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Nominated by Both Parties

It is with great honor that I write a tribute to Dave Frohnmayer for inclusion in this law review. It is also a bit daunting, in part because this piece is not written to be a typical law review article, but rather as a personal statement from a former aide about a great leader, a remarkable human being, and a cherished personal friend.

In 1994, when Dave Frohnmayer was tapped to succeed Myles Brand as president of the University of Oregon, he lightheartedly quipped that he was an accidental president. Although Dave had many aspirations related to public service, I think this designation conveyed that assuming the role of UO's president had not been among them. While he was anticipating what his new, accidental job would entail, his newly inherited staff was similarly anticipating what it would be like to work for our new leader. Although we did not yet know him beyond his public persona, there was excitement in the air, as his arrival was preceded by his reputation for integrity, a human touch, and eloquent leadership.

In my own private moments, I wondered to myself, "What will it be like to work for a lawyer, a politician, a former attorney general—a Republican?" Although not proceeding from harsh stereotypes about our political parties, I could not ever remember voting for a Republican. These slightly concerning thoughts no doubt caused me to linger on one particular item as I first entered our new president's freshly decorated office. A simple frame on the wall behind his desk contained nomination certificates for Dave's reelection to a second term as attorney general. As I paused to look more carefully, I noticed that one certificate indicated that he was the Republican nominee. This was not surprising. But the other certificate caught me off guard—it was an endorsement from the Democratic Party. This bipartisan show of

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support impressed me profoundly. I knew that Dave was not known to be a political chameleon; instead, this rare embrace from opposing parties served as a testament to the person I would come to know—an individual whose ethics, integrity, compassion, and principles appealed to the highest values of our better selves.

My admiration for a man whom I had known mostly by reputation soon became very personal—indeed, I was introduced to the personal side of Dave on the morning of his first arrival as president to his new office. He arrived accompanied by a group of faculty and staff colleagues from the law school. I watched them interact with our staff, soon realizing that our new president's colleagues had come to ensure that we fully appreciated our significant gain, which would come at their professional and personal expense. They wanted assurances that we would take good and proper care of this man whom they had come to love as their dean. One friend, a distinguished law professor in the group, privately commented to me, “Know that you will be working for a very special man—one of the very best.” That same morning, I received a call from Dave's senior advisor from his attorney general days. She wanted to offer some guidance on how best to support Dave, and my conversation with her left me humbled, knowing that I would be serving a leader who was not only admired by the public but sincerely adored by those who worked closely with him.

Although quickly reassured that my new boss would be a pleasure to work with, I still wondered whether his legal acumen, and specifically his exceptional understanding of constitutional and administrative law, would prove to be an asset or, instead, a liability during his presidency. I had an unspoken but nagging concern that seeing problems from a legal orientation might restrict creative decision making. I soon discovered, however, that his comprehensive knowledge of the law and administrative rules in fact empowered him to achieve outcomes that reflected his compassion, his abiding sense of justice, and his commitment to human dignity. Rather than starting from the law, he first determined what was right, and then he brilliantly found the appropriate legal avenues to achieve desired outcomes.

Early in my relationship with Dave, I realized that he did not proceed from labels or prejudgments. While today's political dynamics too often direct energies toward vilifying the other, Dave recognized the value of being inclusive—in both heart and mind. I cannot think of a time when he did not seek first to understand both sides of an argument. When confronted with new—or even contentious—agendas, his impulse was to grasp the values and principles that underpinned the

positions. A couple of examples readily come to mind. In 1999, in response to ethnic slurs in e-mails sent among students, our active students of color organized a sit-in just outside his door in Johnson Hall. The dynamics were loud, and the tone was at times obstreperous and sloganeering. As the building closed, at 5 p.m., the protesters were technically in violation of university policy. Rather than ordering the building to be cleared—as his authority would certainly allow—Dave came out to the foyer and conversed with the students for nearly two hours, when he had to leave at 7 p.m. to teach his class on leadership.

The next day, Dave sought me out to discuss the points students had raised and asked that I meet with the leaders of the protest to understand as fully as possible their issues and goals. Subsequently, the president's office enlisted many of these leaders as presidential interns, with the assignment of planning steps to strengthen our university through the enhanced inclusion of diverse experiences, perspectives, and voices. Dave hired the interns for a summer, and these remarkable students developed the institution's first diversity plan. Because Dave saw past stereotypical assumptions about protesters and sought to understand what propelled these students to action, the university gained immeasurably from their insight and energy.

