

**STATEMENT OF JEFFREY S. LUBBERS  
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**HEARING BEFORE THE  
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE  
LAW  
COMMITTEE ON THE JUDICIARY  
U.S. HOUSE OF REPRESENTATIVES  
ON  
H.R. \_\_\_\_\_, THE “REGULATORY IMPROVEMENT ACT OF 2007  
SEPTEMBER 19, 2007**

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Madam Chair and Members of the Committee:

I am pleased to be here today to discuss with you the continuing need to reauthorize the Administrative Conference of the United States (ACUS). I first want to applaud the Committee’s leadership in this bi-partisan effort that led to the successful effort three years ago to enact the Federal Regulatory Improvement Act of 2004, Pub. L. 108-401, which reauthorized ACUS until the end of this current fiscal year.

Unfortunately, no appropriations were made available to reconstitute ACUS in the past three years, so another reauthorization is necessary. Due to the work of this Committee in fostering studies and forums on the importance of the administrative process, I believe that this time the foundation has been laid for a successful appropriations effort. So I strongly support a new 2007 version of the Federal Regulatory Improvement Act.

I also want to salute the work of my fellow panelists who have been so instrumental in providing assistance to this Committee in this effort.

As I explained to this Committee in 2005,<sup>1</sup> I spent 20 years of my professional career working at ACUS from 1975 until it lost its funding in 1995. I truly believe it was one of the federal government’s most cost-effective institutions, and it has been sorely missed. I have written three short articles supporting the revival of ACUS, which I am appending to this testimony:

- Jeffrey S. Lubbers, *Consensus-Building in Administrative Law: The Revival of the Administrative Conference of the U.S.*, 30 ADMIN. & REG. L. NEWS 3 (Winter 2005);

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\* Fellow in Law and Government, Washington College of Law, American University. Research Director, Administrative Conference of the United States (1982-1995).

<sup>1</sup> Statement of Jeffrey S. Lubbers, Hearings Before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, U.S. House of Representatives, on “The Administrative Process and Procedures Project,” November 1, 2005.

- Jeffrey S. Lubbers, *Reviving the Administrative Conference of the United States: The Time Has Come*, 51 FED. LAWYER 26 (Nov./Dec. 2004);
- Jeffrey Lubbers. “*If It Didn’t Exist, It Would Have to be Invented*”—*Reviving the Administrative Conference*, 30 ARIZ. ST L. REV. 147 (1998).

In my years at ACUS I saw just how cost-effective it was. We had a small staff and a small budget, but a large membership of agency representatives and private sector experts who donated their time in order to seek consensus on some of the most vexing administrative procedure problems of the day—problems that the rest of the government did not have the time to think about in such an ordered way. Our small budget was leveraged into savings many times over for the government, due to streamlined procedures, efficiencies in government-wide operations, and the sharing of information among agencies about procedural problems.

Perhaps more important, the members were drawn from a wide variety of background and interest groups. It was heartening to 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. I firmly believe that the connections forged in the ACUS meetings helped increase civil discourse and reduce the level of partisanship in legal Washington. But you don’t have to take my word for it. The 1995 letters and the May, 2004 testimony before this Committee in support of ACUS by Justices Scalia and Breyer are the most vivid evidence of this spirit. Also persuasive is the strong support for reviving ACUS expressed by both the American Bar Association [see <http://www.abanet.org/adminlaw/annual2007/Tab2ACUS.pdf>], and by the Center for Regulatory Effectiveness, [see [http://www.thecre.com/emerging/20010521\\_acus.html](http://www.thecre.com/emerging/20010521_acus.html)].

And I don’t have to tell you that regretfully, we seem to have regressed in terms of civility and bi-partisanship in the last dozen years.

Just two weeks ago I had a reminder of how ACUS is missed. I was asked to provide testimony to a small independent agency that was created in 2003, the U.S. Election Assistance Commission. This agency was delegated the important function to issue standards and provide federal grants to the states for improvements in election processes around the country. Of course, as a federal agency, it is covered by numerous cross-cutting procedural statutes such as the Administrative Procedure Act, Freedom of Information Act, Privacy Act, Government in the Sunshine Act, Paperwork Reduction Act, and Government Performance and Results Act—many of which require agencies to take affirmative steps to publish procedural regulations and guidelines. The Commissioners were seeking advice on what they had to do under these laws, and when I spoke to them, several of them said publicly that they wished that there was an ACUS today that could advise them. Several of the Commissioners told me privately that they had received no orientation about these laws when they were appointed and that now they realized they really needed some.

The EAC is not alone in this regard—other new agencies or agencies with new rulemaking responsibilities have asked me for help with their administrative procedures. This is just the kind of advice and training that ACUS was able to do, and that no entity is doing now.

I also believe that a large inventory of administrative procedure issues has built up since ACUS shut its doors in 1995. Two years ago, before this Committee, I suggested a research agenda for a revived ACUS.

