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July 1, 2005

The Honorable Christopher S. Bond
Chairman
Subcommittee on Transportation, Treasury, the
Judiciary and Housing and Urban Development
Committee on Appropriations
United States Senate
Washington, D.C. 20510

The Honorable Patty Murray
Ranking Member
Subcommittee on Transportation, Treasury, the
Judiciary and Housing and Urban Development
Committee on Appropriations
United States Senate
Washington, D.C. 20510

Re: Funding the Newly Reauthorized Administrative Conference of the
United States for Fiscal Year 2006

Dear Chairman Bond and Ranking Member Murray:

On behalf of the American Bar Association ("ABA") and its more than 400,000 members nationwide, I write to express our support for funding the Administrative Conference of the United States ("ACUS") for fiscal year 2006 at the fully authorized level of \$3.1 million. As your Subcommittee prepares to mark up the Transportation, Treasury Appropriations Bill later this month, we urge you to provide full funding for ACUS, which was just reconstituted last October by the enactment of the "Federal Regulatory Improvement Act of 2004" (P.L. 108-401, formerly, H.R. 4917). Once it is provided with this modest funding, the agency will be able to restart its operations and then begin addressing the many important tasks that may be assigned to it by Congress, including, for example, assisting the Department of Homeland Security to consolidate the administrative processes from the more than 20 federal agencies that were included in the new Department.

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ACUS was originally established in 1964 as a permanent body to serve as the federal government's 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. Last year, Congress held several hearings on ACUS reauthorization, and during those hearings, all six witnesses, including Supreme Court Justices Antonin Scalia and Stephen Breyer, praised the work of the agency. The written testimony of Justices Scalia and Breyer is available on the ABA's website at <http://www.abanet.org/poladv/ACUSreauthorization.html>.

Following these hearings, H.R. 4917 was introduced by Rep. Chris Cannon (R-UT), Chairman of the House Judiciary Subcommittee on Commercial and Administrative Law, for the purpose of reauthorizing and resurrecting the agency. That bipartisan legislation ultimately garnered 34 cosponsors—including 18 Republicans and 16 Democrats—before being approved unanimously by the House and Senate last October. President Bush then signed the measure into law on October 30, 2004.

At the request of Chairman Cannon, the Congressional Research Service prepared a short study describing the many benefits of ACUS, and a copy of the CRS Memorandum of October 7, 2004 is also available at <http://www.abanet.org/poladv/ACUSreauthorization.html>. As outlined by CRS, ACUS has many virtues, including the following:

- A newly-reconstituted ACUS would 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. The CRS Memorandum concludes that “[ACUS’s] reactivation would fill the current urgent need for an expert independent entity to render relevant, cost-beneficial assistance with respect to complex and sensitive administrative process issues raised by 9/11 restructuring and reorganization efforts,” including the creation of the Department of Homeland Security by consolidating parts of 22 existing agencies and the 9/11 Commission’s recommendations to establish a new intelligence structure. In addition, CRS noted that ACUS could provide valuable analysis and guidance on a host of other administrative issues, including public participation in electronic rulemaking, early challenges to the quality of scientific data used by agencies in the rulemaking process, 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. As CRS also noted in its Memorandum, all six of the witnesses who testified before the House Judiciary Subcommittee on Commercial and Administrative Law agreed that during the more than 25 years of its existence, “...the Conference was a valuable resource providing information and guidance on the efficiency, adequacy and fairness of the administrative procedures used by agencies in carrying out their missions.” 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, 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

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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’s recommendations often resulted in huge monetary savings for agencies, private parties, and practitioners. For example, 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.” The CRS Memorandum provides numerous additional examples of ACUS’ prior successes as well.

● ACUS’ role in the regulatory process is 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 ACUS’ fundamental role in the regulatory process. By virtue of its history and institutional design, ACUS is uniquely in a position to achieve bi-partisan consensus on administrative and regulatory improvements; to provide a forum for executive and independent agencies to exchange “best practices” ideas; and to bring private sector lawyers and academics together with political and career government officials to address ways to improve government operations.

OIRA is a very different type of entity that is neither inclined nor equipped to address many of the issues that ACUS has focused on. For example, there is no way that OIRA could have devoted so much time and attention to developing the ADR techniques that so many government agencies adopted. Nor does OIRA play any role in agency adjudication or judicial review issues. OIRA's principal role is to represent the President in making sure that the Administration’s regulatory policy is followed. ACUS's role, on the other hand, is to be an independent catalyst for seeking to reform and improve administrative and procedural issues that necessarily tend to receive less attention in Congress or the White House in the face of what are deemed more pressing day-to-day matters.

In sum, now that Congress has enacted bipartisan legislation reauthorizing ACUS, the agency 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 \$3.1 million in funding for ACUS for fiscal year 2006 during your Subcommittee’s mark up of the Transportation Treasury Appropriations Bill later this month.

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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 legislative counsel for administrative law issues, Larson Frisby, at 202/662-1098, or the Co-Chairs of the ACUS Task Force of the ABA Administrative Law Section, Warren Belmar, at 202/661-6348, or Philip Harter, at 202/257-4735.

Sincerely,

A handwritten signature in cursive script that reads "Robert D. Evans".

Robert D. Evans

cc: All members of the Senate Committee on Appropriations
The Honorable Arlen Specter
The Honorable Orrin G. Hatch
The Honorable Patrick J. Leahy
The Honorable Jeff Sessions
The Honorable Charles E. Schumer
The Honorable Joseph Knollenberg
The Honorable John W. Olver
The Honorable Chris Cannon