STATEMENT

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BEFORE THE

HOUSE SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY

CONCERNING

"REAUTHORIZATION OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES"

PRESENTED ON

SEPTEMBER 19, 2007

Madame Chair and Members of the Subcommittee:

I am honored to appear before this Subcommittee again today to discuss reauthorization and funding of the Administrative Conference of the United States (ACUS).

As you are aware, the Administrative Law, Process, and Procedure Project for the 21st Century (Project) has been a bipartisan undertaking of the House Judiciary Committee, overseen and conducted by your Subcommittee on Commercial and Administrative Law. It has had two principal goals: to reauthorize and to substantiate the need to reactivate the Administrative Conference of the United States (ACUS), and, simultaneously, to set in motion a study process that would identify the important issues of administrative law, process, and procedure that have emerged in the twelve years since its demise in 1995 that could serve as a basis for either immediate legislative consideration and action by the Committee or as the initial agenda for further studies by a reactivated ACUS.

Initial success was achieved by the Committee with respect to the first effort with the enactment of the Federal Regulatory Improvement Act of 2004, Pub. L. 108-401, on October 4, 2004, reauthorizing ACUS. But, as of this date, funding legislation has not been passed, and its initial reauthorization is to expire this month on September 30.

Action to accomplish the second goal was initiated by the Committee's adoption of an oversight plan for the 109th Congress, which made a study of emergent administrative law and process issues a priority oversight agenda item for the Subcommittee on Commercial and Administrative Law. The oversight plan identified seven general areas for study: (1) public participation in the rulemaking process; (2) congressional review of agency rulemaking; (3) presidential review of agency rulemaking; (4) judicial review of agency rulemaking; (5) the agency adjudicatory process; (6) the utility of regulatory analyses and accountability requirements; and (7) the role of science in the regulatory process. The Subcommittee, in turn, tasked the Congressional Research Service (CRS) with coordinating the research effort.

Together with my CRS colleagues Curtis Copeland, who is on today's panel, and T.J. Halstead, we assisted in the planning, preparation and conduct of hearings before this Subcommittee, public symposia, and empirical studies. In December 2006 we provided the Subcommittee with a 1,436 page Interim Report that provides detailed discussions of the emergent issues in each of the seven topic areas; 68 expert recommendations for further areas of study and possible legislative action, transcripts of the seven hearings held by the Subcommittee; a copy of the West study on "Outside Participation in the Development of Proposed Rules;" and copies of the proceedings of the Symposium on E-Rulemaking in the 21st Century (December 5, 2005), the Symposium on the Role of Science in Rulemaking (May 9, 2006), and the CRS Symposium on Presidential, Congressional, and Judicial Control of Rulemaking" (September 11, 2006). Many of the recommendations emanated from the hearings, symposia, and the West study.

It is anticipated that many of the results of the studies and symposia will be for further congressional consideration of these issues. Other results will be available to affected agencies and may inform or influence action to remedy administrative process shortcomings. In the view of many, however, the value in the long term of an operational ACUS for a fairer, more effective, and more efficient administrative process is inestimable, but sure, and is evidenced by the strongly supported congressional reauthorization in 2004. As you are aware, CRS does not take a position on any legislative options. It may be useful, however, for this

public record to re-state the rationale that appears to have been successful in supporting the passage of the ACUS reauthorization measure. And to describe the difficulties encountered by two of the CRS-sponsored empirical studies that may contribute to the debate on recreation of an ACUS-like institution.

