

# ICANN Reform: Establishing the Rule of Law

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## Abstract

*Debates over Internet governance can be clarified by the recognition that ICANN is a regulatory agency. Its responsibilities for setting base prices, protecting trademarks, and controlling market entry are typical of a regulatory agency. Principles for good governance of regulatory agencies exist and should be applied to ICANN. These emphasize the rule of law, i.e. reliance on rules to limit power politics.*

*ICANN's history shows how private governance can be captured by powerful players. At WSIS governments need to create and enforce a legally-defined framework that limits the power of all stakeholders -- including governments themselves. By establishing the rule of law, the politicized processes of ICANN can be replaced by predictable, fair, and efficient decision-making.*

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## **I. Introduction**

As WSIS policy makers consider Internet governance, the focus for concrete action is on the Internet Corporation for Assigned Names and Numbers (ICANN). This paper clarifies issues and offers proposals for ICANN reform.

Any reform proposal for ICANN must begin by recognizing what ICANN is: a regulatory agency. ICANN exercises such regulatory powers as accrediting registrars, setting base prices for domain names, evaluating the social utility of new TLDs, protecting trademarks, and punishing wrong-doers. Recognition of ICANN as a regulator simplifies ICANN reform, because principles of good governance for regulatory agencies are well known.

Good governance in regulation requires establishing the rule of law. A regulatory agency should be guided by rules that strictly limit opportunities for capricious and arbitrary action. The wealth and power of participants in regulatory processes should not determine their influence. A regulatory agency should have a clear mandate and good internal procedures.

To date, the rule of law has been lacking in ICANN's practices. Rules for decision-making are frequently amended, often disregarded, and not reliably enforced. More powerful government(s) have more influence than less powerful governments, and more powerful private interests have more influence than their less powerful counterparts. If cyberspace is the "electronic frontier," ICANN has created a "wild west" culture of politicized decision making. The time has come to establish the rule of law.

WSIS can guide ICANN toward good regulatory practice. Good regulatory practice includes the following elements:

- **Political Authorization:** A legitimate political authority (presumably an international body) should formalize the delegation of regulatory powers to ICANN.
- **Legislative Mandate:** That same political authority should spell out and delimit ICANN's mandate. This should be codified in an international legal instrument.
- **Internal Processes:** ICANN's system of stakeholder representation and decision-making should be reviewed for fairness and efficiency. Internal procedures should be clearly specified in a legal instrument, most likely its corporate charter and bylaws.
- **Judicial Review:** Mechanisms should be created by which ICANN's regulatory decisions can be appealed to higher authority. Any appellate body should have the power to enforce its decisions.
- **Political Oversight:** The legitimate political authority described above should periodically review ICANN's actions and mandate. Political oversight should itself be highly constrained in order to insulate ICANN from political pressures.

Such reforms would not sink ICANN in excessive bureaucracy or formalism. On the contrary: the rule of law is more efficient than the power politics of the "wild west." Efficient economies are built on sound institutions. The replacement of ICANN's informal and politicized procedures with well-ordered rules and enforcement mechanisms should greatly contribute to the stability of the Internet and the efficiency of ICANN's activities.

## **II. ICANN is a Regulatory Agency**

Once ICANN is recognized as a regulatory agency, Internet governance issues are more easily understood. Every country in the world has regulatory agencies, some public, some quasi-private. The rules for the institutional design and on-going operation of regulatory agencies are well-established.

ICANN's regulatory features include:

- **Price Setting:** ICANN acts like a public utility for name registrations, setting the base price for domain names.
- **Registrar Accreditation:** ICANN controls access to the global Internet namespace, setting numerous conditions on such access.
- **New Public Offerings:** ICANN approves and denies new TLDs in large part based on their anticipated public benefit.
- **Power of Enforcement:** ICANN can sanction entities that violate its regulations, most notably by removing their entry in the DNS name space.

Additionally, ICANN's actions have a national security dimension. The Internet is a critical infrastructure, providing communication capabilities that are vital to the orderly functioning of most societies around the world.

