Reflections on the Faculty meeting of 6 May 2009
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On 6 May, the Faculty convened and voted to ratify the current governance document and all actions of the Assembly and Senate. At first glance, the Faculty may appear to have met the requirements specified by the DoJ. However, the Faculty failed to fully comply with the recommendations of the DoJ. Furthermore, the Faculty imposed strictures on the Senate that may prove cumbersome.

**Failure to comply:** By ratifying the 1995 governance document, the Faculty failed to provide mechanisms by which the Statutory Faculty can exist as a separate body and practice oversight as prescribed by the DoJ (APPENDIX I). In part, this failure lies at the Senate’s doorstep.

The Senate lived up to its responsibilities when it asked the DoJ to clarify the quorum requirements for Assembly meetings. In so doing, the Senate was made aware of serious shortcomings of the governance document. The Senate, as the only functioning governance body, then took steps to remedy these shortcomings. However, the Senate President failed to carry through on his promise to facilitate the development of a satisfactory governance document, to educate the Faculty on the issues, and then to convene a Faculty Assembly that could debate, amend and ratify the document (by April 2009). Nevertheless, the opportunity for the Senate to set things straight remains. They can prepare a governance document that defines the Faculty Assembly as a distinct oversight body and provides means for convening it, as required by the DoJ. Furthermore, the Senate can start educating the Faculty on the need to ratify such a document when the opportunity arises.

It is important for the Senate to take this initiative for two reasons. First, since the Senate is the only functional governing body, it is obliged to promote a document that establishes the Faculty as an identifiable body with a means of meeting and acting, as called for by the DoJ’s interpretation of Oregon Law (APPENDIX I). Second, since the Senate will have to function under whatever governance document is adopted, it is in the Senate’s narrow interest to promote a thoughtful document.

**Cumbersome stricture:** By ratifying the 1995 document, the Faculty imposed upon the Senate the obligation to operate according to the Oregon Public Meetings Law (OPML). In APPENDIX II we consider whether State Law imposes that obligation. However, even if it does not, the Senate must follow the OPML as long as the properly ratified governance document imposes it.

What are the consequences of this imposition? Apart from raising the issue of whether Committees that report to the Senate must also follow the OPML, and under which circumstances the OPML allows the Senate to meet in executive session, the most conspicuous consequence is the need to comply with the voting requirements of the OPML. Under the OPML (and all rulings concerning it) a body that is subject to the law can pass motions only by an "aye" vote of more than 50% of its membership. This implies that attendance at Senate meetings will be a critical issue, and that a count of the "ayes" will be needed in order to demonstrate the magnitude of the aye vote.
Arguments (APPENDIX II) suggest that OPML does not apply to UO internal governance. However, at the 6 May 2009 meeting, President Frohnmayer (under whose direction the 1995 governance document was formulated) stated that some aspects of internal governance may be so subject, because some activities of the University are of public interest. President Frohnmayer cited the granting of degrees as being of particular public interest. In so doing, he was, at a minimum, advising the Senate to follow the OPML, since they are the body that grants degrees.

Because of President Frohnmayer’s statement that the OPML probably does apply (by law) to some parts of internal governance, it would be a courtesy to the incoming President for the Senate to ask the Office of the General Counsel of the University to obtain an opinion from the AG on the matter of what, if any, parts of UO internal governance are subject to the OPML.

APPENDIX I
Is the University in Compliance with the DoJ Directives?

The DoJ letter of November 2008 (Joe McNaught’s) (http://www.uoregon.edu/~uosenate/dirsen089/PvD-Nov08.html) states:

“Accordingly, we recommend that, at some point in the reasonably near future, the faculty (presided over by the President of the University) hold a meeting and, among any other agenda items, take action along the following lines for precautionary purposes only:

“To the extent that it may be argued any prior approval or delegation by the faculty is invalid, o (sic) Approve a delegation of the faculty’s ORS 352.010 powers to the Assembly and the Senate or to any successor groups under the framework of the Enabling Legislation as it may be amended (emphasis added); and

“Approve and ratify all actions taken by the Assembly and the Senate under the Enabling Legislation to the extent such actions are an exercise of the faculty’s ORS 352.010 powers.”

