

**Little Hoover Commission**  
**Public Hearing on the California Institute for Regenerative Medicine**  
**Thursday, November 20, 2008**

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**Testimony of Kenneth Taymor**  
**Berkeley Center for Law, Business and the Economy**

My name is Kenneth Taymor. I am Executive Director of the Berkeley Center for Law, Business and the Economy, a research center at the UC Berkeley School of Law and a member of the Stem Cell Research Oversight Committees at UC Berkeley and Stanford University. The opinions expressed in this testimony are my own and do not reflect the views of either of those institutions. Prior to taking the position at the UC Berkeley School of Law, I practiced law in San Francisco for approximately 25 years. During that time I have structured and advised a wide variety of for-profit, non-profit and state and local entities, including the City and County of San Francisco and the California Department of Water Resources and Department of General Services – Telecommunications Division. I became interested in the issues presented by Proposition 71 during the campaign for its passage at which time I was both practicing law and working as a business and financial advisor for early stage biotech companies. After passage of Proposition 71, I attended many of the meetings of the Independent Citizens' Oversight Committee and its Working Groups and subcommittees as an interested member of the public. I also briefly assisted the president of the California Institute for Regenerative Medicine (the Institute) in developing procedural rules for the meetings of the Institute's Medical and Ethical Standards Working Group. During the past several years I have been conducting research relating to commercialization of pluripotent stem cell technology and political and economic issues related to the adoption and implementation of Proposition 71. At no time have I received any compensation from the Institute or from any person or entity in connection with any matter relating to the Institute.

In my testimony, I will briefly review the overall structure of the Institute and identify several elements and matters that may warrant further investigation and evaluation by this Commission. My testimony will first describe the Governance and Executive Management of the Institute, focusing on the following elements:

- Governing Body: Independent Citizens' Oversight Committee (ICOC)
- Delegated Major Policy and Decision making: Working Groups
- Executive Leadership: Chairman and President.

I will then explore the following four points that I believe could profitably be examined by this Commission in any consideration of whether changes to the governance of the Institute are warranted. At the outset, I stress that my identification of these matters is not to assert that there is a problem in the current governance structure, but that these matters are good candidates for further evaluation in any analysis of the governance structure of the Institute.

- Overlapping and Lack of Clear Lines of Executive Authority
- Large, diffuse Board with no Independent Board Members
- Staffing limitations – number and funding
- Meeting Openness and Transparency

### **Governance Body: The Independent Citizens' Oversight Committee (ICOC)**

**Responsibilities.** The Independent Citizens' Oversight Committee (ICOC) is the principal governance body of the Institute. The role of the ICOC is set forth in Proposition 71 which adopted Health & Safety Code section 125290.40. As summarized in the ICOC Bylaws, the ICOC performs the following functions:

- (a) Oversees the operations of the Institute;
- (b) Develops annual and long-term strategic research and financial plans for the Institute;
- (c) Makes final decisions on research standards and grant awards in California;
- (d) Ensures the completion of an annual financial audit of the Institute's operations.
- (e) Issues public reports on the activities of the Institute;
- (f) Establishes policies regarding intellectual property rights arising from research funded by the Institute;
- (g) Establishes rules and guidelines for the operation of the ICOC and its working groups
- (h) Performs all other acts necessary or appropriate in the exercise of its power, authority, and jurisdiction over the Institute;
- (i) Selects members of the working groups;
- (j) Adopts, amends, and rescinds rules and regulations to carry out the purposes and provisions of the statutory provisions applicable to the Institute and to govern the internal procedures of the ICOC;
- (k) Requests the issuance of bonds from the California Stem Cell Research and Cures Finance Committee and loans from the Pooled Money Investment Board as provided in Proposition 71;
- (l) Modifies as it sees appropriate its funding and finance programs to optimize the Institute's ability to achieve the objective that the Institutes activities be revenue-positive for the State of California during its first five years of operation without jeopardizing the progress of its core medical and scientific research program; and
- (m) Accepts additional revenue and real and personal property, including, but not limited to, gifts, royalties, interest, and appropriations that may be used to supplement annual research grant funding and the operations of the Institute.

**Working Groups.** Pursuant to the structure created by Proposition 71, many of the activities of the ICOC are partially delegated to three working groups which formulate medical and ethical standards for research undertaken with the Institute's funds and develop grant programs and

review grant applications. The working groups make recommendations to the ICOC which are reviewed, debated and voted on in a public meeting. Examples of the recommendations made by these working groups are

- (a) the standards that must be observed for collection of oocytes (eggs) from research donors;
- (b) what grant applications should be funded or denied funding
- (c) the internal procedures by which the working groups operate.

