



# ICANN, Inc.: Accountability and participation in the governance of critical Internet resources

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**Abstract:** *This paper assesses the relationship between public participation and accountability in ICANN. It explains how ICANN has responded to accountability concerns by creating new opportunities for public comment, review, and participation. Is public participation an adequate means of making this global Internet governance organization accountable to the public? ICANN is fundamentally a private corporation. Private corporations are held accountable in three ways: 1) directly through their membership or shareholders, 2) through competition, which gives the public the opportunity to avoid their products or services, and 3) through external regulation or supervision by judicial or public authorities. None of these forms of accountability apply to ICANN. Instead, the public is given a wide range of opportunities to participate in ICANN's processes and to voice their opinions. This paper questions whether participation is an adequate substitute for accountability. It analyzes three distinct reforms in ICANN's history to show how participation can displace accountability rather than improve it.*

## Participatory evangelism

*Participation* seems to have become the main legitimizing principle of all forms of Internet governance.<sup>1</sup> The answer to every criticism of a policy or a process is to issue a call for more people to “get involved” in the process. The answer to any legitimacy challenge is for the process to “be more inclusive.” The response to all distributional inequities is to call for special efforts to bring the marginalized and disadvantaged directly into the policy making process.<sup>2</sup> Whether it is ICANN, the UN Internet Governance Forum, the Regional Internet Registries, the many new national and regional IGFs or the OECD, maximizing public participation, sometimes in processes of dubious value, has become the overriding impetus of all Internet policy making structures. Participation and inclusion have almost become ends in themselves.

The new participatory evangelists, however, seem more willing to offer people opportunities to get involved than they are willing to offer them real authority or influence over the decisions. There is an important distinction between “making your views known” and “making your views count.” When the public is offered the opportunity to participate in Internet governance institutions, which of these two – self-expression or some tangible measure of decision making power – is the public being offered?

That question bears directly on the future of ICANN. As it is currently constructed, ICANN invests a large amount of its budget on public participation. ICANN's accountability mechanisms as a global governance institution for the Internet

<sup>1</sup> A more academic version of this paper will be published in the Korean Journal of Policy Studies Vol 24, No. 2, Dr. Jisuk Woo, editor. A special thanks to KJPS and Dr. Woo for organizing the conference at which the initial draft of this paper was given.

<sup>2</sup> Or at least the people who claim to speak for them, who always seem to be affluent folks from developed countries.



are still, after 10 years, a matter of interest and concern. Its perceived legitimacy, though improving, is also frequently questioned.<sup>3</sup> Typically, ICANN responds to legitimacy and accountability concerns by creating new opportunities for public comment, public review, and public participation. It is time to assess the relationship between participation and accountability in a deeper, more systematic way.

## ICANN the corporation

Several years ago the Harvard Berkman Center's John Palfrey (2004) characterized the mission and organizational form of the Internet Corporation for Assigned Names and Numbers (ICANN) as an unusual mash-up of three distinct institutional models. ICANN, he wrote, simultaneously purported to be 1) a private corporation run from the top down by a Board of Directors; 2) an open space for the development of bottom-up consensus about policy, similar to Internet standards organizations; and 3) a governmental regulatory body, with fair representation of affected stakeholder groups in a legislative process for the development of public policies. According to Palfrey,

...ICANN's structure was a compromise in the worst sense of the word. The designers attempted to blend the best parts of a corporation, a standards body, and a government entity, but they ended up with a structure that does not carry the legitimacy or authority or effectiveness of any of its component parts. (2004, p. 425)