ACUS' past accomplishments in providing nonpartisan, nonbiased, comprehensive, and practical assessments and guidance with respect to a wide range of agency processes, procedures, and practices are well documented.[1] During the hearings considering ACUS' reauthorization, C. Boyden Gray, a former White House Counsel in the George H.W. Bush Administration, testified before your Subcommittee in support of the reauthorization of ACUS, stating: "Through the years, the Conference was a valuable resource providing information on the efficiency, adequacy and fairness of the administrative procedures used by administrative agencies in carrying out their programs. This was a continuing responsibility and a continuing need, a need that has not ceased to exist." [2] Further evidence of the widespread respect of, and support for, ACUS' continued work at the hearings was presented by Supreme Court Justices Antonin Scalia and Stephen Breyer, both of whom worked with the ACUS prior to their judicial careers. Justice Scalia stated that ACUS "was a proved and effective means of opening up the process of government to needed improvement," and Justice Breyer characterized ACUS as "a unique organization, carrying out work that is important and beneficial to the average American, at a low cost."[3] Examples of the accomplishments for which ACUS has been credited range from the simple and practical, such as the publication of time saving resource materials, to analyses of complex issues of administrative process and the spurring of legislative reform in those areas.[4]

During the period of its existence Congress gave ACUS facilitative statutory responsibilities for implementing, among others, the Civil Penalty Assessment Demonstration Program; the Equal Access to Justice Act; the Congressional Accountability Act; the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act; provision of administrative law assistance to foreign countries; the Government in the Sunshine Act of 1976; the Railroad Revitalization and Regulatory Reform Act of 1976; the Administrative Dispute Resolution Act; and the Negotiated Rulemaking Act.

In addition, ACUS produced numerous reports and recommendations that may be seen as directly or indirectly related to issues pertinent to current national security, civil liberties,

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[1] See *e.g.,* Gary J. Edles, The Continuing Need for An Administrative Conference, 50 Adm. L. Rev. 101 (1998); Toni M. Fine, A Legislative Analysis of the Demise of ACUS, 30 Ariz. St. L.J. 19 (1998); Jeffrey Lubbers, "If It Didn't Exist, It Would Have to Be Invented."–Reviving the Administrative Conference, 30 Ariz. St. L.J. 147 (1998); Paul R. Verkuil, Speculating About the Next Administrative Conference: Connecting Public Management to the Legal Process, 30 Ariz. St. L.J. 187 (1998).

[2] C. Boyden Gray, Testimony Before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, Hearing on the Reauthorization of the Administrative Conference of the United States, 108th Cong., 2d Sess. (June 24, 2004).

[3] Hearing on the Reauthorization of the Administrative Conference of the United States, 108th Cong., 2d Sess. (May 20, 2004)(May 20, 2004 Hearing).

[4] Fine, *supra,* note 1 at 46. See also Gary J. Edles, The Continuing Need for an Administrative Conference, 50 Admin. L. Rev. 101, 117 (1998); Jeffrey Lubbers, Reviving the Administrative Conference of the United States, 51 Dec. Fed. Law 26 (2004).

information security, organizational, personnel, and contracting issues that often had government-wide scope and significance.

ACUS evolved a structure to develop objective, nonpartisan analyses and advice, and a meticulous vetting process, which gave its recommendations credence. Membership included senior (often career) management agency officials, professional agency staff, representatives of diverse perspectives of the private sector who dealt frequently with agencies, leaders of public interest organizations, highly regarded scholars from a variety of disciplines, and respected jurists. Although in the past the Conference's predominant focus was on legal issues in the administrative process, which was reflected in the high number of administrative law practitioners and scholars, membership qualification was never static and need not be. Hearing witnesses and commentators on the revival of ACUS have strongly suggested that the contemporary problems facing a new ACUS would include management as well as legal issues. The Committee can help assure that ACUS's roster of experts will include members with both legal backgrounds and those with management, public administration, political science, dispute resolution, and law and economics backgrounds. It could also encourage that state interests be included in the entity's membership.