I won't repeat today everything I said on that occasion, but I will list the topics I think are most in need of attention:

I. The Rulemaking Process.

A. The Increasing Complexity of the Rulemaking Process.

1. *Analysis of Impact Analyses.*
2. *White House Review of Agency Rules.*
3. *Congressional Review.*
4. *The Nexus of Science and Rulemaking.*
5. *What's Holding Back Negotiated Rulemaking?*
6. *"Midnight" Rules.*
7. *"Lookback" at Existing Regulations.*

B. E-Rulemaking.

1. *Issues Concerning the Informational Goal.*
2. *Issues Concerning the Participatory Goal.*

II. Broader Regulatory Issues.

A. Regulatory Prioritization.

B. Retrospective Reviews of Agency Rulemakings.

C. Alternative Approaches to Regulation.

D. New Approaches to Enforcement.

E. Waivers and Exceptions.

F. Alternative Dispute Resolution.

G. Cooperative Federalism.

H. Requirements for Agency "Planning" in Natural Resource Regulation.

I. Agency Structure.

III. Administrative Adjudication

A. The Administrative Law Judge Program.

B. Administrative Appeal Boards.

C. Mass Adjudication Programs.

IV. Judicial Review of Administrative Agency Action

A. Chevron-Related Issues.

B. Access to the Courts.

C. Attorney Fees.

In terms of the legislation being considered by the Committee in today's hearing, I would support the same type of "clean bill" that was drafted for the 2004 legislation. I think the ACUS statute is well-suited for its function and it provides the flexibility that is needed for its Chair to manage the operation. I would however support one change recommended by my former colleague, Gary Edles, in his testimony before this Committee on the 2004 legislation—to avoid a potential problem caused by a restrictive interpretation by the Office of Legal Counsel of the Emoluments Clause of the Constitution.<sup>2</sup> He suggested an additional sentence be added to section 593(b)(6) of ACUS's enabling statute as follows:

The members shall participate in the activities of the Administrative Conference solely as private individuals without official responsibility on behalf of the Government of the United States and, therefore, shall not be considered to hold an office of profit or trust for purposes of Article 1, Section 9, Clause 8 of the U.S. Constitution.

As for the authorization of appropriations to be included in the bill, ACUS' highest appropriations was \$2.3 million in 1992—about the same in today's dollars as the \$3.2 million figure authorized in the 2004 Act for FY 2007. (During the four-year reauthorization cycle immediately preceding ACUS' shutdown, OMB had authorized ACUS to request an amount of appropriations that would have reached \$2.928 million in FY 1998.) I supported the amounts in the 2004 legislation and would think that similar amounts with a slight inflation adjuster would be appropriate in the 2007 legislation. Thus I would think that the figures could be \$3.4 million for FY 2008,<sup>3</sup> \$3.6 million for FY 2009, and \$3.8 million for FY 2010.

To put these amounts in perspective, I would note that far greater amounts are often authorized by Congress for individual studies of the administrative process. I was personally involved in a congressionally mandated study of just one aspect of the Social Security program that cost \$8.5 million.<sup>4</sup> And I can't resist pointing out the story in last

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<sup>2</sup> For more on this issue, see Gary J. Edles, *Service On Federal Advisory Committees: A Case Study of OLC's Little-Known Emoluments Clause Jurisprudence*, 58 ADMIN. L. REV. 1 (2006).

<sup>3</sup> I recognize that even in the best-case scenario, a reauthorized ACUS probably would not receive FY 2008 appropriations or have its Chairman appointed until some months into FY 2008. But I think it would be better for the appropriators to make whatever adjustment is needed in that regard.

<sup>4</sup> 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*

Saturday's Washington Post about a report of the Department of Justice's Inspector General, which found that DOJ spent \$6.9 million in the last two years to host or send employees to ten conferences, with a total amount of \$81 million for all conferences in those two years.<sup>5</sup>

The Administrative Conference is quite a bargain in light of those figures.

So in summary, I would suggest that for all these reasons, as elaborated in my attached articles and my earlier testimony, I would strongly support the reauthorization and the reappropriation of this highly effective and cost-saving agency.

Thank you Madam Chair, and I would be happy to try to answer any questions you might have.

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*Minimizing Misuse* (2007), available in pre-publication version at [http://books.nap.edu/openbook.php?record\\_id=11992&page=R1](http://books.nap.edu/openbook.php?record_id=11992&page=R1).

<sup>5</sup> See Lara Jakes Jordan, *Snacks Take Big Bite Out of DOJ Budget*, ASSOCIATED PRESS, [washingtonpost.com](http://www.washingtonpost.com/wpdyn/content/article/2007/09/15/AR2007091500588.html), Sept. 15, 2007, available at <http://www.washingtonpost.com/wpdyn/content/article/2007/09/15/AR2007091500588.html>.