STATEMENT OF JEFFREY S. LUBBERS

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HEARINGS BEFORE THE

SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
COMMITTEE ON THE JUDICIARY,
U.S. HOUSE OF REPRESENTATIVES

ON

THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
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Mr. Chairman and Members of the Committee:

I am pleased to be here today to discuss the revived Administrative Conference (ACUS). I was a career attorney at ACUS from 1975 until 1995 and served as its Research Director for the last 13 years of that period. Since 1996 I have been on the faculty of American University's Washington College of Law, where I am now Professor of Practice in Administrative Law. I was invited to testify by this Committee in 2005 and 2007 at hearings in which I supported ACUS's reauthorization,[1] so I am thrilled to be here today to mark ACUS's rebirth—an event that is happening thanks primarily to this Committee's bi-partisan support. The support of Justices Scalia and Breyer was also invaluable in shining a spotlight on the need for ACUS, the American Bar Association provided steadfast support, and the Congressional Research Service has compiled a legislative record that has helped all of us to make a compelling case for ACUS's return.

Needless to say, it is very unusual for an agency to go on a 14-year hiatus, and this presents some interesting challenges to get it going again. Fortunately the Administrative Conference Act, as amended, still offers an excellent blueprint and foundation for the Conference's work and Chairman Verkuil is an excellent choice to provide the leadership necessary to meet these challenges. I would say that even if he had not asked me to serve as a consultant to assist him in beginning this effort.

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* Professor of Practice in Administrative Law, Washington College of Law, American University. (ACUS Staff Attorney (1975-82); ACUS Research Director (1982-1995). I am currently serving as a consultant to the Office of the Chairman, assisting in the agency's re-establishment.

[1] *See* Statement of Jeffrey S. Lubbers, Hearings Before the H. Subcomm. on Commercial & Admin. Law, Comm. on the Judiciary, on "The Administrative Process and Procedures Project," (Nov. 1, 2005) and Statement of Jeffrey S. Lubbers, Hearings Before the H. Subcomm. on Commercial & Admin. Law, Comm. on the Judiciary, on "The "Regulatory Improvement Act of 2007" (Sept. 19, 2007).

In that regard I should say that the views I express in this testimony are my own and do not necessarily represent Chairman Verkuil's or the agency's and I have not cleared this testimony with anyone.

As your staff knows, I was an advocate for keeping the Administrative Conference Act fundamentally as it was in 1995—and I appreciate that you have done that. Like the Administrative Procedure Act, it is a remarkably flexible and adaptable law—perhaps because the legendary Administrative Law Professor Walter Gellhorn had a big role in drafting each of them. Of course, today's problems, and the landscape of today's government are somewhat different from those of 1995, so there may be a need for a tweak or two in the statute as ACUS goes forward, but the basic tensions in our administrative procedure between fairness and efficiency, discretion and accountability, formality and informality, and openness and confidentiality continue to exist. And it is a big part of ACUS's mission to help find the right balance between those poles in various contexts.

This Committees' excellent December 2006 Committee Print,[2] provides a wealth of information about ACUS's past operations and accomplishments, as well as numerous suggestions for possible topics for ACUS to undertake, and Chairman Verkuil's statement provides a good summary of some of these matters as well. I myself provided a long list of possible topics back in 2005, and would be happy to talk about them in the question period, but what I thought I might contribute today is sort of an insider's look at how ACUS and its small staff functioned in practice.

Of course the real *raison d'être* of this agency is the public-private partnership—the membership that is so carefully delineated in the Administrative Conference Act. These (maximum) 101 members form a diverse group of experts—each of whom brings something to the table when considering recommendations for improvement in government procedures. The Chairman and the Council provide the policy direction, but the full Assembly of members—including savvy experts like Sally Katzen—is the great resource of the Conference.

The government members in this Assembly—a mix of political appointees and career civil servants—were for the most part the best and the brightest in their agencies. And the 40 or so non-government "public members" were chosen both for their expertise and their diversity. The five Senate-confirmed Chairmen that I served under—three Republicans and two Democrats—each took this responsibility seriously and chose people from the full political spectrum. But ACUS members often left their political affiliations at the door. ACUS's bylaws stated that "Each member is expected to participate in all respects according to his [or her] own views and not necessarily as a representative of any agency or other group or organization, public or private." 1 C.F.R. § 302.2(a)(1) (1995). This may have been a little unrealistic in some situations, but I think that ethos did permeate Conference deliberations. The debates were nearly always civil, and what persuaded people was the force of the speaker's arguments and not whom they represented. It is also worth remembering that the time of all these members is donated, and if one calculated the billable hours of these members for each year, it would probably exceed

[2] H. SUBCOMM. ON COMMERCIAL & ADMIN. LAW, 109TH CONG. INTERIM REPORT ON THE ADMINISTRATIVE PROCEDURE LAW, PROCESS AND PROCEDURE PROJECT FOR THE 21ST CENTURY, (Comm. Print No. 10) (Dec. 2006).