All observers, both before and after the demise of ACUS in 1995, have acknowledged that the Conference was a cost-effective operation. In its last year, it received an appropriation of $1.8 million. All have agreed that it was an entity that throughout its existence paid for itself many times over through cost-saving recommended administrative innovations, legislation, and publications. At the heart of this cost-saving success was the ability of ACUS to attract outside experts in the private sector to provide hundreds of hours of volunteer work without cost and the most prestigious academics for the most modest stipends. The Conference was able to "leverage" its small appropriation to attract considerable in-kind contributions for its projects. In turn, the resulting recommendations from those studies and staff studies often resulted in huge monetary savings for agencies, private parties, and practitioners. Some examples include: In 1994, the FDIC estimated that its pilot mediation program, modeled after an ACUS recommendation, had already saved it $9 million. In 1996, the Labor Department, using mediation techniques suggested by the Conference to resolve labor and workplace standard disputes, estimated a reduction in time spent resolving cases of 7 to 11 percent. The president of the American Arbitration Association testified that ACUS's encouragement of administrative dispute resolution had saved "millions of dollars" that would otherwise have been spent for litigation costs. ACUS's reputation for the effectiveness and the quality of its work product resulted in contributions in excess of $320,000 from private foundations, corporations, law firms, and law schools over the four-year period prior to its defunding. Finally, in his testimony before the Subcommittee, when asked about the cost-effectiveness of the Conference, Justice Scalia commented that it was difficult to quantify in monetary terms the benefits of providing fair, effective, and efficient administrative justice processes and procedures.

I would note that ACUS' established credibility and nonpartisan reputation opened doors at federal agencies and allowed access to ACUS-sponsored research to internal operational information that normally would not have been been available otherwise. Justice Scalia remarked that, " I think the Conference's ability to be effective hinged in part on the fact that we were a government agency, and when we went to do a study at an agency, we were not stonewalled. Very often, a member of that agency was on our own Assembly, and so the agency would cooperate in the study that we did. I think its much harder to do that kind

of study from the outside. The agencies tended to look upon us as essentially people from the executive branch trying to make things better."[5]

Justice Breyer concurred, commenting on the American Bar Association's Administrative Law Section's attempts to do studies of agencies: "[W]hat the Conference could do that the Ad Law Section couldn't do is just what Scalia is talking about: they could get access to the information inside the Government and the off-the record reactions of people in charge of those agencies. So it produced a conversation that you can't have as easily just through the ABA." Justice Scalia underlined the point: "I was Chairman of the Ad Law Section for a year, and there's a big difference between showing up at an agency and saying, 'I'm from the American Bar Association, I want to know this, that and the other,' and coming from the Administrative Conference which has a statute that says agencies shall cooperate and provide information. It makes all the difference in the world."[6]

The CRS experience with its two sponsored empirical studies was disappointing for the very reasons alluded to by the Justices. Professor William West testified before this Subcommittee of the reluctance of most agencies to provide him with information vital to his study on public participation at the development stage of a rulemaking proceeding. His requests for information were often met with reluctance and suspicion and his most valuable contacts with knowledgeable officials were on deep background. With this potential obstacle in mind, when CRS considered a comprehensive study of science advisory panels in federal agencies to determine, among other things-- how many are there; how are members selected; how issues of neutrality and conflict of interest are handled; and the impact of advisory body recommendations on agencies decisionmaking-- we provided the research group at Syracuse University's Maxwell School of Public Administration with letters of introduction from the Director of CRS and the Chairman and Ranking Minority Member of this Subcommittee to assure agency officials of their bona fides and neutral academic purposes. That effort was of no avail and the agencies with the most advisory bodies, such as Health and Human Services, "closed their doors," refusing to respond to e-mail surveys and requests for personal interviews. As a last resort, CRS attempted to enlist the assistance of a former Hill client who was a senior official at the Office of Management and Budget, again to no avail. The result was a product that relied essentially on public documents which provided few insights with which to assess the workings of such important bodies. This was not the usual ACUS experience where agency cooperation was generally the rule. ACUS researchers were often welcomed because the results of their studies redounded to the benefit of the agency.