Dave's sympathetic nature combined with his unsurpassed curiosity regarding the human experience was again evident when the university took steps to honor former students who had been expelled in 1942 because of their Japanese ancestry. As it became public that the university—with authority granted from the legislature—intended to award honorary degrees to twenty former students, the *Oregonian* published an article highlighting our plans. In the piece, Mr. Sam Naito was quoted as saying that he would never accept a degree from the UO because of the way he was treated by our institution.¹ On reading that comment, Dave asked if I would reach out to Mr. Naito to learn more about what he had gone through at the UO—not to placate him, but rather with an interest in shedding light on the experiences that shaped his harsh opinion of the university.

In fact, Dave never sought anything from Mr. Naito except an understanding of what he had personally encountered as a young student in 1941. I had several visits with Mr. Naito, and, after each visit, Dave wanted me to share—in detailed depth—the personal narrative that Mr. Naito recounted. In one of our meetings, Mr. Naito indicated that he had a high regard for Dave Frohnmayer and was pleased that

¹ Steven Carter, *Honoring Dreams of Education*, OREGONIAN, Mar. 31, 2007, at A4.

the President's Office wanted to know more about his time at the UO. In particular, he appreciated this interest because, in 1941, he had experienced insulting and callous disrespect from that same office.

In proceeding with plans for this honoring ceremony, I had occasions to see how Dave's deep knowledge of law, understanding of legislation, and insights into history gave him latitude to accomplish what was right. The legislative intent had been to give the university authority to honor all of our students whose educations and lives had been interrupted by the fear and prejudice that had led to Executive Order 9066, which allowed for the deportation of Japanese Americans to internment camps. As we researched the backgrounds of the victims of internment, we ran into a complication. One of the students had been enrolled through fall 1941, but after Pearl Harbor, financial struggles with her family's restaurant in Portland kept her from having the necessary tuition to enroll during the subsequent winter term. When it was pointed out to us that the wording in HB 2823² granted us authority to award the honorary degrees *only* to students enrolled in 1942, Dave believed that applying this policy within this context would be unjust.

By then, having worked with Dave for many years, I was confident that he would be able to find a solution. And, of course, he did. Drawing on his encyclopedic knowledge of history, he reassured me, "Honoring all of our former students will not be a problem; we will, ironically, apply the definition of college enrollment that General Hershey used on student deferments during the draft." Dave explained that under Selective Service policy, a student who had not graduated was still considered enrolled at an institution through the interterm break. Under this definition, Dave pointed out, any of our students who completed fall term of 1941 still maintained student status until the first day of winter term classes. In his heart, Dave knew what was right, inspiring him to find a creative reconciliation between the legislative intent and our governing policy. In the spring of 2008, the university honored its former students in a ceremony that Dave later told me was one of the most meaningful of his career. The former students—by then in their early eighties—had an opportunity to tell their individual stories. To Dave's great pleasure, one of those in attendance was Mr. Naito, eager to accept his honorary degree.

Dave possessed remarkable self-confidence without the self-aggrandizing associated too often with people as they rise in public stature. I am frequently reminded of a distinction Dave made when he

² H.B. 2823, 74th Leg. Assemb., Reg. Sess. (Or. 2007).

confided to me that he wanted to work with people “who have strong egos—not big egos.” To me, Dave exemplified this difference, which was especially evident when he expressed his regard for the accomplishments of his predecessors. I remember, for example, that on multiple occasions he acknowledged Myles Brand for his leadership during the time when Measure 5 required draconian state budget cuts in higher education. Both publicly and privately, Dave gave credit to Myles for how he handled the difficult scenario, suggesting that he “literally saved this university.” Then, he would continue with, “Now it is our job to build on that.” He never felt the need to ignore or lessen past president’s accomplishments, but instead believed that he was standing on the work that came before.