Recognition of ICANN's status as regulator does not negate its role as a standards-setting body: ICANN also allocates Internet identifiers and works with the IETF on technical standards. Its regulatory functions, however, are what make it powerful. ICANN exercises public powers. For that reason, it is imperative that ICANN conform to good governance practices for regulation.

## **III. Good Governance for Regulatory Agencies**

Regulatory agencies are like miniature governments: they make and enforce binding rules in a sector of the economy. Standards of good governance for regulatory agencies ensure that the exercise of public power is neutral, efficient, fair, and predictable.

Typical reasons for creating specialized regulatory agencies include:

- The area of regulation is highly technical and rapidly changing
- Regulators need close and frequent consultation with stakeholders (industry, users, technical experts.)

Global Internet coordination, with its attendant policy-making requirements, is a typical activity requiring oversight by a regulatory agency.

The creation of such a miniature government must itself be carefully constrained. The following bullets summarize elements of good governance.

- **Political Authorization.** Regulators may only exercise public authority that is delegated to them from higher political institutions. In constitutional democracies (which provide the model for ICANN) supreme political authority resides in the legislature, which represents the people. An explicit act of delegation is required.

- **Legislative Mandate.** Legislatures do not provide a blank check. Rather they define broad policy mandates, and then agencies create more detailed regulations through rulemaking. The legislative mandate is embodied in a legal instrument, usually a law.
- **Internal Processes.** As a miniature government, a regulatory agency will usually have detailed procedures of due process. These may include the definition of a governing board with representation for different classes of stakeholders. Rulemaking processes provide for input, comment, and record-keeping. Internal processes are embodied in legal instruments, such as corporate bylaws.
- **Judicial review.** Disputes may arise over whether an agency is complying with its legislative mandate or with its internal processes. Parties may appeal a decision to an independent body.
- **Political Oversight:** Regulators are subject to some degree of oversight by higher-level political officials (often elected.) Overseers may wield legislative and budgetary mechanisms to exert influence. Political oversight is a two-edged sword: it provides protection against an agency's abuse of power, but it can also expose an agency to political interference.

**Regulatory capture** is a major danger in the governance of regulatory agencies. Regulatory capture occurs when entities regulated by an agency gain control of its governing board or effectively control its decisions. Regulatory capture can take various forms: an agency's board may be filled by members of the regulated industry, high-level political oversight may impose industry interests on an agency, or claims of technical expertise may disguise interests as objective scientific fact.

#### **IV. Assessing ICANN**

As noted earlier, many of ICANN's activities are those of a regulatory agency. The claim here is not that ICANN *ought* to regulate; the claim is that it already is regulating. Recognizing that reality is a prerequisite for establishing good governance. In general, the governance mechanisms for ICANN's regulatory practices are poor.

##### Political Authorization

ICANN is a global regulator, but it was not created by a global legislature – nor even by a national legislature. ICANN's political mandate comes from the executive branch of the US government, specifically the US Dept. of Commerce. Thus ICANN's exercise of public powers has only a weak connection to established political institutions. Its legitimacy is weak.

##### Legislative Mandate

There is no legislative instrument that spells out ICANN's mandate. The closest thing to enabling legislation is the Memorandum of Understanding (MoU) with the US Dept. of Commerce, which defines various policy parameters for ICANN's on-going work. The MoU certainly does not exemplify the rule of law. It is subject to frequent modification, and the change processes for those modifications have been non-transparent.

### Internal Processes

Like the MoU, ICANN's bylaws have been fluid and unpredictable. They have been frequently amended (approximately 20 times,) with the substance of the changes reflecting the distribution of power among various stakeholders. Presumably, the changes were made in consultation with political authorities, but such high-level political processes were closed to public scrutiny.

The rule of law does not prevail in ICANN's internal processes. In 2002 industry representatives on ICANN's board eliminated user representation on the board altogether. An expert on democratic process from the US-based Carter Center characterized this action as a "coup," i.e. a lawless seizure of power. ICANN's "wild west" culture of power politics renders its regulatory decisions unpredictable and not neutral or objective.

### Judicial Review

Since ICANN has no formal legislative authorization, it is not possible to appeal its decisions on the basis of this authorizing legislation. A major area of judicial review is lacking.