***ICOC Membership.*** The ICOC has 29 members. The criteria for each member, the method of appointment and term were established by Proposition 71. Members of the ICOC are appointed by the Chancellors at five University of California Campuses which have medical schools (1 appointment each), the Governor, Lt. Governor, Treasurer and Controller (5 appointments each), the Assembly Speaker and Senate President Pro Tem (1 appointment each). An additional two members, the Chair and Vice-Chair are selected by the other 27 members from persons nominated by the four constitutional officers identified above. The ICOC members serve six or eight year terms and can serve a maximum of two terms. Since the express intended lifespan of the Institute is approximately ten years, no turnover in ICOC membership (including Chair and Vice-Chair) is required.

The members (other than Chair and Vice-Chair) of the ICOC are selected based on the following specific criteria set forth in Proposition 71:

- (a) One executive officer from each of the five UC campuses identified above (5 members)
- (b) One executive officer from each of four other UC campuses (4 members);
- (c) One executive officer from each of four nonprofit academic and research institutions that are not a part of the UC system (4 members);
- (d) One executive officer from each of four California commercial life sciences companies (4 members); and
- (e) One executive officer from each of ten California regional, state, or national disease advocacy groups, one of which must be a mental health advocacy group and one of which must be an HIV/AIDS disease advocacy group (10 members).

### **Executive Leadership: The President and Chair**

Proposition 71 divides executive leadership responsibility between the ICOC Chair and the Institute's President. The division of control and responsibility between the two officers has been a subject of much discussion within the ICOC and the Institute and develop of an Organization Chart and allocation of employee reporting relationships took well over a year to develop. The Institute's Internal Governance Policy (adopted, 1/17/08) currently describes the allocation of responsibilities between Chair and President as follows:

**Chairperson.** The Chairperson of the ICOC's primary responsibilities are:

- (a) To manage the ICOC's agenda and work flow, including all evaluations and approvals of scientific and medical Working Group grants, loans, facilities, and standards evaluations;
- (b) To supervise the annual report and the annual financial plan of the Institute, the public accountability requirements for the ICOC and its subcommittees, including compliance with public meeting and conflict of interest requirements, and the legal and financial accountability of the ICOC;
- (c) To provide oversight for the annual audit of the Institute and for the legal and financial accountability of the Institute;
- (d) To manage and optimize the Institute's bond financing plans and funding cash flow plans;
- (e) To optimize all financial leverage opportunities for the Institute; and
- (f) To provide oversight of, and establish the policies for, the Institute with respect to legislation through the ICOC and the Legislative Subcommittee and, consistent with these policies, to assist in carrying them out by interfacing with the California Legislature, the United States Congress, the California healthcare system, and the California public.

**President.** The President shall serve as Chief Executive of the Institute whose primary responsibilities are:

- (a) To recruit the highest scientific and medical talent in the United States to serve the Institute on its Working Groups;
- (b) To direct the staff of the Institute's Working Groups;
- (c) To direct ICOC staff and participate in the process of supporting all Working Group requirements to develop recommendations on grants, loans, facilities, and standards as well as to direct and support the ICOC process of evaluating and acting on those recommendations, the implementation of all decisions on these and general matters of the ICOC;
- (d) To hire, direct and manage the staff of the Institute;
- (e) To develop the budgets and cost control programs of the Institute;
- (f) To manage compliance with all rules and regulations of the ICOC, including the performance of all grant recipients;
- (g) To manage and execute all intellectual property agreements and any other contracts pertaining to the Institute or research it funds; and
- (h) Supervise and direct the Policy Office of the Institute and implement the policies established by the ICOC and the Legislative Subcommittee with respect to legislation.

**Employees.** Proposition 71 (Health & Safety Code section 125290.45) limits the Institute to having not more than 50 employees. The ICOC has determined that eight of the employees shall support and report directly to the Chair and Vice-Chair (six and two employees respectively). The President may assign additional Institute staff to assist the Chair or Vice-Chair. The Institute's current Organization Chart is attached to this testimony.

## **Recommendations for Further Investigation**

Based on my experience with for-profit, non-profit and governmental entity governance and operations and my observations of the structure and functioning of the Institute, I have concluded that the following four areas present the potential for significant governance problems.

**1. *Overlapping and Lack of Clear Lines of Executive Authority.*** As discussed above and as appears in the Institutes Organization Chart, the executive authority for the Institute is divided between an active executive chair and a President who is the nominal chief executive officer. As long as the Chair and President are in agreement, this diffusion and overlap is inconsequential. However, when the two differ on a matter, there is potential for internal conflict, unclear communication to external constituencies and a loss of accountability.

