persuasion) to obtain the cooperation or input of agency personnel who may be directly affected, or the views of senior government officials from across the government. In addition, recommendations from the Ad Law Section must be approved by the Association as a whole (typically through debate and votes in the House of Delegates). Regrettably, administrative law is not easily understood by those who are not engaged in it (Justice Scalia has called it "arcane," which may be an understatement), and the subject does not command much interest compared to more sexy topics such as individual rights or national security.

For these reasons, I would state categorically, based on my experience, that there is no viable alternative for ACUS. Therefore, if you are persuaded, as I am, that the function ACUS performs is important and contributes to good government, you should agree that the Administration must quickly stand up ACUS and the Congress must do everything in its power not only to encourage the resumption of a fully functioning ACUS but also to ensure that we do not have another unhappy hiatus in its operations as has been the case for the last 15 years.

I recognize that the Administration has a lot on its plate, but this is wholly within its hands at this point. The President showed exceedingly good judgment in selecting a prominent person with exceptional credentials in the field of administrative law to be the Chair; and fortunately Paul Verkuil was relatively quickly confirmed by the Senate. It is now time for the President to name the Council and let the Chair and the Council convene the Assembly so that important work can be done.

For the Congress, the task is equally straightforward but less in your control. This Committee was instrumental in reauthorizing ACUS and persuading your colleagues to provide funding. But unlike authorizations, appropriations are almost always on an annual basis, and it was the inability to be funded in 1995 that led to ACUS' being closed down. This Committee has heard on several occasions about the cost of that shutdown – including the absence of ACUS recommendations, the lost opportunities for more efficient and effective administrative practices, and the loss of ACUS's sentient institutional memory. Given the lead time necessary to stand it up again, the hiatus continues and we are all the poorer for that. To the extent you can set an example by permanent authorization for ACUS, to the extent you can prevail on your colleagues to support ACUS funding, and to the extent you remain staunch supporters of ACUS, those of us who care about good government and sound and sensible administrative procedures will be deeply grateful.

Thank you and I would be happy to answer any questions you may have.