Well, isn’t that what the Faculty did on 6 May 2009? The answer to that depends on the context of Joe McNaught’s remarks when he said “…as it may be amended…” For a clue, we look to the letter to which Joe McNaught was responding -- Paul van Donkelaar’s letter of 12 November 2008 -- which reads in part:

“On page 16, the opinion points out a number of actions which can be taken to reconcile the tensions created under IMD 1.123 and ORS 352.010 including having the statutory faculty recommence meeting and/or delegating the exercise of their statutory powers to the Assembly. We do plan to have at least one such meeting this academic year, but the question arises as to whether such a meeting needs to occur as soon as possible (i.e., in the next month or two) or if it can wait until later in the spring term (i.e. April 2009). The reason for bringing this question up is that there are some faculty who are concerned that with OP-6735 finalized, any action
taken by the University Senate will no longer have any legal standing. On the other hand, some of us would rather wait so that we can work through a more thorough process for revising the internal governance at the UO.”

Paul is asking, in effect, must we produce a governance document that follows the recommendations expressed in the opinion right away (in the winter 2008-9), or may we have a few months to work on it and then offer it to the Faculty for ratification at an April meeting?

And where are the recommendations expressed in the opinion? The section of the DoJ opinion that is copied below tells us. First, the opinion states:

We believe that any tension between the governance bodies created under IMD 1.123 and ORS 352.010 can be reconciled through a few actions. First, the faculty can simply recommence meeting as a body distinct from the Assembly. The faculty could delegate the exercise of their statutory powers to the Assembly. The faculty also could set the quorum and voting requirements for the Assembly’s exercise of the faculty’s powers. Other than these initial acts, the opinion goes on,

the only necessary business for the statutory faculty is to retain a separate existence that would facilitate a reclamation of authority delegated to the Assembly should the faculty determine in its discretion that part or all of the delegation is no longer desirable. As means to this end, the faculty should establish some schedule of faculty meetings, along with a procedure for calling such meetings should some portion of the membership so desire. Because it has been decades since such a separate meeting last occurred, it may also be desirable at the first such meeting to ratify the acts of the Assembly during the interim that pertain to curricular matters and to the immediate government and discipline of the University and its students, and affirm that the faculty is satisfied by the way in which the Assembly has exercised authority. The University’s statement of internal governance also should be amended to recognize this role of the statutory faculty. Finally, since the statutory faculty would reassume its role as part of the “internal governance structure” of the University, and to be consistent with IMD 1.123, any amendments to the internal governance statement should also be ratified by the statutory faculty.

Thus, at the 6 May 2009 meeting, the document that was ratified did not contain the amendments called for by the Opinion and by Joe McNaught.

APPENDIX II

Applicability of the Oregon Public Meetings Law to UO Internal Governance

The notion that the UO Senate and Assembly (in whatever form) are subject to the Oregon Public Meetings law (OPML) rests primarily on the undocumented and unconfirmed assertions found in two documents, none of which predate President Frohnmayer’s Administration:
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The first is the UO Governance document (Senate Charter, Enabling Legislation) http://www.uoregon.edu/~uosenate/SenateCharter.html. On its front page, a section labeled "Open Meetings Law" starts out: "Because the University Senate is a public body...". (The document does not cite the source for this assertion. Instead, it cites, irrelevantly, the undisputed legal definition of a governing body of a public body [See ORS 192.610(3)].)

A primary definition of "Public Body" is provided in ORS 192.610(4) of the OPML, which defines "public body" rather vaguely as "the state,.....or any .....agency thereof", but "agency" is left undefined.

Could the UO Senate possibly be considered an Agency of the State? ORS351.110 states "All relationships and negotiations between the Legislative Assembly and its various committees and the institutions of higher education shall be carried on through the Department of Higher Education. NO SUBORDINATE OFFICIAL REPRESENTING ANY OF THE SEPARATE INSTITUTIONS SHALL APPEAR BEFORE THE LEGISLATIVE ASSEMBLY OR ANY COMMITTEE EXCEPT UPON THE WRITTEN AUTHORITY OF THE STATE BOARD OF HIGHER EDUCATION (emphasis added).[Amended by 1999 c.59 §99]". Thus, it seems unlikely that our "Institution" (or any component of the UO), which is not allowed to communicate directly with the State Legislature except by permission of the State Board of Higher Education (the true Public Body), could be considered an Agency of the State.