Dave also appreciated Myles Brand’s desire to strengthen UO’s relationships with Oregon’s nine federally recognized Native American tribes. One of his first steps in fulfilling Brand’s vision was to codify the President’s Native American Advisory Council. With his deep understanding of sovereignty and a belief that positive relationships with Oregon’s nine tribes would further strengthen our government-to-government relationships with sovereign entities, Dave reached out to the tribal chairs. I remember numerous occasions when I watched Dave form sincere bonds of respect. As this new council was being put together, Dave conveyed to me that he wanted to include national native leadership. As we discussed names, he suggested that I call John Echohawk. I had heard the name Echohawk before, but I had to ask about his association to Dave. To my surprise, Dave shared that John was the Director of the Native American Rights Fund and had been opposing counsel in the Native American church case, *Employment Division of Oregon v. Smith*,³ that Dave, as attorney general, had argued before the U.S. Supreme Court. With a bit of uncertainty, I contacted John and asked whether he would be willing to serve on an advisory council to the university president, to which John, without a moment of hesitation, enthusiastically responded, “Sure—I would do anything for Dave Frohnmayer.” In that conversation and others that followed, I learned that, despite their opposing counsel roles in a Supreme Court case, Dave and John had begun a lifelong relationship built on mutual respect and admiration. Separately, they saw beyond labels to discover similar values and shared aspirations.

³ *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1488.

One of the first agenda items that Dave took to the President's Native American Advisory Council was a proposal to award in-state residency status for descendants of Oregon's first peoples. Our campus' Native American leaders had approached Dave with this idea, which would affect all enrolled members of the fifty-four tribes and bands who had direct relationships to the land that would later become known as the State of Oregon. This idea captivated Dave, as it would honor treaty obligations made to the first peoples of this region, many of whom had been forced to leave their homes and relocate in states as far away as Idaho, Colorado, and Oklahoma.

At the first formal meeting of the President's Native American Advisory Council, the group strongly endorsed this proposal for residency by aboriginal right, but when Dave took the idea to the Chancellor's Office, he was told to slow down. This was a time when affirmative action programs were under assault—even, ironically, from the U.S. Office of Civil Rights. The U.S. Supreme Court's denial of certiorari of the Fifth Circuit's decision in *Hopwood vs. Texas*,⁴ a decision limiting affirmative action, had just been handed down. Further, in California, Proposition 209,⁵ with its direct limitations on affirmative action in university admissions, had just been approved. The Chancellor's Office suggested that, given the climate at the time, the proposal would not be received well, and that it might, in fact, provoke legal battles.

On hearing that advice, Dave came back to the office, walked to the bookcase that held the quills bestowed on him for each case he had argued before the U.S. Supreme Court, and said with passion, "This is not the set of issues involved in *Hopwood*; it goes beyond affirmative action; it is honoring treaties." Then, with no false bravado but with the confidence befitting his scholarly background, he continued, "I have argued seven cases before the U.S. Supreme Court. If defending this residency proposal that honors the legal obligations of treaties with America's first peoples comes under legal challenge, I would be quite willing and proud to make this my eighth case before that Court." With guidance from his Native American Advisory Council, at a 1996 potlatch, the university formally bestowed residency status to enrolled members of each of the fifty-four bands and tribes with historic ties to

⁴ *Texas v. Hopwood*, 518 U.S. 1033 (1996) (denying review of *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), which was later abrogated by *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

⁵ Proposition 209 is codified in CAL. CONST. art. I, § 31(a).

Oregon. Within two years, the Oregon University System adopted the program for all of its institutions.⁶

In 2005, after a decade in which Dave led the university to widespread collaboration with Oregon's first peoples, the university and the nine federally recognized tribes dedicated the new Many Nations Longhouse.⁷ In keeping with its historic partnership, the event drew from a range of constituencies, with representatives from local, state, and federal agencies, the governments of the nine federally recognized tribes, and members of the local community joining UO faculty, staff, and students. In remarks that were entirely his own, Dave suggested how the new building was an architectural reflection of the spiritual richness of the first peoples of this region—the Kalapuya people. He emphasized how this new longhouse on the UO campus was the fulfillment of the vision begun by others—both university and native leaders. He went on to convey that we were witnessing the fulfilled vision and commitment of his predecessor, Myles Brand. After his own decade-long work to build the bonds and relationships with the governments of Oregon's first peoples, Dave could easily have taken all the credit, overlooking the earlier seeds of Myles Brand's accomplishments. But forgetting to acknowledge others' work was antithetical to our president's character.