To anyone familiar with ICANN's workings, the observation about mixed models rings true. ICANN constantly refers to its processes as "open," "bottom-up" and "consensus-based," drawing on norms derived from Internet standards organizations such as the Internet Engineering Task Force (IETF).<sup>4</sup> At the same time, its structure attempts to provide balanced representation of different "constituencies" or "stakeholder groups" as if it were a governmental legislative body; moreover, its processes are laden with public notice and comment requirements characteristic of a government agency formulating regulations. At the same time, ICANN is legally a private corporation (specifically, a California nonprofit public benefit corporation). All decision making authority rests solely and exclusively in the hands of a Board of Directors. The huge number and complex nature of the decisions the Board must make and the large number of meetings held means that the Board must rely on an increasingly large, professional staff to manage its information flows and procedures. The Board has practically untrammelled authority to dispose of the recommendations and policies handed to it by its various advisory committees and supporting organizations. It can modify the bylaws governing its processes and structures almost at will; and it has done so, making modifications at a pace of at least two a year for the past decade. Most importantly, the Board governs Internet identifiers by means of private contracts. While the substance of the contracts is influenced in some ways by general policies developed by its bottom-up, representational organs, the critical details and implementations are negotiated bilaterally between the corporation and the private businesses that operate under the terms of those contracts.

Palfrey and others (e.g., Koppell 2005; Pommerening 2004) have implied that the strange combination of corporation, standards body and governmental agency in a single institution causes both legitimacy problems and organizational turmoil. Consistent with

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<sup>3</sup> Generally, accountability can be viewed as an *ex post* factor (the organization makes a decision, and is then held accountable) whereas legitimacy is an *ex ante* concern, based more on input; i.e., the organization makes decisions based on an appropriate and representative level of inputs received, and so the decisions are accepted as legitimate from the start.

<sup>4</sup> The term "bottom-up" appears five times in its own "ICANN Factsheet," which makes claims such as "ICANN does not create or make Internet policy. Rather, policy is created through a bottom-up, transparent process involving all necessary constituencies and stakeholders in the Internet Community." ICANN Factsheet, <http://www.icann.org/en/factsheets/fact-sheet.html>, accessed October 31, 2009.



these arguments, ICANN has gone through constant structural change and many challenges to its legitimacy since its founding in 1998. It went through some sweeping structural changes late in 2002<sup>5</sup> and is now going through another round of reformation.<sup>6</sup>

Nevertheless, there is a method to the madness; an emergent order underlying the apparent chaos. ICANN has, in fact, learned to integrate these three organizational tendencies in a unique way. The key to understanding the interrelationship among them is to focus on the problem of *accountability*. Accountability – or the avoidance thereof – provides the key that unlocks many of the mysteries of ICANN’s structure – including its strong emphasis on public participation.

The thesis of this paper is that ICANN is, first and foremost, a private corporation. Its status as a private corporation dominates its approach to representation, participation and accountability. Like any corporate entity, ICANN is concerned primarily with its own survival and wants to be as autonomous as possible. It resists being subjected to the authority of any external agency, be it a membership, a collection of governments or an independent judiciary. In short, we are dealing with ICANN, Inc.

When this paper asserts that ICANN is a corporation it recognizes that it is a *public benefit* corporation and that its mission, bylaws and articles of incorporation (and its new Affirmation) invoke the public interest as a guiding principle. The paper also acknowledges that many if not most of ICANN’s Board members are sincerely devoted to discovering and implementing policies that serve the global public interest. No matter how much ICANN’s Board and staff profess to act on behalf of the public, however, the fact remains that it is not *accountable* to the global public in any significant way. It is, as this paper will explain, still fundamentally disconnected from most of the accountability mechanisms that normally accompany a corporation, a standards development organization or a government agency. In the absence of these moorings, the chief concern of a private corporation, whether for-profit or nonprofit, becomes its own survival, growth, security and autonomy. The corporation’s understanding of the public interest will, inevitably, be profoundly shaped by its own organizational imperatives.

Once ICANN Inc.’s basic nature is understood, it is easier to understand how its devotion to representation and bottom-up participation, which Palfrey found inconsistent with its status as a private corporation, performs an important function. Participation and representation can give people the feeling that they have a stake in the policy making process, even when they are in fact relatively powerless. Participation can create legitimacy and some semblance of accountability, even when it is absent. The large amount of staff and financial resources and public relations activity ICANN invests in inviting public comment and participation allows ICANN to achieve greater public legitimacy; this in turn helps it to avoid more direct, harder forms of public accountability.

