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To: Members of the University Senate

cc: Dr. Richard Lariviere, President of the University
Melinda Grier, General Counsel to the University President
Members of the *ad hoc* Internal Governance Committee

Fr: John E. Bonine, Professor of Law & Dean’s Distinguished Faculty Fellow

Re: **Shared Governance at the University of Oregon**

On November 10, 2009, the General Counsel to the university president sent a letter to the president of the University Senate¹ claiming, *inter alia*, “Because of the authority granted by statute and SBHE² to the president, most decisions regarding the operations of the university are recommendations to the president.”

A person receiving recommendations may simply make a contrary decision, rather than persuading others to his or her view. On the other hand, if two persons or bodies share authority, they must seek common ground. The letter is correct in noting that the University Senate’s exercise of the faculty’s statutory authority does not extend to *all* University matters. However, the letter provides no legal basis for its suggestion that the faculty’s statutory authority extends only to “curriculum and the discipline of the students.”

It is important that the University Senate, members of the *ad hoc* Internal Governance Committee, and individual faculty members understand the legal basis for and extent of the faculty’s role in university governance. The letter from the university president’s General Counsel mischaracterizes both. In this memorandum I shall explain its errors.

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¹ The letter can be found at <http://www.uoregon.edu/~uosenate/dirsen090/Grier-10Nov-PublicMeetings.pdf>. It was sent in response to a request sent by Dr. Gilkey on October 13, 2009, which can be found at <http://www.uoregon.edu/~uosenate/dirsen090/Gilkey13Oct09.html>. The University General Counsel’s letter will be cited hereinafter as “General Counsel’s Nov. 2009 letter.”

² State Board of Higher Education.

1. Views expressed by the General Counsel's Letter

The General Counsel's letter cites ORS 352.004 for its proposition that the president is designated as "the executive and governing officer of the university" and that the president has authority to control the "practical affairs" of the university. The letter omits, however, this qualifying language: "except as otherwise provided by statute."

Of even greater importance, the letter completely fails to cite the statutory grant of authority to the faculty that is contained in ORS 352.010. Following that failure, the letter asserts that the faculty's authority "is not stated in detail" and "is not well-defined." Combined, the letter gives an impression of the faculty's role in governance that is quite misleading, as will be explained in the next sections of this memorandum.

To an incorrect premise—that the statutory basis for the faculty's authority is undefined while the president's is plenary—the letter adds another premise without explanation or support. It asserts that "historically the faculty's authority has been over the curriculum and the discipline of the students."³ This limited view is also in error, as will be explained below.

Finally, the letter concludes from these incorrect premises:

As a result, it appears that the University Senate when it is making decisions regarding curriculum and . . . student discipline might be considered a governing body. Beyond that . . . it appears the University Senate's authority is not express and is that authorized by the president subject to veto by the president. . . . In other words, it is a recommendation to the president.⁴

Correcting these errors in premises and conclusion is important as the faculty contemplates revisions to the structure of governance at the University of Oregon.

One consequence of its incomplete analysis is that the General Counsel's letter gives incorrect advice regarding the applicability of the Oregon Public Meetings Law (OPML).⁵ This present memorandum will not, however, discuss the letter's OPML analysis because my purpose here is simply to set the record straight on issues of shared governance. In due time, I may provide another memo on the OPML.

³ General Counsel's Nov. 2009 letter at page 2.

⁴ *Id.* at pages 2-3. Internal citations omitted. Please refer to the original.

⁵ Oregon Revised Statutes (ORS) 192.610, *et seq.*, available at <http://www.leg.state.or.us/ors/352.html>.

2. The General Counsel's letter ignores one-third of the University of Oregon Charter

The General Counsel's letter gives an unbalanced view of the faculty's (and therefore the University Senate's) role in shared governance. In contrast, the November 7, 2008, letter opinion written by the Chief Counsel of the General Counsel Division of the Attorney General's Office (hereinafter, "2008 DOJ Letter") was unequivocal, referring to the Oregon *faculty* as a "public governing body" as a result of ORS 352.010.⁶ Earlier, on page 3, the 2008 DOJ Letter refers to the *faculty* as a "governance body."⁷ Elsewhere, the 2008 DOJ Letter refers to the ability of the *faculty* to create bodies "to exercise ORS 352.010 powers."⁸ The 2008 DOJ Letter avoids making any ruling on the scope of the faculty's power, in light of other statutes,⁹ but it is clear in the letter that the *faculty* (which includes both the president and the professors) has significant power.

