

MINUTES OF THE JANUARY 7, 2009, GOVERNANCE AND NOMINATING COMMITTEE MEETING

The Governance and Nominating Committee (“the Committee”) of the Board of Regents of the Smithsonian Institution held a meeting on January 7, 2009, beginning at 8:10 a.m. in the Smithsonian Castle in Washington, D.C. Attending in person were Committee Chair Shirley Ann Jackson and members Patricia Stonesifer and Diana Aviv. Participating by teleconference were Committee members Senator Chris Dodd (who joined at 8:45 a.m.), Representative Doris Matsui, and ex officio member Roger Sant. Also present were Secretary Wayne Clough, Executive Assistant to the Secretary Patricia Bartlett, Chief of Staff to the Regents John K. Lapiana, Acting General Counsel Marsha Shaines, Associate General Counsel Farleigh Earhart, Assistant General Counsel Craig Blackwell, Inspector General Sprightley Ryan, Counsel to the Inspector General Epin Christensen, Celia Roady, Esq. of Morgan, Lewis & Bockius, and Office of the Regents Program Officer Grace Jaeger. Colin McGinnis, Assistant to Senator Dodd, and Alexis Marks, Assistant to Congresswoman Matsui, participated by teleconference.

The Chair called the meeting to order.

Approval of the Minutes

The minutes of the July 1, 2008, meeting of the Committee were approved.

Report of the Chair

Dr. Jackson reported that the General Counsel search committee had been interviewing candidates and expected to present a slate of three or four candidates to the Secretary, Roger Sant, and Patricia Stonesifer before the January 26, 2009, Regents’ meeting. Over 700 applications were received for the position, belying the concern that the Federal equivalent salary of \$177,561 would deter qualified candidates from applying. She thanked Marsha Shaines for ably serving as Acting General Counsel since the retirement of former General Counsel John Huerta.

The Chair said that at the January 26, 2009, meeting, Board Chair Roger Sant would announce that all 25 of the Governance Committee recommendations from June 2007 will have been completed. She also noted that the Executive Committee would soon review the Special Events Spending Guidelines, the last official action to complete the recommendations. She thanked Patricia Stonesifer, Diana Aviv, Doris Matsui, and John Lapiana in particular for their efforts to address the Smithsonian’s governance issues.

Proposed Revisions to Smithsonian Directive 807

The Chair thanked the Committee, staff, and Lydia Griggsby, Senator Leahy staff member and the Chief Counsel for Privacy and Information Policy for the Senate Judiciary Committee, for the significant time they had devoted over the past year to the development of revised Smithsonian Directive 807: Requests for Smithsonian Institution Information. She said that Senator Leahy still had some remaining obstacles that would be discussed.

She also noted that, at the suggestion of Senator Dianne Feinstein's staff, the draft policy now contained a requirement that any changes to the policy in the future be subject to Board approval. She explained that the intention of the new requirement was to make the policy more permanent and to parallel similar legislation.

Ms. Shaines and Mr. Blackwell provided background on the development of the policy. They noted that the current version had been through many iterations and, while it closely followed the principles of disclosure under the Federal Freedom of Information Act (FOIA) and contained standard FOIA exemptions, the policy also interpreted FOIA's exemptions to account for its application to information unique to the Smithsonian. A general discussion followed on the disclosure of investment information and transparency. Dr. Jackson asked whether the schedule of fees for requesting documents (Attachment C of the revised policy) could be removed from the directive because changes in fees need not be subject to the Board's approval. Mr. Blackwell suggested the fee schedule be removed from the policy but posted on the Smithsonian's Web site.

Mr. Sant then began a discussion on Senator Leahy's two remaining objections to the revised policy by recapping his recent discussion with the Senator. He reported that the Senator first suggested that the first paragraph of the directive state that the Smithsonian will disclose information unless the directive "clearly provides otherwise." (See paragraph 1 of the attached Action Paper). After discussion, it was agreed to add the language suggested by Senator Leahy with the following modification:

When considering requests for Smithsonian Information, the Smithsonian will apply a presumption of disclosure. It will be the policy of the Smithsonian to disclose information unless this directive clearly provides otherwise, except where disclosure would be harmful to an interest protected by an exemption.