Significantly, ICANN's corporate bylaws do allow for review. ICANN is incorporated in California, and state courts there have provided some mechanisms for judicial review. For example, in 2002 ICANN director Karl Auerbach successfully contested an ICANN staff decision to deny him access to internal financial records. Auerbach filed suit in California court, and the court found that ICANN acted wrongly. California courts also possess the power to have their decisions enforced. Following the court's judgment, ICANN complied with the rules and provided the information to Auerbach.

Any ICANN reform needs to consider the adequacy of US mechanisms for judicial review. If those mechanisms are judged inadequate or inappropriate for a global regulator like ICANN, alternative mechanisms for judicial review must be found. However, it may be that California law is adequate for at least some areas of review. (This is a technical legal issue, beyond the scope of this document.)

### Political Oversight

Political oversight of ICANN is simultaneously too much and too little. ICANN is subject to formal political oversight by the US Dept. of Commerce, which can easily terminate its contracts with ICANN. In addition, ICANN seems to be vulnerable to political pressure by other powerful governments, notably the EU. Such informal mechanisms invite meddling and render ICANN's actions unpredictable.

At the same time, there may be too little oversight. The majority of governments in the world have no voice in oversight, despite the fact that ICANN oversees a critical infrastructure.

## Regulatory Capture

ICANN suffers from regulatory capture, mostly to the benefit of US-based corporations. To cite the main episodes:

- **Capture of International Forum on the White Paper (IFWP) (1998):** The process by which the Internet community was to design ICANN was captured by powerful industry and technical stakeholders. They boycotted public meetings and successfully proposed their own secretly-written bylaws for ICANN.
- **Capture of ICANN Board (2002):** The same industry and technical interests eliminated user representation on the board. (This remains the case today.)
- **Capture of the Internet Society (2002):** In 2002 ISOC revised its bylaws to ensure that the society would be governed by its largest corporate members. This has led to two derivative acts of capture:
  - **Capture of .ORG registry.** This registry is now managed by ISOC.
  - **Capture of ICANN's At Large Advisory Committee (ALAC).** Nearly 60% of certified user-related organizations in ICANN are chapters of ISOC.
- **Capture of .COM by Network Solutions.** This US corporation has extended its very profitable control of the most popular domain name.

The goal of legitimate private governance of the Internet has not been met. Powerful stakeholders are able to bend rules in their favor, while the influence of users and civil society groups has been minimized. (In light of this, it is risky for such groups to endorse the private governance model. To draw on an old parable, it is like the hens proposing to partner with foxes in guarding the henhouse.) The goal of bottom-up, consensus based policy-making has proven unworkable.

In light of this, the US's hesitancy to fully privatize ICANN has been appropriate. To give ICANN independence would definitively pass public powers to the powerful stakeholders that control ICANN.

## V. Recommendations

The following recommendations would go a long way to establish the rule of law in Internet governance. By subordinating ICANN to a framework of rules, they would increase efficiency and impose needed limits on ICANN's activities.

### Political Authorization

ICANN badly needs a formal delegation of public authority. There are three ways to achieve this: an international agreement, a sole US authorization, or an adjustment to today's mechanisms.

The clearest way to establish international political authority is by a treaty. Signatory nations would collectively delegate authority to ICANN to perform its functions. (However, such a treaty may not be politically feasible, due to US opposition.)

A possible alternative might be for WSIS to recommend that the US formalize its delegation of authority to ICANN. The US Congress could pass a law defining ICANN's mandate. This would have the benefit of bringing ICANN within the normal regulatory

structures of at least one government. (However, this might effectively move ICANN to an even more US-centric regime than it has today, which, again, could be politically unfeasible.) (This option is explored in depth in Michael Fromkin's excellent article, "Wrong Turn in Cyberspace" 50 Duke L.J. 17, 24, 2000.)

A third option would be to work within the existing legal structures. The ICANN MoU could be internationalized. The content of this contract could be reviewed and elaborated by an international process. This would leave ICANN formally under sole US authority, but it would give some international legitimacy as well. (The ambiguity of such an approach might render it more politically acceptable to the international community.)

Any one of these approaches would clarify the source of ICANN's regulatory powers. Also, by replacing unilateral authorization with international authorization it would render ICANN's global powers more legitimate.