"Open Oregon" provides a more elaborate definition of "public body". It states: "A 'public body' is any state, regional or local governmental board, department, commission, council, bureau, committee, subcommittee or advisory group created by the state constitution, statute, administrative rule, intergovernmental agreement, by law or other official act". Since neither the UO Faculty nor its agents, the UO Assembly and the UO Senate, “were created by the state constitution, statute, ...law or other official act”, there is no reason to think that any of these bodies is subject to the OPML.

Further clarification in support of the Senate's and Assembly's independence of the OPML comes from Open Oregon’s definition of a "governing body". Open Oregon states that a "governing body" [implied, by the UO Enabling Legislation to describe the UO Senate] is two or more members of a public body who have the authority to make decisions for or recommendations to a public body on policy or administration. A group without power of decision is a governing body when authorized to make recommendations to a public body, BUT NOT WHEN THE RECOMMENDATIONS GO TO INDIVIDUAL PUBLIC OFFICIALS (emphasis added)." Again, since the Faculty, Senate and Assembly were not created by any official act of the state, and since they make recommendations to the UO President rather than directly to a public body, such as the State Board, the definition of public body or of governing body of a public body does not apply to Faculty Governance.

(BTW, the ASUO Senate is subject to the OPML, but only because it does make recommendations to the State Board.)
The second document (suggesting to some that the Senate and Assembly are subject to the OPML) is the 14 November 2003 Memorandum sent to UO Counsel Melinda Grier from AAG Elizabeth Denecke.
http://darkwing.uoregon.edu/~uosenate/dirsen078/US-DOJ21Nov03.pdf

This letter states to be an answer to two questions:

1. Does "the Faculty [sic] Senate have the authority to make decisions on the rules of the University Assembly, including the number required for a quorum"?

2. Can the University of Oregon Assembly "change its quorum requirements from one-half of their number plus one to a lower number to enhance the effectiveness of the body"?

Ms Denecke’s response is that the UO Senate and Assembly must adhere to the quorum requirement of ORS 174.130. In reaching this conclusion, she assumes the applicability of the OPML to the operations of the UO Senate and Assembly, but gives no justification for that assumption.

In contrast to these feeble arguments suggesting that faculty government is subject to the OPML, the Internal Management Directives (IMDs) adopted by the State Board of Higher Education imply otherwise. The office of the Oregon State Attorney General, in a letter dated March 8, 2007 to then-Senate President Suzanne Clark, cites IMD1.123 to argue that our "Enabling Legislation" is simply an internal agreement between the President and the faculty. The president may veto any decision of the faculty subject to review by the Chancellor, and the Chancellor, in turn, must justify his/her action to the Board of Higher Education. Nowhere in IMD1.123 is there any indication that the faculty - or the president - is obliged to conform to the OPML.

In addition, several other factors suggest that neither the UO Assembly nor the UO Senate is subject by law to the OPML. First, it is hard to believe that President Dave Frohnmayer, as a lawyer and former State Attorney General, would be either unfamiliar with -- or unwilling to meet -- the requirements of the OPML. Therefore, when the President, as presiding officer, allowed an Assembly, lacking a quorum, to approve the 1995 Enabling Legislation (by an aye vote of less than half the membership), we must believe that he was aware that the Assembly was not subject to the quorum requirement reserved for public bodies according to the OPML.

In the light of the recent DoJ opinion (7 November 2008), the best argument may be found in Public Meetings Law Appendix A, which states: "...the meetings law will apply if a quorum of the group’s members are required to make a decision or recommendation." Since the DoJ opinion relieves the Faculty of any quorum requirement, the Faculty (and, by extension, its agent, the Senate) appears, ipso facto, to be relieved of the OPML.
Finally, consider the following analogy:

Community Boards of Education (analogous to State Board of Higher Ed) are subject to the OPML, as many of us know. Teachers' meetings (analogous to our Assembly and Senate meetings) are not (as many of us also know) despite the interest that the public has in their activities.