

MINUTES OF THE MARCH 23, 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 March 23, 2009, beginning at 2:05 p.m. in the Smithsonian Castle in Washington, D.C. Participating were Committee Chair Shirley Ann Jackson* and Committee members Representative Doris Matsui* and Senator Chris Dodd*. In attendance were Secretary Wayne Clough, Chief of Staff to the Secretary Patricia Bartlett, Chief of Staff to the Board of Regents John K. Lapiana, Acting General Counsel Marsha Shaines, Associate General Counsels Craig Blackwell and Farleigh Earhart, Inspector General Sprightley Ryan, Assistant to Congresswoman Matsui Alexis Marks*, and Office of the Regents Program Officer Grace Jaeger.

The Chair called the meeting to order.

REPORT OF THE CHAIR

General Counsel Search. Dr. Jackson reported that Judith Leonard had been selected as the next General Counsel, effective June 1, 2009. She is currently the Vice President for Legal Affairs and General Counsel at the University of Arizona and has a range of other legal experience. Dr. Jackson expressed her gratitude on behalf of the Committee to Marsha Shaines for serving as Acting General Counsel since August 2008.

Regents Self-Assessment. Dr. Jackson relayed the results of the Regents’ self-assessment conducted in the fall of 2008, facilitated by Booz Allen Hamilton (BAH). The results showed that the Regents are generally satisfied with the governance improvements implemented over the past two years and all respondents were “very comfortable with the Board’s size, structure, blend, and transparency.” One identified deficiency was a lack of coordination between staff and Regents regarding strategic planning. The launch of the strategic planning initiative in coordination with the Strategic Planning and Programs Committee, which is chaired by Congresswoman Matsui, will help address this, as will Board Chair Patricia Stonesifer’s plans to devote a significant portion of each Regents’ meeting to topics of strategic importance, including the national campaign, communications, and interdisciplinary collaborations.

The self-assessment also identified the Regents’ unfamiliarity with the Institution’s fund-raising policies and strategies. The establishment of the Advancement Committee, chaired by Alan Spoon, along with planning for a national campaign should help address this deficiency.

BAH noted the Board’s biggest concern: the need to better leverage the skills and expertise of members and improve the constructive partnership with the Secretary and his staff. The selection of David Rubenstein and France Córdova demonstrates the Board’s increased

** participated by teleconference*

commitment to identifying Regents with skills that supplement and complement the skill sets already on the Board. Carole Neves, Director of the Office of Policy and Analysis, and John Lapiana will develop recommendations to remedy other deficiencies identified in the survey and prepare a report for the next meeting, along with the draft assessment for 2009.

New Regent Appointment Status. The Senate approved the nominations of David Rubenstein and France Córdova and legislation has been introduced in the House. It is expected that Dr. Córdova will join the Governance and Nominating and the Strategic Planning and Programs Committees and Mr. Rubenstein will join the Advancement and Finance Committees.

FOIA Update. At its January 26, 2009, meeting the full Board adopted the FOIA policy recommended by this Committee with a revision to strike the exemption from disclosure of correspondence between Smithsonian Tropical Research Institute (STRI) and the Panamanian government if the information would not be subject to disclosure under Panamanian law and the Panamanian government requested withholding.

At the January 2009 Board meeting, the Regents also discussed the exemption permitting the withholding of employee financial disclosure forms filed by Smithsonian employees. It was pointed out at the meeting that financial disclosure forms filed by certain staff at Federal agencies, members of Congress, and the Chief Justice are publicly available. Mr. Blackwell briefly explained to the Committee the basis for the exemption for Smithsonian financial disclosure forms. The Ethics in Government Act requires Federal judges, elected Federal officials, high-ranking Executive Branch officials, and employees of Executive Branch agencies earning a salary over Grade 15/Step 10 to file financial disclosure forms and requires that those forms be publicly available. The Ethics in Government Act, however, does not apply to the Smithsonian. Smithsonian financial disclosure forms contain a statement that, except in certain limited circumstances (such as a request by Congress), the forms will be treated confidentially. Because there is no Federal statute compelling the Smithsonian to disclose financial disclosure forms filed by Smithsonian employees, the Smithsonian may treat these forms confidentially. The Smithsonian could choose to make financial disclosure forms filed in the future by high-ranking Smithsonian employees publically available, but it would not need to inform these employees in advance that their forms would be subject to disclosure.