ACUS's appropriations. I would reiterate something I said in my 2007 testimony: nowhere else would you see interest group lawyers, who were normally strong opponents in the world of litigation, lobbying, and politics, come together in a spirit of cooperation to seek consensus on process.[3] I firmly believe that the connections forged in the ACUS meetings helped increase civil discourse and reduce the level of partisanship in legal Washington.

The role of the Office of the Chairman's staff—never more than 20 FTEs—was to serve the membership, and to undertake all the other operational responsibilities that come with being an agency. I'm sure you realize that every agency, no matter how big or small, has to draft a continuous stream of budget and appropriations documents, various annual reports, and responses to correspondence and information requests. These duties can be burdensome for an agency with a very small staff, so everyone must pitch in.

And the mission-related work for the staff was also a mix of various duties. Obviously in order for the Conference to produce recommendations, there must be a research program producing authoritative research reports. We relied heavily on academic consultants to undertake these projects. We could recruit them for fairly small stipends because we could also offer them a large measure of academic freedom along with invaluable access to key government experts followed by peer review by ACUS members. So a big part of the Research Director's job was to develop proposed project topics for the Council and then find and recruit these consultants to undertake them.

Each ACUS committee was assigned a staff attorney to serve it. Once the research projects were underway and tentatively earmarked for one of the committees, the assigned ACUS staff attorney and I monitored the progress of the research, and offered critiques of the draft reports. When the reports and tentative recommendations were ready for review, the committee would begin its consideration. The ACUS staff attorney worked closely with the committee chair and the consultant to schedule meetings, which were noticed in the Federal Register and open to the public. These meetings were held in order to consider and hopefully reach consensus on recommendations to be sent to the next plenary session of the Assembly. Typically the draft recommendations were put out for public comments as well.

At the plenary sessions—also open to the public—the Committee Chair, with the consultant as a resource person, presented the committee's recommendation for approval. The debate that followed was according to Robert's Rules of Order and often resulted in changes or in some instances a remand to the Committee for more work. We normally had anywhere from two to five recommendations up for consideration at each plenary session.

Once a recommendation was officially approved, it was given a number such as for example "Recommendation 92-2," and then it was the job of the Office of the Chairman to work on "implementation." If possible, this was normally spearheaded by the staff attorney who worked on the project during the committee process. It involved meetings and correspondence with the Congress or executive branch recipients of the recommendation. The staff was expected to

[3] For a few examples of this kind of debate, see my article about Justice Breyer's participation in the plenary sessions, Jeffrey Lubbers, *Justice Breyer: Purveyor of Common Sense in Many Forums*, 1 ADMIN. L. J. AM. U. 775 (1995).

continually be on the lookout for targets of opportunity such as congressional hearings, agency rulemakings, etc.[4]

We were very fortunate to have a dedicated and stable group of staff attorneys during my tenure at ACUS. They had to do a little of everything—take minutes at Committee meetings, critique reports, wordsmith draft recommendations, help write Office of the Chairman sourcebooks and guides, interact with high-level or high-powered members of the Conference and then work on implementation of ACUS's body of recommendations. And on top of this, ACUS staff had to carry out special statutory responsibilities under the Administrative Dispute Resolution Act, Negotiated Rulemaking Act, Equal Access to Justice Act, and several other laws. All of ACUS's employees, except for the Chairman and his or her confidential assistant, were career civil servants, so we had to be, and I think we were, scrupulously non-partisan and supported the Chairman's agenda regardless of his or her political ideology.

The two other senior staff members—both career SES—also played key roles. The Executive Director made sure that all the budget and appropriations materials were prepared in a timely fashion and that all the administrative details of the operation were carried out. The General Counsel superintended the other relations with Congress and, and handled the many legal questions that came up.

I thought I would close by mentioning the biggest operational challenges we had from my point of view.

First, ACUS's membership is a quite a large one and that creates a lot of administrative responsibilities—just keeping up with the rosters, travel reimbursements, and professional communications with the members.

Second, the large body of ACUS recommendations issued over the years needed appropriate follow-up. These recommendations were not just issued as helium balloons let loose into the atmosphere to deflate somewhere in the blue yonder. No, they were issued to persuade the recipients—the agencies, Congress, sometimes the President or the Judicial Conference—to take the action suggested. In that regard, ACUS's lack of enforcement power was both its greatest strength and greatest weakness. The fact that ACUS is purely advisory meant that the agency members in the Assembly could participate in deliberations frankly and without concern that the group's conclusions were binding on them—and this willingness was a key to obtaining consensus. Now that I am teaching Administrative Law, I can look more dispassionately at ACUS's work product and conclude that ACUS has over its history produced a really excellent body of work—that has not only improved government operations, but also has influenced generations of administrative law scholars and their students.

On the other hand ACUS has no actual power. It cannot order anyone to do anything, so it was up to the Office of the Chairman to do everything it could to cajole and advocate for the recommendations. With nearly 200 recommendations, this meant that we had to not only

[4] For example, one of our staff attorneys co-authored an article with a Senator, see Sen. Charles E. Grassley & Charles Pou, Jr., *Congress, the Executive Branch, and the Dispute Resolution Process*, 1 J. DISP. RESOL. 1 (1992).

monitor a lot of developments, but we also had to prioritize and concentrate on the ones that were either the most pressing or that had the best chance of being adopted. It was also somewhat difficult to measure success in this area. Of course, if Congress enacted the recommended legislation—as did happen fairly often—we could check that one off. But sometimes only a part of the recommended law would be enacted, or in the case of a recommendation addressed to all agencies, some may take the suggested action and some not. We felt the need to measure our success in this area, and we did keep a running tally, but it was a challenge.