In addition, the relationship between the ICOC and the Chair is unclear. This issue was noted as early as the ICOC June 6, 2005 meeting at which then ICOC member Dr. David Baltimore commented that the Organization Chart should make clear that the Chair reports to the ICOC. While this relationship is customary and recognized as a good governance structure, it is not clear that Proposition 71 intended for the Chair to actually be subject to or report to the ICOC on many matters. Unlike a conventional board chair who is subject to annual review and reelection by a board of directors, the ICOC Chair is elected to a six year term with no clear standard of performance or opportunity for ICOC review. Furthermore, the relatively precise requirements set out in Proposition 71 for a person to qualify as ICOC Chair limit the ability to replace the Chair or to have the ICOC consider evolving needs of the Institute.

**2. *Large, diffuse Board with no independent board members.*** The ICOC has two distinct characteristics that can limit its ability to be an effective governance entity: its size and the absence of independent board members. Large governance entities are at risk that the diffusion of responsibility across many individual members undermines the ability and inclination of individual board members to ensure proper oversight of the organization and its executive staff. In large boards, no individual board member believes that she can, or in fact can, make a difference. The quorum issues that the ICOC has been facing may reflect this problem. The infrequency with which the ICOC modifies or rejects Working Group or subcommittee recommendations also may be a reflection of the risk that large boards, in which individual members are relatively powerless, become rubber stamps in their policymaking and other governance reviews

The absence of independent board members compounds this problem. It is customary for boards to have members with conflicts of interests, for example, management insiders or members of the class of recipients of an organization's benefits. These "conflicted" directors bring some special expertise that gives rise to an inherent conflict. The conflict is commonly mitigated on many boards by having a significant block of independent directors outside of the zone of any conflict. This independence is entirely lacking on the ICOC. Ten members (11 counting the Chair) are advocates for disease research funding and 13 members are executive officers of Institute grantee research institutions. The absence of independent governors limits the likelihood that there will be substantial debate and dissent among Board members over critical policy and funding issues.

3. **Staffing limitations – number and funding.** The Institute has two significant staffing constraints: staff size and budget. Both are admirable from the perspective of economizing on overhead dollars. However, they may create undesirable governance distortions. The 50 employee cap divided between the President and Chair, can further erode the strength and independence of the President as chief executive officer charged with carrying out the essential function of the Institute to grant funds for scientific research. Much of the work in developing grant programs, evaluating grant applications and monitoring grant awards is labor intensive. This is especially the case in a new and rapidly evolving field such as pluripotent stem cell research. It will be worthwhile to evaluate on an ongoing basis whether the President can successfully run all of the elements of the Institute assigned to his office while over 15% of the staff are assigned to support the Chair and Vice-Chair.

A related issue is the budget for paying for staff and general operations. Proposition 71 ties the operating budget of the Institute to its grant funding. This linkage can be beneficial by encouraging the Institute staff to push dollars out the door and not hoard funds to perpetuate the life of the Institute and the staff's job tenure. In an emerging scientific field, however, it can lead to "overfunding." Projects may receive grant support because of the need of Institute staff to obtain operating funds linked to making grant awards rather than because of the merit of the project. This issue was touched upon at early ICOC grantmaking meetings where one board member questioned whether the "payline" for grant awards was too high and that some projects were being funded because the money was available, not because they were of outstanding merit. The long term consequences of these actions could be a shortfall in funding availability later in the Institute's life as the science in the field matures and enters the more expensive clinical trials phase. This issue also demonstrates the value of independent board members who might be more willing than either the dominant research funding advocates and grantee institution executives to question the payline.

4. **Meeting participation, openness and transparency.** The ICOC observes most of California's open meeting laws which provide the public to attend and give brief comments on proposed actions. The Institute goes to substantial lengths to publicize its meeting, make relevant materials available in advance of the meeting, and provide transcripts and meeting minutes on line. This is a very commendable exercise in good governance and all indications are the Institute is committed to continuing and where possible improving this transparency.