Real *accountability* means that the actions of the Board and staff are held in check or reversed when they violate the rules and principles governing ICANN or clash with the interests of its constituents. *Participation*, in contrast, simply offers the Board viewpoints that it can accept or reject depending on its own interests and perceptions. Furthermore, whatever participation takes place must flow in channels and procedures defined by the Board and staff themselves and can be readily altered, either to win more support or participation from influential external constituencies, or to avert threats to the corporation’s autonomy and interests.

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<sup>5</sup> STUART LYNN, PRESIDENT’S REPORT: ICANN — THE CASE FOR REFORM, INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (Feb. 24, 2002), at <http://www.icann.org/general/lynn-reform-proposal-24feb02.htm>.

<sup>6</sup> Here I refer to both the “GNSO Improvements” and the replacement of the JPA with the Affirmation of Commitments. Both are discussed in greater detail below.



If participation can both legitimate the corporation's governance role while simultaneously allowing it to avoid direct accountability, it is clearly in the interests of ICANN, Inc. to *maximize* public participation and the degree to which the participants are "representative" of the general population, while *minimizing* the degree to which the participatory and representational structures are capable of actually controlling the Corporation's actions. In short, public participation can *displace* public accountability or become a *substitute* for it.

That is the basic thesis of this paper. The rest of the paper is divided into two parts. The first part provides the conceptual underpinnings of the thesis. It analyzes the various modes of accountability that might be applied to ICANN, and shows in abstract terms how ICANN employs public participation and representation as substitutes for accountability mechanisms.

The second part describes the process of substitution in empirical-historical terms. It analyzes three structural reforms that have taken place in ICANN since 2003. The three are:

- The replacement of direct election of Board members with the At Large Advisory Committee and Nominating Committee
- The current round of structural changes in the Generic Names Supporting Organization (GNSO)
- The replacement of the Commerce Department Joint Project Agreement with an "Affirmation of Commitments."

The final section explores the implications of this analysis for civil society participation in ICANN.

## Modes of Accountability

Table 1 below provides a schematic summary of four different types of accountability and how they correspond to the three organizational models upon which ICANN was founded. The first type of accountability is "Direct" accountability. This allows people to influence the organization through voting for the key decision makers in the organization. It affords them a special status, such as membership or citizenship, which brings with it voting and other rights. It is the core concept behind democratic accountability. The second is what I call "Exit" accountability. This refers to competition, or the ability of subjects or citizens to escape the authority or services of the entity if its policies or performance are unacceptable. This is the core of market accountability. The third form of accountability is labeled "External." It consists of an oversight or appeals process conducted by an independent entity with the authority to reverse the organization's decisions or impose sanctions on it for failure to comply with agreed rules. This is the core concept behind the rule of law or legal/constitutional accountability. Last, there is what I call "Voice," a form of accountability which encompasses the ability to directly participate in a process and express one's opinions. This involves deliberating over, formulating and promoting desired decisions and policies, as well as protesting or criticizing undesired decisions and policies.

As an accountability mechanism, Voice is arguably the weakest of the four, unless it is combined with the other modes. Engaging in deliberations or expressing one's view about policy has no guaranteed effect on the actual decisions taken. If participation is completely detached from Direct, Exit or External forms of accountability, it has no effect on an organization other than what its decision makers choose to give it.

Table 1 also shows how these four types of accountability are related to the different organizational types. A gray cell indicates that the organizational form in the column typically does not or cannot rely on that mode of accountability. The discussion below is organized according to the three organizational types.



**Table 1: Modes of accountability mapped to organizational models**

Accountability modes ↓	← Organizational models →		
	Corporation	Consensus-based standards	Governmental
Direct	Shareholders (profit); Members (nonprofit)	Election of WG chairs	Citizenship and voting; Representation
Exit	Competitive alternatives (profit); Refusal to support (nonprofit)	Voluntary adoption	
External	Conformity to public law; Government regulation		Rule of law; Judicial review
Voice		Open participation	Lobbying, public hearings, protests, etc.