Third, in terms of new research, the challenges were to maintain a solid agenda of projects, both internally and externally generated, to keep the committees busy but not too busy, and to find the funding for empirically based studies. Attracting highly qualified academic consultants was not too difficult—there are many well-qualified administrative law professors who want to conduct studies and write articles. But we didn't just want studies that could be done in the law library—we wanted what former Chairman Robert Anthony called "eyeball and shoe-leather" research. That meant we wanted our consultants to interview agency and congressional staff and affected stakeholders. One of the Office of the Chairman's major attributes was that it could facilitate those interviews.[5]

Fourth, a part of the programmatic challenge was to find the funds to undertake larger, more empirically based, studies. ACUS did not have a line item in its budget for research, so, in inflationary times, operational expenses started to eat into the funds that we tried to set aside each year for research. And even in the best of times ACUS had difficulty in funding large-scale empirical research projects without extra assistance. Several times Congress specifically asked ACUS to undertake projects that required rather large empirical inquiries without providing additional funds.[6] This meant that other research had to take a back seat to those projects. On the other hand sometimes Congress did include a supplemental appropriation for a project.[7] Similarly, when other agencies asked us to undertake projects for them we sometimes had to ask them for funds to do them. Especially in the last years before ACUS closed, when our appropriation was reduced, we became dependent on outside funding for most of our research.

Thankfully, ACUS's statute made it possible to accept such contributions, but doing so also presented challenges in the sense that we had to make doubly sure that these projects could go

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[5] The Chairman has the statutory power to "request agency heads to provide information needed by the Conference, which information shall be supplied to the extent permitted by law." 5 U.S.C. § 595(c)(3).

[6] *See, e.g.*, ACUS's "IRS Project," resulting in Recommendations 75-5 to 75-10, and published in "REPORT ON ADMINISTRATIVE PROCEDURES OF THE INTERNAL REVENUE SERVICE, Sen. Doc. 94-286 (Oct. 1975). The study was "undertaken at the request and with the continuing cooperation and encouragement of Senator Joseph M. Montoya of New Mexico, Chairman of the Senate Appropriations Subcommittee on Treasury, Postal Service and General Government. *Id.* at III. Another example is ACUS's "FTC Rulemaking Study," resulting in Recommendations 79-1, 79-5, & 80-1, mandated by Pub. L. No. 93-637 § 202(d) (1975).

[7] *See* Pub. L. No. 101-370 § 3 (1990) (appropriating $50,000 and mandating that ACUS "shall conduct a study and evaluation of the administrative adjudicatory procedures of the Federal Aviation Administration and the National Transportation Safety Board and shall make a recommendation not later than 18 months after the date of the enactment of this Act as to whether the authority to adjudicate administrative complaints under the Federal Aviation Act of 1958 should remain with the Department of Transportation, should be transferred to the National Transportation Safety Board, or should be otherwise modified").

forward without undue influence from the funding sources. I believe we were successful in doing that, but I was always concerned about appearances and would have much preferred it if we could have counted on having enough of our own funds for research. In that regard, let me repeat a point I made in 2007. Because of its ability to attract researchers at bargain rates, and its in-place body of peer reviewers, ACUS is equipped to do research projects at a much lower cost than other entities. This is shown by one example of a project that Congress funded in 2004 when ACUS was in its hiatus—an $8.5 million study conducted by the National Research Council of the National Academies of just one aspect of the Social Security disability program.[8] I served as a member of the committee that oversaw that project and we spent about half of that amount on a nationwide empirical survey conducted under contract by a private firm. In my opinion, the result of that project, while useful, was not much better than what ACUS could have done for 2% of that amount. But 2% of that amount would still be $170,000—more than ACUS's typical annual research budget in the past. So I hope that as ACUS moves forward, this Committee will support funding that allows ACUS to really take on the important administrative process issues of today—because doing so will produce even bigger savings and payoffs for the government in the future.

In closing let me say that I plan to do everything I can do to help ACUS resume its essential activities. I have kept a lot of old files in my basement for 14 years and I am looking forward to returning them to their rightful place when the new office is up and running.

Thank you Mr. Chairman. I look forward to any questions you may have.

[8] *See* Public Law No. 108-203, "The Social Security Protection Act of 2004," 42 USC § 1305 note, Section 107(b), which authorized and appropriated up to $8,500,000 "for purposes of conducting a statistically valid survey to determine how payments made to individuals, organizations, and State or local government agencies that are representative payees for benefits paid under title II or XVI are being managed and used on behalf of the beneficiaries for whom such benefits are paid." I served (pro bono) on the National Academies Committee that undertook this study for the Social Security Administration, which resulted in a report, *Improving the Social Security Representative Payee Program: Serving Beneficiaries and Minimizing Misuse* (2007).