Dave's deep sense of justice, both social and personal, was evident in his approach to resolving issues that came to him from students and their families who were frustrated by communications with other UO offices. I recall a situation in which out-of-state tuition had been mistakenly charged to a student who was actually a resident of Oregon. The father realized the error only after the student's sibling was charged the lower rate for in-state tuition. A refund seemed, of course, to be the correct course of action; however, by state law the university's fiduciary responsibilities required it to keep the mistakenly charged higher tuition because the error had not been pointed out until after the lapse of the legally prescribed period in which the fee could be challenged. Dave found that unacceptable and sought to pursue every possible legal and administrative means to return the money, regardless of the complexities in doing so. To accomplish this, he located an Internal Management Directive (IMD) of the Oregon University System that gave him the clear authority to waive or reduce fees when

⁶ See OR. ADMIN. R. 580-010-0037 (1999) (effective July 1998).

⁷ *Many Nations Longhouse*, U. OR. DIVISION EQUITY & INCLUSION, <http://inclusion.uoregon.edu/content/many-nations-longhouse> (last visited Feb. 18, 2016).

it was in the interest of the university. Creatively, he then used his authority to waive fees and tuition for the younger sibling to make the family financially whole. Although state law proscribed his ability to return the funds, his authority to waive the sibling's tuition was explicit. He asserted—and rightly so—that restoring funds to a family that had been mistakenly charged a fee was definitely in the university's interest—irrespective of whether the person had pointed out the error within a statutorily prescribed time period. In this case, with the younger sibling enrolling, Dave found an IMD that allowed him to produce a just outcome; knowing Dave, I am certain that even if there had not been a younger sibling and thus no possibility for that particular adjustment, he would have somehow reimbursed the family because, as Dave himself maintained, not refunding the money “would simply not pass the Nordstrom test.”⁸

Dave used the same IMD on another occasion to comfort a grieving family. We were faced with the tragic death of a young man who had been nearing the completion of his degree. Following the loss of their son, the young man's parents approached the university to see if he could be awarded a posthumous degree. As a father who had lost two daughters, Dave understood their need to acknowledge their son's living achievements, and Dave was committed to bestowing this honor for the bereaved parents. The university's policy on posthumous degrees, however, required that in order for a degree to be awarded, the student had to be enrolled in the courses that would have completed their degree that very term. Their child, who had been terminally ill during winter term, had not enrolled for spring term. When Dave learned of this policy, and the impact that it would have on this family, he looked for a way to bestow the degree. It occurred to him that the university registrar had the authority to retroactively enroll the student in courses while he, as president, had the authority to waive all fees and tuition. He directed me, “Have the registrar enroll the student, and I will pay or waive the tuition and fees.” The parents received their son's posthumous degree, never knowing that the creativity of a compassionate president made their heart-felt request possible. Dave subsequently asked that our policy on posthumous degrees be

⁸ Dave was referring to Nordstrom's widely admired reputation for customer service. *See generally, e.g.*, ROBERT SPECTOR & PATRICK D. MCCARTHY, *THE NORDSTROM WAY: THE INSIDE STORY OF AMERICA'S #1 CUSTOMER SERVICE COMPANY* (2d ed. 1996); Neeli Bendapudi & Venkat Bendapudi, *Creating the Living Brand*, HARV. BUS. REV. (May 2005), <https://hbr.org/2005/05/creating-the-living-brand>.

reconsidered; a revised policy now clearly provides for exceptions and flexibility when deemed appropriate by the president and provost.

Over the fifteen years we worked together, I marveled at how Dave's intellect, wisdom, and compassion positioned him to use the law to remedy individual injustice while advancing our public good. He led with legal expertise and political savvy, but was stirred by empathy, compassion, and a quest to understand the human condition. I titled this piece "Nominated by Both Parties" because that early revelation was my personal introduction to this remarkable man. When asked in the early months of his presidency what it was like working for Dave Frohnmayer, I would often refer to this political accomplishment. And more often than not, the response showed a bit of amazement: "Really? That's incredible." But then, as the months went by, and this statesman became revered as our academic leader, the response was less one of surprise and more typified by a colleague, who said to me, "Yes, that is extraordinary, but does that surprise you? That's just Dave." I came to realize that the two nomination certificates were just a simple and singular proxy for the characteristics our president embodied. Dave was a rare and wonderful individual, a historic leader, and I miss him very much.