The University Senate operates under a delegation from the statutory faculty, not as primarily a body making recommendations to the president. It is part of our statute-based "shared governance." As the Accreditation Self-Study performed by both administration and faculty noted two years ago, "The University of Oregon has a foundation of shared governance that goes back to the original charter of 1876."¹⁰ Legislation grants governance authority for the University of Oregon to three bodies or persons—the faculty, the president, and the board of higher education.

The "University Charter,"¹¹ enacted by the state legislature in 1876—133 years ago—has been retained to this day as the fundamental and continuing "organic act" for the University of Oregon. A fundamental element of the University Charter is codified as Oregon Revised Statute (ORS) 352.010. It clearly grants authority *directly* to the university's faculty, not merely as a delegation from the university president or the State Board of Higher Education. The state law currently reads (referring to all state institutions):

352.010 Status of faculty. The president *and professors* constitute the faculty of each of the state institutions of higher education *and as such have the immediate government and discipline of it* and the students therein. The faculty may, subject to the supervision of the State Board of Higher Education under

⁶ Don Arnold, Chief Counsel, General Counsel Division, Oregon Department of Justice, letter to Paul van Donkelaar, President of the University Senate, November 7, 2008 (hereinafter 2008 DOJ Letter) at page 6, available at <http://www.uoregon.edu/~assembly/dirSF/dirExtra/DOJ-OP-6735.pdf>.

⁷ *Id.* at page 3.

⁸ *Id.* at page 16.

⁹ *Id.* at page 17.

¹⁰ UO Accreditation Steering Committee, ACADEMIC EXCELLENCE: SUCCESSES, CHALLENGES, AND OPPORTUNITIES AT THE UNIVERSITY OF OREGON at page 245 (April 2007) (hereinafter "Self-Study"), available at <http://accredit.uoregon.edu/pdf/UOSelfStudyReport.pdf>.

¹¹ <http://www.uoregon.edu/~uosenate/dirsens/SenateHistory.html>.

ORS 351.070, prescribe the course of study to be pursued in the institution and the textbooks to be used.¹²

This language is similar to the laws in several states establishing state-run universities.¹³ The University Charter also elaborates the role of the university president in another section. Adopted also in 1876 and now codified in ORS 352.004, legislation designates the president as “president of the faculty” and

the executive and governing officer of the institution, *except as otherwise provided by statute . . .* with authority to control and give general directions to the *practical affairs* of the institution.¹⁴

The legislation thus grants two types of authority to two different persons or bodies. The faculty (of which the president is the head) has authority over the “immediate governance and discipline” of the University (not only the students). The president alone, on the other hand, has authority over the “practical affairs” of the University. The president is the governing officer “except as otherwise provided by statute”—a provision that in 1876 said “except as otherwise provided herein,” which self-evidently refers to the provisions of the University Charter granting authority to others.

The University Charter also granted authority to a governing board in 1876—authority that continues to this day in the State Board of Higher Education.¹⁵ ORS 371.070 provides that the State Board has authority to “adopt rules and bylaws for the government” of each institution, “including the faculty, teachers, students and employees therein.”¹⁶ Thus the Board joins the president and the professors in the realm of shared governance that is so valued at the University of Oregon.

¹² ORS 352.010 (emphasis added). A useful comparison chart showing the original 1876 language and the current language can be found in the 2008 DOJ Letter, note 3 *supra*, at page 17, n. 1.

¹³ *See, e.g.*, Michigan: Mich. Comp. Laws Ann. sec. 390.11 (“Sec. 11. The immediate government of the several departments shall be entrusted to the president and the respective faculties; but the regents shall have power to regulate the course of instruction . . .” Adopted in 1851.); Idaho: Idaho Code § 33-2811 (“The president of the university shall be president of the faculty The immediate government of the university shall be intrusted to the faculty . . .” (adopted in 1888-89)); Nebraska: Neb. Rev. Stat. § 85-108 (“The immediate government of each college shall be by its own faculty, which shall consist of the professors therein . . . (adopted in 1869)); New Mexico: New Mex. Stat. Ann. 1978, § 21-7-9 (“The immediate government of the several departments shall be entrusted to their respective faculties (adopted in 1889)). Oregon’s law also grants to the faculty “discipline of it [the university] and the students therein.” Similarly, the Act of March 23rd, 1868, to create and organize the University of California (Stats. 1867-8, p. 248), provided that “the *immediate government and discipline* of the several colleges shall be intrusted to their *respective faculties, to consist of the President and the resident professors of the same.*” *Quoted in Foltz v. Hoge*, 4 P.C.L.J. 445, 1879 WL 1488 (Cal. 1879).

¹⁴ ORS 352.040 (emphasis added).

¹⁵ The General Counsel’s 2009 letter and a 2008 DOJ Letter opinion have both accurately pointed out this provision.