#### Legislative Mandate

In any of the above cases, it is crucial to articulate a clear legislative mandate. ICANN needs to be subordinated to a legal instrument that sets clear limits on its powers and scope of action. ICANN today has few formal limits on its exercise of power. Clear rules would render its actions more predictable. A legislative mandate would also help separate ICANN's internal multi-stakeholder processes from external political oversight. A clear demarcation between these two domains would separate expert-based decision making from politics.

#### Internal Processes

Powerful non-governmental interests have demonstrated their ability to capture ICANN. Furthermore, through their control of the Internet Society, those same powerful interests can probably capture any user representation mechanisms. ICANN's bylaws need a thorough review with an eye towards achieving balanced representation and neutral outcomes. A starting point could be the proposals by the Internet Governance Project (Klein and Mueller, "What to do About ICANN: A Proposal for Structural Reform." April 2005) or the ICANN-commissioned Carl Bildt Report (2002) on user representation. Ultimately, the main mechanism to guard against capture is likely to be political oversight, since only governments have the power to stand up to corporations.

#### Judicial Review

Currently, ICANN is subject to limited judicial review under the laws of California. Since ICANN is incorporated as a California non-profit corporation, alleged violations of bylaws can be reviewed by California courts. Some may question whether it is appropriate for an international corporation to be regulated by California law. The recommendation here is to be pragmatic: if this legal framework works, then it should be used. If it doesn't work, then a new site of incorporation or a new host country agreement might be required. This choice requires detailed legal analysis by experts.

Judicial review is more problematic at a higher level. Absent a legislative authorization creating ICANN, there are few applicable rules that can be violated or be reviewed. High level judicial review is linked to the articulation of an explicit legislative mandate.

Depending on the form of political authorization (international treaty, US legislation, or MoU,) an appropriate review mechanism should be identified. Again, since only governments are likely to be able to enforce judgments against corporations, a review mechanism should be linked to governmental institutions.

The importance of judicial review cannot be overstated. Without it, the rule of law is meaningless. WSIS must establish effective mechanisms for the appeal of ICANN decisions.

### Political Oversight

Political oversight invites meddling and power politics. If ICANN reform is successful in establishing the rule of law, then the importance of political oversight may decline. Still, a treaty or an internationalized MoU could both include mechanisms for regular political hearings and possible revisions to the legislative mandate.

Here the rule of law is most important. A clear legislative mandate can protect against government meddling by setting clear conditions for government intervention. Likewise, a legislative mandate can prevent abuse of power by private stakeholders by setting limits on what ICANN can do. Law can limit politics, making possible multi-stakeholder governance and limited but essential political oversight.

### Multi-stakeholder Processes

Perhaps the most controversial claim here is that a fully non-governmental (“private”) Internet governance is not feasible. ICANN’s history shows that privatization leads to industry capture. ICANN has been captured and will remain captured until governments intervene.

A reformed ICANN as proposed here would still consist primarily of private, multi-stakeholder governance. As with so many regulatory processes, good decisions require the expertise and agility of non-governmental actors. In the reforms proposed here, ICANN would not change significantly (balanced representation would be restored, however.) What would change is that multi-stakeholder processes would unfold in the context of law, i.e. clear rules for internal processes, a clear legislative mandate, and workable mechanisms for appealing decisions. Multi-stakeholder processes can only succeed if governments play a role in governance.

## **VI. Conclusions**

This paper’s call for greater formalization in Internet governance is also a call for greater efficiency. It is extremely costly to have informal, politicized, and fluid processes for Internet regulation. The current arrangement for Internet governance is neither efficient nor conducive to stability. Efficiency is only possible through the design of stable and predictable institutions that are backed up the power of government and protected by the power of law.

The rule of law is a pre-requisite for good governance. A reliance on law entails a role for governments: they must hammer out the legislative mandate that allows for multi-

stakeholder processes, that limits governmental intervention, and that allows for effective appeals processes.

What ICANN does is not unique or novel; it is a fairly typical regulatory agency. Rules for good governance of regulatory agencies are well known. WSIS should guide ICANN into the familiar and proven track of good regulatory governance.

## **VII. Acknowledgements**

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