### Direct accountability

In private commercial corporations, shareholders exercise direct accountability, and in nonprofits, members can exercise direct accountability. Both types of direct accountability allow people to vote for or against Board members and literally remove undesired decision makers from office or help place someone desired on the Board. Membership or shareholder status may confer other legal rights as well, such as a right to receive more information or to participate in certain processes.

In the governmental model, an electorate composed of citizens is able to exercise direct accountability by voting in elections. There are also multiple layers of representational structures, put into place through such voting.

A consensus-based standardization process, on the other hand, has weaker forms of direct accountability when they are truly open and there are no members. Working Group chairs might be elected or appointed by the participants. Some formalized standards organizations may have members who are empowered to vote to select officers or approve policies. But these should be characterized as nonprofit corporations rather than as open, bottom-up organizations such as the IETF.

### Exit accountability

Competition is an important accountability mechanism. It directly and tangibly punishes an organization for poor performance and, assuming a better alternative can be found, improves the condition of the party who exits. Private commercial corporations are normally subject to strong forms of exit accountability. The products and services they produce can be produced by other organizations. Nonprofit private corporations, if they are not tax-supported, are also subject to significant kinds of exit accountability. Members and funders can abandon them and start alternative organizations or transfer their support to other organizations if they do not perform the way they want.

Open standards organizations are subject to powerful forms of Exit accountability. In most cases, no one has to adopt the standards they produce. If they want to be relevant they have to produce standards that are broadly beneficial, widely supported and meet the needs of the relevant constituencies.

Governments, on the other hand, are only weakly subject to exit accountability. They are by definition territorial monopolies on the provision of public functions, and it is highly costly and disruptive for citizens to abandon their citizenship to escape them.



## External accountability

The private corporate form is potentially subject to different layers of external accountability. It can be subject to externally-defined public law, as well as to more specific forms of governmental regulation. Most (liberal-democratic) governments are subject to external accountability, too. Ideally, the actions of states are subject to judicial review by independent judges who can reverse or modify their decisions if they contravene basic constitutional law.

Consensus-based standards organizations, on the other hand, are difficult to subject to external accountability. While the individuals and organizations involved must obey basic civil and criminal laws, it would be hard for an external, judicial-type authority to second-guess or regulate their functioning as consensus-builders and technical solution developers. These organizations may develop their own internal appeals procedures to guard against abuse of their processes, however.

## Voice

As noted above, “voice” or participation can be used as a mode of making organizations accountable. In the private corporation model, however, voice is typically the *least* important accountability mode. Private corporations are not set up to encourage open public participation in the making of their decisions and policies. By definition, the corporate form of organization sets up a boundary between the general public and a smaller group of owners or shareholders who make decisions by and for themselves. While corporations may respond to strong and concerted expressions of negative public opinion, it is mainly because such expressions threaten to trigger some form of exit or external regulation.

A partial exception to this rule occurs when private corporations leverage peer production techniques or crowd-sourcing, such as software producers who leverage open source methods or web services providers who organize and channel customer feedback. Corporations that do this are integrating Voice into their decision-making apparatus rather extensively. However, the real motivation for this is that their customers and users have a strong exit option. Voice is not so much an accountability mechanism as it is a method of learning and adapting; it is used to gather feedback and improve upon their products in an environment governed by market competition.

Governments, too, rely heavily on Voice if they are democratic in nature. Lobbying, public hearings, protests, petitions, and monitoring of news all constitute essential forms of being responsive to the public’s wishes. But with governments, Voice as a mode of accountability is clearly subordinate to Direct accountability, just as Voice is subordinate to Exit with private corporations. In a governmental context, Voice is primarily a means of gauging demand for policies, laws and regulations. If public officials assess that demand correctly they will be rewarded at the polls; if they judge it incorrectly or disregard it, they will be punished at the polls. If governments are not subject to Direct accountability, Voice tends to be disregarded, or even suppressed.