The Smithsonian has created a new FOIA Web page, linked from the main Smithsonian public page, which contains information on how to make a request, staff contacts, and the status of pending requests. The site will also contain frequently requested documents and be linked to other Web-based “reading rooms,” such as the one on the Regents’ Web page.

Other Updates. As part of the fiscal year 2009 Omnibus Budget Act, the House requested that the Government Accountability Office (GAO) conduct a “thorough review” of the Smithsonian’s governance reform process by the end of this year. The conference report acknowledges that “much progress has been made,” but that the efforts over the past two years are “only the initial steps and that a continuing commitment to reform, especially the principles of fiscal stewardship of public resources, and to accountability and openness, is

essential.” Nell Payne, Director of the Office of Government Relations, has been working with Congressional staff to move the deadline date to the end of 2010.

GAO is conducting a survey of governance practices and the role of Inspectors General (IG) at a number of designated Federal entities, including the Smithsonian. The report is not designed to make recommendations or conclusions on the effectiveness of governance and IG practices at each agency, but to provide the Hill with information for consideration in future oversight. A draft report was circulated to those agencies for comment and is available for the Regents’ review. A final report will likely be issued in April 2009.

REGENT FINANCIAL DISCLOSURE FORM AND ETHICS GUIDELINES REVISIONS

Mr. Blackwell discussed two proposals: 1) to revise the Board of Regents’ Annual Disclosure Form and Instructions to require that Regent-nominees complete the disclosure prior to passage of a public law appointing him/her as a Regent; and 2) to revise the Board of Regents’ Ethics Guidelines to clarify that a conflict of interest be defined to include interests or affiliations of Regents which seek to have a relationship with the Smithsonian and to make other non-substantive changes for clarity.

Upon discussion, the Committee determined that there should be two options for when a Regent-nominee must file a financial disclosure form: either prior to the nominee’s name being submitted to the Board for approval or 30 days following nomination by the Board. The Committee determined further that the time for filing should be “at the direction of the Governance and Nominating Committee.” Mr. Blackwell stated that the Office of General Counsel would do a further review of the Regents’ Annual Disclosure Form and Ethics Guidelines to ensure compliance with best practices.

The Committee then approved the following motion with the revisions noted above:

VOTED that the Committee approves the revisions to the Board of Regents Annual Disclosure Statement Form and Instructions.

The Committee then approved the following motion:

VOTED that the Committee approves the revisions to the Board of Regents Ethics Guidelines.

PROPOSED REVISED INDEMNIFICATION POLICY

Ms. Earhart and Ms. Shaines discussed the two proposed indemnification policies, one for Regents and advisory board members and one for employees and non-board volunteers. The board member policy is consistent with the laws of virtually all states in that it uses the same standards of conduct and mandates payment of legal expenses in the event of success on the merits (though the draft policy is limited to non-criminal matters). The draft provides that payment of liabilities will be provided at the Regents’ discretion. As requested at the last Committee meeting, the draft policy also provides that advances for legal expenses will be made if the Regents determine that an eligible person is likely to

meet the standards of conduct. The policy allows eligible persons to have legal fees paid if they are asked to be a witness.

It was noted that the Executive Committee strongly believes that the policy for board members and Regents should be completely discretionary.

Ms. Earhart noted the substantial protections already afforded Smithsonian employees and volunteers under the Westfall Act. In addition to these protections, the proposed employee policy gives the Regents discretion to indemnify in all circumstances, in light of the same standards of conduct and exclusions applicable to board members. It does not have the provision concerning payment of legal fees for an eligible person asked to be a witness. Whether for board members or employees, it was noted that the Smithsonian's indemnification policies would be utilized to pay legal expenses only if the Justice Department declined to represent an eligible person.

Discussion followed on whether attraction of Board member candidates would be compromised if indemnification was not mandatory. Senator Dodd suggested that information be gathered, perhaps from previous Committee member Diana Aviv, on whether this is a problem.

The Committee then approved the following motion:

VOTED that the Committee approves the proposed indemnification policies and recommends their adoption by the Board of Regents.