¹⁶ ORS 371.070, available at <http://www.leg.state.or.us/ors/351.html>.

3. The statutory authority of the faculty has long been recognized at the University of Oregon

Former President Dave Frohnmayer recognized as recently as April 2009 that the faculty derives its authority “[u]nder state law.”¹⁷ In remarks made on May 31, 2000, he stated the importance of the University Charter:

That charter has remained as faithfully observed as any piece of legislation which has lasted for more than a century, that I can recall. And *it is the basis* upon which we reach decisions¹⁸

University of Oregon Policy Statement 3.150 states in part:

A. Faculty Governance and the Responsibility of Educators: The University of Oregon Charter. The Charter of the University of Oregon, adopted in 1872,¹⁹ places the governance of the University in the hands of its faculty, with the President at its head. . . . This system of governance imposes a solemn collective responsibility on the professors of the University of Oregon that is in addition to their individual responsibility to their students, their profession, and the larger society.²⁰

These statements regarding “the [legislative] basis on which we reach decisions” and stating that the “governance of the University” is placed by law “in the hands of its faculty” are far different views from the narrow view in the General Counsel’s November 10, 2009, letter—that any authority that the University Senate may exercise beyond curriculum and student discipline is merely “authorized by the president.” The General Counsel’s view also contradicts years of positions taken by the Senate itself regarding the source of its authority. For example, upon his retirement on May 22, 1996, Senate President Paul Simonds (currently the Senate Parliamentarian) read a farewell address as he completed his two years as Senate President, in which he noted:

First, as a reminder of your charge, I want to read to you the *legislation that gives you authority*.²¹

¹⁷ Dave Frohnmayer, “Dear Colleagues” letter, April 27, 2009, calling a meeting of the statutory faculty, available at <http://www.uoregon.edu/~assembly/dirSF/dirExtra/SF-Let-27APR09.html>.

¹⁸ Remarks by University President Dave Frohnmayer to the University Assembly 31 May 2000 (emphasis added), available at <http://www.uoregon.edu/~assembly/frohn31may00.html>.

¹⁹ This date refers to “An Act to create, organize and locate the University of the State of Oregon,” adopted in 1872. Others, such as former University Archivist Keith Richards, date the University charter to 1876.

²⁰ University of Oregon Policy Statement 3.150, available at <http://policies.uoregon.edu/ch3t.html>.

²¹ Minutes of the University Senate, May 22, 1996 (emphasis added), available at http://www.uoregon.edu/~uosenate/dirsen956/5_22_minutes.html.

4. Statutory faculty authority is not limited to curriculum and student discipline

The General Counsel's letter asserts that "historically the faculty's authority has been over the curriculum and the discipline of the students."²² This narrow view of the role of the faculty and its delegated body, the Senate, contradicts both tradition and statute.

Former University President David Frohnmayer put things differently in a discussion with the University Senate on February 8, 2006. He referred to "co-governance" and stressed that the University Senate's authority includes "*core matters of academia, such as curriculum and academic reputation.*"²³ President Frohnmayer asserted that faculty governance under the University Charter "does not extend to co-decision-making on administrative decisions of the kind that involve university housing and axillaries." But the references to "core matters of academia" and "academic reputation" clearly mean much more than "curriculum."

At the *national* level the organizations representing boards of trustees, universities, and their faculties issued a joint statement issued in 1966:

The faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, *research, faculty status*, and those aspects of student life which relate to the educational process. . . . Faculty status and related matters are primarily a faculty responsibility; this area includes *appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal.*²⁴

ORS 352.010 grants to the faculty "*the immediate government and discipline*" of the University, terms that are consistent with the broad national norms quoted above.

5. Conclusion

The General Counsel's letter fails to present a proper legal view of faculty authority and therefore of the inherent (statutory) authority of the University Senate, exercised in cooperation with the university president and the state board.

As we enter into discussions of any potential revisions to the governance structure at the University of Oregon, it is crucial that the full scope of faculty authority be understood.

²² General Counsel's 2009 letter at page 2, final partial paragraph, *supra* note 1.

²³ David Frohnmayer, discussion after State of the University Address, Minutes of the University Senate, February 8, 2006 (emphasis added), <http://www.uoregon.edu/~uosenate/dirsen056/08Feb06minutes.html>.

²⁴ Association of Governing Boards of Universities and Colleges and representatives of their faculties, the American Council on Education, and the American Association of University Professors, *Joint Statement on Government of Colleges and Universities* (1966) (emphasis added), available at <http://people.oregonstate.edu/~uzgalisw/aaup/national/joint.html>.