The Senator also suggested that the exemption for Smithsonian commercial information be revised to require disclosure of information contained in a contract or agreement committing "federal . . . assets." Ms. Shaines said that this paragraph relates only to revenue-generating Trust fund contracts. Mr. Blackwell said that it could be difficult to define a "Federal asset" and that the language could produce interpretive problems in the future. Following further discussion, the Committee decided to revise the commercial information exemption to include:

Smithsonian trade secrets and Smithsonian commercial or financial information directly related to the Smithsonian's revenue-generating activities, including fund-raising and development activities, and where release of the information would be likely to cause the Smithsonian substantial competitive harm or impair its ability to carry out its charitable and educational mission by raising private funds. Unless directly related to the Smithsonian's revenue-generating activities, the Smithsonian will not apply this exemption to Smithsonian information contained in contracts or agreements which commit federal appropriations or federal assets.

The Committee then approved the following motion:

VOTED that the Committee approves the revised Smithsonian Directive 807 with amendments and without Attachment C and recommends that the Board of Regents adopt the policy at its January 26, 2009, meeting.

Proposed Revised Indemnification Policy

The Committee next discussed revisions to the Smithsonian's Indemnification Policy, which the Office of General Counsel prepared with input from Celia Roady and Jeff Minear, Counsel to the Chief Justice. Ms. Shaines and Ms. Earhart provided background information on the policy and referred members to a chart prepared by Ms. Earhart that highlighted the differences between the current policy and past Smithsonian policy, current Federal regulations, and state codes.

Smithsonian employees, both paid and unpaid, are entitled to certain protections under the Westfall Act, and the Department of Justice represents employees acting within the scope of their employment in virtually all cases. The current Smithsonian policy has been in place since 2000 and the previous one was in effect from 1982 to 2000.

The Committee discussed two issues highlighted by Mr. Minear: 1) whether the policy should permit indemnification of criminal fines and penalties, and 2) whether it should require indemnification of expenses if the person is successful on the merits.

Ms. Aviv said that having an indemnification policy is key to the successful recruitment of candidates to serve on boards and that the protection of board members is a separate issue than the protection of employees. Ms. Aviv noted that most board policies provide for mandatory advances of legal expenses. Dr. Jackson tasked the Office of General Counsel to prepare separate yet parallel indemnification policies: one for employees and one for Regents, committee members, and advisory board members. Pending preparation of those drafts, Dr. Jackson asked the Committee to consider the current proposal.

Further discussion followed on whether the Smithsonian should pay fees in a criminal proceeding if the person has been wholly successful on the merits. The Committee agreed to include the following language in the policy:

***Success on the Merits.** The Board of Regents shall indemnify an eligible person for reasonable expenses, including attorney's fees, incurred in presenting a defense in a civil or other non-criminal proceeding, if the person has been wholly successful, on the merits or otherwise, in such defense.*

The Committee voted to recommend the modified policy for adoption by the Board of Regents until such time as the Office of the General Counsel prepares, and the Committee considers, the two policies requested by Dr. Jackson.

Consent Agenda

The Committee then approved the following motions *en bloc*:

VOTED that the Committee approves the revised bylaws for the Smithsonian National Board and recommends their adoption by the Board of Regents.

VOTED that the Committee approves the proposed amendments to the bylaws for the Board of Trustees of the Cooper-Hewitt, National Design Museum, and recommends their adoption by the Board of Regents.

VOTED that the Committee recommends that the Board of Regents accept the proposed slate of candidates for appointment or reappointment to various Smithsonian advisory boards.

VOTED that the Committee recommends the full Board approve the reappointments of Mr. Caldwell as SNB Chair, Ms. Burnet and Mr. Neely as SNB Vice Chairs, and Ms. Fisher and Mr. Hoch as members of the SNB.