Reactivation of ACUS arguably would come at an opportune time. For example, the Department of Homeland Security's (DHS) response to Hurricane Katrina and its continuing efforts to stabilize and adjust its organizational units to achieve optimum efficiency and responsiveness in planning for and successfully dealing with terrorist or natural disaster incidents have been and are continuing to receive considerable congressional attention and criticism. Both these issues, and the role ACUS might play in resolving them, appear closely related.

The Katrina catastrophe, for example, raised a number of questions as to the organization, authority, and decisionmaking capability of DHS' Federal Emergency Management Agency (FEMA). Previously an independent, cabinet-level agency reporting

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[5] May 20, 2004 Hearing at 10.

[6] *Id*, at 17.

directly to the President, FEMA was made a subordinate agency in the creation of DHS and saw some of its authority withdrawn and placed elsewhere and its funding reduced. Suggestions were made that these and other administrative operating deficiencies contributed to ineffective planning and responses that included communications break-downs among federal, state and local officials, available resources not being used, and official actions taken too late or not taken at all, among others.[7] It was also suggested that FEMA revert to its previous independent status outside of DHS. In October 2006 Congress acted by "reassembling" FEMA as a "distinct" entity within DHS. A reactivated and operational ACUS could be tasked with reviewing, assessing and making recommendations with respect to FEMA's new role, how it should play that role, and the authorities it needs to fulfill that role, as well as assessing the need for more comprehensive authority for such emergency situations.

The terrorist attacks of September 11, 2001, have had, and will continue to have, a profound effect on governmental processes. One of the initial responses to the 9/11 attacks was the creation in November 2002 of the Department of Homeland Security (DHS), a consolidation of all or parts of 22 existing agencies. Each of the agencies transferred to DHS had its own special organizational rules and rules of practice and procedure. Additionally, many of the agencies transferred have a number of different types of adjudicative responsibilities. These include such diverse entities as the Coast Guard and APHIS which conduct formal-on-the record adjudications, and have need for ALJs; and formal rules of practice; the Transportation Security Administration and the Customs Service, which have a large number of adjudications but do not use ALJs and the transferred Immigration and Naturalization Service units which also perform discrete adjudicatory functions. The statute is silent as to whether, and to what extent, these adjudicatory programs should be combined and careful decisions about staffing and procedures still appear to be needed. Similarly, all the agencies transferred had their own statutory and administrative requirements for rulemaking which do not appear to have been integrated. Also, the legislation gives broad authority to establish flexible personnel policies. Further, provisions of the DHS Act eliminated the public's right of access under the Freedom of Information Act and other information access laws to "proprietary critical infrastructure information" voluntarily submitted to DHS. The process of integration and implementation of the various parts of the legislation goes on and is likely to need administrative fine tuning for some time to come. Again, a reactivated ACUS could have a clear role to play here. A recent report of the Government Accountability Office was critical of DHS's progress after four years in addressing its management and implementation problems.[8]

The recommendations of the 9/11 Commission with respect to reforms and restructuring of the intelligence community were recognized by the Commission as having the potential of profoundly affecting government openness and accountability. It noted:

> Many of our recommendations call for the government to increase its presence in our lives– for example, by creating standards for the issuance of forms of identification, by better securing our borders, by sharing information gathered by many different agencies. We also

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[7] See, *e.g.,* Susan B. Glassner and Michael Grunwald, Hurricane Katrina- What Went Wrong, Wash. Post., Sept. 11, 2005, A1, A6-A8.

[8] U.S. Government Accountability Office, "Department of Homeland Security: Progress Report on Implementation of Mission and Management Functions," GAO-07-1081T.