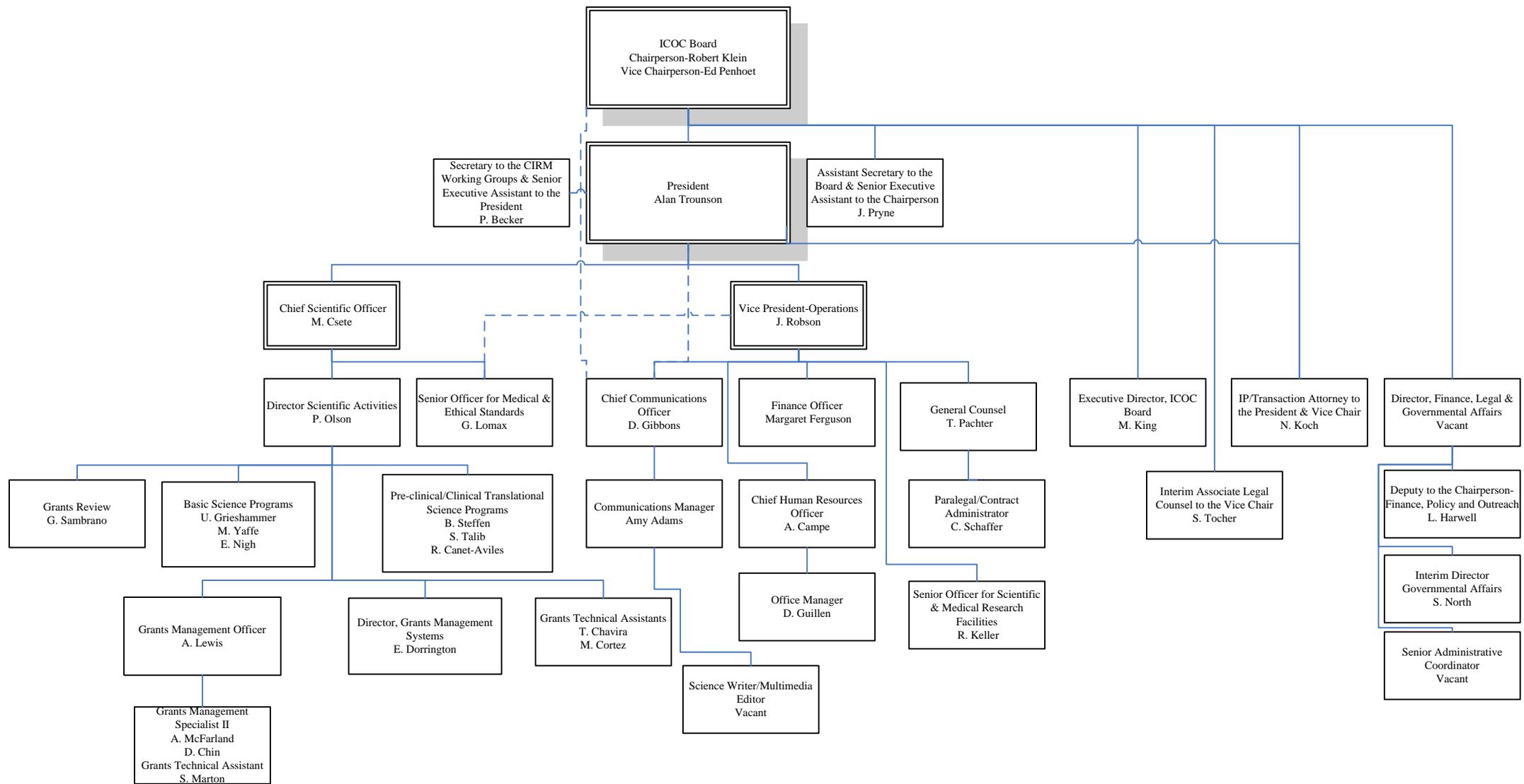
Nonetheless, attendance at meetings is often sparse and public participation very limited. Public speakers who do attend meetings often are interested parties who are potential grantees or a very small handful of representatives from interest groups that are monitoring Institute activities. Drawing on my observations at these meetings, I believe that several factors may contribute to this low level of interest in how substantial public funds are being spent. First, although public comment is allowed there is a strong sense that it is more tolerated than listened to and that it rarely, if ever has an impact. The debate that seems to occur at the ICOC or a particular Working Group or subcommittee (other than some of the initial discussions of the Medical and Ethical Standards Working Group) often was bounded by the interests of the participant board members which, as discussed above, did not include any independent members or disinterested viewpoints. There is not a sense that dissenting views from the public would

resonate with any significant number of Board members and open up or contribute to a genuine debate of an issue.

In addition, the atmosphere at many of the meetings that I attended was one in which challenging the decisions of the Chair or recommendations of a Working Group or subcommittee was an act of disloyalty. Again, the absence of independent voices in leading governance positions within the organization create the appearance the Institute and its governing structures are a club in which membership requires subscribing to specified goals and a path to their achievement.

Finally, one key set of decisions is made with complete lack of transparency – the evaluation of grant applications. The Institute asserts that confidentiality is essential when reviewing grant applications and there is good reason to believe that this is the case. However, the result of this lack of transparency, combined with the absence of independent voices on the ICOC, and the high percentage of the grants Working Group recommendations that are accepted by the ICOC, may seriously erode public confidence in and support of the decisions of that body. This Commission may make a substantial contribution to attenuating that threat if it can identify mechanisms that either or both (i) increase the presence of independent voices on the ICOC and (ii) make the grants evaluation and award process more transparent.

Thank you for the opportunity to present my testimony today.



\*Personnel in the Office of the Chair will report to the Chairperson and Vice Chairperson and through them to the President.

7/18/08