Appointment of Audit and Review Committee Advisor

Mr. Sant discussed the appointment of Herbert C. Schulken as an advisor to the Audit and Review Committee. Mr. Schulken, a retired partner of PricewaterhouseCoopers, will provide advice to the Committee but not be a member of the Committee or have a vote in Committee deliberations.

The Committee then approved the following motion:

VOTED that the Committee recommends the full Board appoint Herbert C. Schulken Jr. as an advisor to the Audit and Review Committee for a one-year renewable term.

Vice Chair of the Board

Dr. Jackson noted that, with Patricia Stonesifer slated to succeed Roger Sant as Chair of the Board of Regents after the January 2009 meeting, the position of Vice Chair would be vacant. She proposed the nomination of Alan Spoon as Vice Chair to succeed Ms. Stonesifer and that Mr. Sant, as Chair Emeritus, remain a member of the Executive Committee for one year. This structure would provide for the rotation of new members onto the Executive Committee as well as ensure continuity.

The Committee then approved the following motion:

VOTED that the Committee recommends to the Board of Regents the election of Alan G. Spoon as Vice Chair for a one-year renewable term.

Non-Regent Committee Appointments

As part of the Smithsonian's governance reforms, the appointment of non-Regents to Regents' committees was recommended to provide additional expertise and support to the committees. It was agreed that the committees would look first to current Smithsonian advisory board members to recruit candidates. Pursuant to that recommendation, the Secretary, with the assistance of the Office of External Affairs and the concurrence of

Advancement Committee Chair Alan Spoon, identified candidates to serve on that committee.

The Committee then approved the following motion:

VOTED that the Committee recommends that, assuming their interest, the full Board approve the appointments of Travis Engen, Sakurako Fisher, David H. Koch, Herbert D. Kelleher, and Adrienne Bevis Mars to membership on the Advancement Committee.

2009 Regent Committee Assignments

Dr. Jackson referred members to the proposed Regents' committees assignment chart (attached) and noted two changes: the first was to add Ms. Stonesifer to the Compensation and Human Resources Committee and the second was to remove her from the Strategic Planning and Programs Committee.

The Committee then approved the following motion:

VOTED that the Committee recommends that the Board of Regents elect Patricia Stonesifer, Roger Sant, and Alan Spoon as members of the Executive Committee, and further request that the Chancellor appoint members to each Regent committee as set forth in the proposed matrix, dated January 2, 2009.

Diana Aviv

Member Diana Aviv announced that she would be stepping off of the Committee in March 2009 but that she would always be willing to assist the Committee. She noted that the Committee had helped the Institution implement strong governance reforms during her two years of service. Dr. Jackson and the members of the Committee thanked Ms. Aviv for her service and recognized her efforts on behalf of the Committee.

Proposed Bylaw Revision: Chair of the Board

In September 2007 the Bylaws of the Board of Regents were changed to create the position of Chair of the Board. In doing so, the Bylaws required the Chair to serve as a non-voting, ex officio member on eight Regents' committees and as the (voting) Chair of the Executive Committee.

Mr. Sant said that the Chair's time would be better served by strategic membership on certain Regents' committees. The Committee concluded that, aside from the Executive Committee, the Chair should serve as a voting member of the Compensation and Human Resources Committee, in part because the Chair is responsible for recommendations regarding the Secretary's compensation.

Accordingly, the Committee agreed to recommend to the full Board that the Bylaws be revised to:

(1) make the Chair a voting member of the Executive Committee and the Compensation and Human Resources Committee and

(2) allow for the Chair to serve on “any other” committee as a non-voting, ex officio member.

It further recommended that, for those committees on which the Chair serves as ex officio, the Chair’s participation count towards those committees’ quorum requirements.

Adjournment

The Committee then went into Executive Session after which the meeting was adjourned at 10:45 a.m.

Respectfully submitted,
Shirley Ann Jackson, Chair