Consensus-based standards organizations, on the other hand, derive nearly all of their legitimacy and accountability from the exercise of Voice. They style themselves as expert meritocracies, or, if they want to be pretentious, as Habermasian discourse communities. (Froomkin, 2003a) As such they have strong incentives to at least listen to all sides of a controversy before making a decision. As with private corporations, however, the incentive to incorporate Voice is strongly dependent on the prospect of Exit or competition.



## ICANN and the modes of accountability

With this framework in place, we are better able to analyze and interpret ICANN, Inc.’s unique approach to accountability and participation. Table 2 shows how ICANN as governance organization relates to the various accountability modes.

**Table 2: ICANN and the modes of accountability**

Accountability modes ↓	Present in ICANN?	Comments
Direct	No	No membership, very indirect forms of Board appointment (Nominating Committee, SO elections)
Exit	No	Monopoly power; limited possibility of a competing root
External	Weak	California Nonprofit Public Benefit Corporation law; A nonbinding independent review process (IRP)
Voice	Yes	Extensive opportunities for public participation and comment. Very open treatment of information. Staff and Board very accessible.

The chart reveals that ICANN’s pattern of accountability is the exact opposite of that normally associated with private corporations. Table 1 indicates that private corporations, whether market-based or nonprofit, typically rely primarily on Direct and Exit modes of accountability. Additionally, corporations are subjected to External regulation depending on the degree of monopoly power they have or the degree of public dependency on their operations. Private corporations are not structured to rely heavily on Voice or, if they do, it is merely an extension of their concern with Exit.

*ICANN inverts this pattern.* It has no membership or shareholders to provide Direct accountability. There is no credible Exit option, aside from the costly, unlikely “nuclear option” of forming an alternate DNS root. Despite having what is in effect strong monopoly power over an essential facility, this private corporation is subject to rather limited forms of External accountability as well. The absence of External accountability in ICANN’s case is explained by its unique status as a new global governance organization. In the nation-state system, the supply of External accountability in a transnational context is difficult and complicated. Either the corporation must be regulated by one national government (in which case the norms and laws involved will have no legitimacy outside that state) or it will require an international treaty (which involves governments in a host of costly, time-consuming negotiations and potentially undesirable or difficult-to-resolve political tradeoffs).<sup>7</sup> ICANN does have an independent, non-governmental appeals process, based on a private arbitration model, known as the Independent Review Procedure (IRP).<sup>8</sup> IRP could be considered a form of External accountability but it is, by design, non-binding. Moreover, it is quite expensive if pursued seriously.<sup>9</sup> Thus it is at best a weak form of External accountability.

By way of contrast, when it comes to Voice, ICANN far exceeds the standards of other international, intergovernmental organizations. With its extensive participatory mechanisms and its thoroughgoing receptiveness to public Voice, it is more open than

<sup>7</sup> The “political oversight” debate engendered by the World Summit on the Information Society provides a clear example of how contentious any attempt to apply External accountability to a global Internet governance agency can become.

<sup>8</sup> Article IV, section 3 of the ICANN Bylaws defined the Independent Review Procedure.

<sup>9</sup> The procedure has only been used once, by ICM Registry in connection with the .xxx top level domain controversy. At the time of this writing, the results are unknown but Stuart Lawley, the proprietor of ICM registry, claims that the procedure has cost him US\$ 5 million.



many national or local governmental agencies. No other private corporation that I know of opens up its processes to this degree. Thus, even though it is a private corporation it relies extensively, if not exclusively, on Voice.

What explains this unusual pattern? My theory is that ICANN Inc.'s Board and management employ participation (Voice) as an alternative to, and substitute for, the other forms of accountability. ICANN's massive emphasis on public participation can be interpreted as a kind of over-compensation for the glaring absence of Direct, Exit and External forms of accountability. The underlying logic is: "if you cannot control the Corporation, be the Corporation"; or, "if you do not like what we do, you take responsibility for helping us to do it differently." If larger and larger numbers of people can be convinced to exercise Voice within the Corporation, ICANN can claim that its policies and actions are legitimate and accountable to the public because a broad and representative slice of the global public participated in formulating them.