REVISED BYLAWS FOR THE ADVISORY COUNCIL OF THE NATIONAL MUSEUM OF AFRICAN AMERICAN HISTORY AND CULTURE

Discussion turned to the proposed changes to bylaws of the Council of the National Museum of African American History and Culture. Proposed changes include codifying term limits, making certain committees discretionary, allowing for ad hoc committees, and increasing the size of the Council. Dr. Jackson said that the bylaws were originally modeled after those of the National Museum of the American Indian and that certain provisions, including term limits, are not the most appropriate for a three-year old Council deeply involved in establishing a new museum. Congresswoman Matsui, a member of the Council, supported the proposed changes and commented that the Council was acting in part to retain its founding members as well as add new members. Dr. Jackson also supported the changes and stated that the Committee should review the bylaws again once the museum has been established.

The Committee then approved the following motion:

VOTED that the Committee approves the proposed amendments to the bylaws for the Advisory Council of the National Museum of African American History and Culture and recommends their approval by the Board of Regents.

NON-REGENT COMMITTEE APPOINTMENTS

Dr. Jackson noted that at its next meeting the Committee will likely review Facilities Committee candidates put forth by Committee Chair Robert Kogod. In keeping with the new practice of looking first to Advisory Board members for candidates, Dr. Clough, with assistance from the Office of External Affairs and the concurrence of Strategic Planning and Program Committee Chair Matsui, proposed three new members, assuming their interest, to that committee. Biographies of the candidates were provided in the meeting materials.

The Committee then approved the following motion:

VOTED that the Committee recommends that, assuming the candidates' interest, the full Board approve the appointments of Mr. W. Clark Bunting, Ms. Judy Huret, and Mr. Paul Neely to the Strategic Planning and Programs Committee.

CONSENT AGENDA

The Committee approved the following motions *en bloc*:

VOTED that the Committee approves the minutes of the January 7, 2009, meeting.

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

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

Senator Dodd then left the meeting, leaving only two Committee members present which did not constitute a quorum.

IRS FORM 990

Dr. Jackson asked Ms. Shaines to present information on the requirements of the newly revised IRS Form 990 (Return of Organization Exempt from Income Tax), which the Smithsonian will file in the summer of 2010 for fiscal year 2009. Part VI of the revised IRS form "Governance, Management, and Disclosure" asks questions intended to help organizations, their regulators, and the IRS focus on areas of governance weakness. Ms. Shaines is working with the Audit and Review Committee to develop a process for a substantive review of the form prior to its distribution to the full Board. This process will enable the Institution to answer affirmatively to the question in Part VI regarding whether the form has been reviewed by the organization's governing board.

In Part VI, Section B, "Policies," the form asks about the existence of a number of organizational policies. Ms. Shaines indicated the Smithsonian has procedures in most of these areas, but not all of those procedures have been memorialized in written policies.

The Committee asked Ms. Shaines to develop: 1) a written process for the Board's review of the Form 990 before it is filed, 2) a written policy memorializing existing protections for Smithsonian whistleblowers, and 3) a written policy for evaluating the tax implications of participating in joint ventures.

HONORARIA POLICY REVIEW

Ms. Shaines provided an update on its review of the Smithsonian's honoraria policy. Unlike Executive Branch agencies, the Smithsonian is not subject to the Ethics in Government Act (which permits acceptance of honoraria in some cases), but generally follows it as an appropriate ethics practice. The Smithsonian's policy on honoraria is stricter in some regards than the Ethics in Government Act provisions, and more flexible in other regards, reflecting the Smithsonian's unique status. The Office of General Counsel (OGC) has started providing training to staff through quarterly workshops on the Smithsonian's Standards of Conduct, which includes guidance on the acceptance of honoraria, and is developing an online Standards of Conduct training course.

Discussion followed on the issue of the appropriate institutional and ethics review of cash prizes or awards offered to Smithsonian staff in connection with their work at the Smithsonian, which currently is not explicitly addressed by the Standards of Conduct. Dr. Jackson suggested that standards be developed concerning acceptance of the award, e.g., it must be a standing award and the award amount must be set, not negotiated. Dr. Jackson suggested that the policy also include the ability of the prize winner to accept reimbursement for travel expenses associated with accepting the award. Ms. Shaines explained that OGC currently evaluates prizes and awards offered to Smithsonian staff under the Ethics in Government Act standards, which include the considerations articulated by Dr. Jackson, and that the travel reimbursement issue is addressed by the Smithsonian's travel policies. Ms. Shaines indicated that OGC was planning to amend the Standards of Conduct to make clear that OGC will review for potential conflicts of interest all offers of prizes and awards to employees.

ADJOURNMENT

The Committee then went into executive session after which the meeting was adjourned at 3:20 p.m.

Respectfully submitted,

Shirley Ann Jackson, Chair