> recommend the consolidation of authority over the now far-flung entities constituting the intelligence community. The Patriot Act vests substantial powers in our federal government. We have seen the government use of the immigration laws as a tool in its counter-terrorism effort. Even without changes we recommend, the American public has vested enormous authority in the U.S. government.
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> At our first public hearing on March 31, 2003, we noted the need for balance as our government responds to the real and ongoing threat of terrorist attacks. The terrorists have used our open society against us. In wartime, government calls for greater powers, and then the need for those powers recedes after the war ends. This struggle will go on. Therefore, while protecting our homeland, Americans should be mindful of threats to vital personal and civil liberties. This balancing is no easy task, but we must constantly strive to keep it right. This shift of power and authority to the government calls for an enhanced system of checks and balances to protect the precious liberties that are vital to our way of life.

A reactivated ACUS could be utilized to facilitate the process of implementation of the restructuring and reorganization of the bureaucracy for national security purposes. ACUS could serve to identify measures that might slow down the administrative decisional process, thereby rendering the agency less efficient in securing national security goals; it could also assist in carefully evaluating and designing security mechanisms and procedures that can minimize the number and degree of necessary limitations on public access to information and public participation in decisionmaking activities that affect the public, and minimize infringement on civil liberties and the functioning of a free market.

Finally, in addition to the impact of 9/11, the decade long period since ACUS's demise has seen significant changes in governmental policy focus and emphasis in social and economic regulatory matters, as well as innovations in technology and science, that appear to require a fresh look at old process issues. For example, the exploding use of the Internet and other forms of electronic communications presents extraordinary opportunities for increasing government information availability to citizens and, in turn, citizen participation in governmental decisionmaking through e-rulemaking. A number of recent studies has suggested that if the procedures used for e-rulemaking are not carefully developed, the public at-large could be effectively disenfranchised rather than having its participation enhanced. My colleague, Curtis Copeland, will address the latest issues that have arisen with respect to the executive's attempts to get a government-wide e-rulemaking system up and running, issues that appear ripe for ACUS-like guidance.

The Interim Report identifies a number of emergent proven and procedural problems that merit attention. Among other public participation issues that may need study are the peer review process; early challenges to special provisions for rules that are promulgated after a November presidential election in which an incumbent administration is turned out and a new one will take office on January 20 (the so-called "Midnight Rules" problem); and the continued practice by agencies avoiding notice and comment rulemaking by means of "nonrule rules." Control of agency rulemaking by Congress and the President continues to present important process and legal issues. Questions that might be presented for ACUS study could include: Should the Congress establish government-wide regulatory analyses and regulatory accountability requirements? Should the Congressional Review Act be revisited? Is there an effective way to review, assess, and modify or rescind "old" rules? Is the time ripe

for codification of the process of presidential review of rulemaking that is now guided by executive orders?

On a positive note, a third study commissioned by CRS, which was unfettered by agency noncooperation, will be reported on next by Professor Jody Freeman of the Harvard Law School. Professor Freeman agreed to conduct a study which would analyze the pertinent rulings of all federal circuit courts of appeal from 1994 to 2004 to determine, among other issues, the rate at which rules are invalidated in whole or in part; the reasons for those invalidations; and the agencies most invalidated. Long-cited anecdotal evidence suggested that the successful challenge rate was 50% or more. Professor Freeman's preliminary findings appear to demolish that long-standing notion as mythical and perhaps suggests that the major blame heaped on the courts by the so called "ossificationists" for burdening the agency rulemaking process lies elsewhere, perhaps equally with Congress and the Executive.

In any event, I will conclude by observing that much of the Administrative Law Project has an important constitutional dimension, raising the crucial question of where ultimate control of agency decisionmaking authority lies in our constitutional scheme of separated but balanced powers. The tensions and conflicts in this scheme were well brought forth in CRS' symposium on presidential, congressional, and judicial control of agency rulemaking. There can be little doubt as to Congress' authority to make the determinative decisions with respect to the wisdom of any particular agency rulemaking and to prescribe the manner in which the review shall be conducted. Whether or not to do so is a political decision, a hard one with many practical consequences. It is a decision that might be mediated by a reactivated and funded ACUS.