I do not suggest that this strategy of substitution is a conscious one intended to deceive or mislead the community of actors around ICANN. Rather, I see it as a logical response to the political and organizational tensions inherent in ICANN's DNA. ICANN consists of an all-powerful Board with the legal and organizational authority to rule from the top down, yet this Board co-exists with norms and expectations derived from a bottom-up standards organization and a government agency. Given this Board's utter independence from the normal forms of accountability associated with the corporate model and its obvious self-interest in remaining free of the other forms of accountability, ICANN has learned to develop ever-more elaborate and extensive forms of participation as a response to the absence of accountability.

This conclusion is corroborated by a historical analysis of some changes in ICANN's structure. The accountability framework discussed above provides a good analytical basis for examining some aspects of ICANN's historical evolution.

## **ICANN, the accountability problem and participation: Some historical episodes**

In 1998, as ICANN was being created, several factions argued that the only solution to the accountability problem was for ICANN to become a membership organization and for its members to directly elect the Board. The Clinton administration officials overseeing the process agreed with this argument. They agreed despite the utter hostility with which the initial incorporators of ICANN, Jon Postel and Joe Sims, reacted to the suggestion. In its negotiations with the fledgling ICANN the Commerce Department ultimately required it to develop a membership that would elect half of its Board. (Mueller, 2002 p. 183-4)

### ***The flight from direct accountability: from elections to ALAC***

There is a lot of scholarly and policy literature about the ICANN elections of 2000. (See Klein, (ed.) 2001; NAIS, 2001) That work discusses democracy in cyberspace and asks whether the elections were a success or a failure. This paper is not concerned with that issue. Whatever the merits or flaws of elections as a means placing people on its Board, the issue is moot because ICANN abolished its membership and its ability to directly elect Board members near the end of 2002. (Froomkin, 2003b) In the place of individual membership, ICANN's Board created the At Large Advisory Committee (ALAC) and a Nominating Committee. This was, in fact, one of the first and most important structural changes in ICANN. It was the first step toward reconciling the inconsistencies in the three organizational models and marked the ascendancy of the private corporation model. It was the beginning of the process of substituting participatory structures and corporate patronage relationships for Direct modes of





accountability. The 2002 “reforms” moved decisively away from Direct accountability towards an advisory-participatory structure that had to be mediated and managed by ICANN’s staff.

The Nominating Committee (NomCom) is now the primary mechanism for placing people on the Board. It appoints all Board members except for the 6 elected by the Supporting Organizations. It also appoints voting members to the Councils of the Supporting Organizations and one third of the ALAC. NomCom consists of five (5) people appointed by ALAC, nine (9) members appointed by various constituencies or organs of the Supporting Organizations, two (2) appointed by the sitting Board of Directors, and two (2) from technical organizations. It vets Board candidates in secret and selects most of its members on the basis of these private deliberations.

ALAC is a committee of 15 people, three for each world region recognized by ICANN. ALAC represents the demotion of the individual Internet user from autonomous voter to a category of indirect representation by a small committee. ALAC, which advises the ICANN Board about “the interests of individual Internet users,” is supposed to be merely the capstone of a broader group known as the “At-Large community.” This “community” is formed around five regional organizations composed of entities recognized as “At Large Structures.” At Large Structures are organizations that purport to represent individual Internet users in a given region, and apply to ICANN staff and ALAC to be accredited as such. These organizations are federated into Regional At Large Organizations (RALOs), yet another tier of organization. RALOs elect people from their region to the ALAC and supposedly carry on dialogues about policy issues before ICANN. One of the oddest aspects of the At Large community is that despite its official claim that it advises on the needs of “individual Internet users,” RALOs do not permit individuals to join! Only organizations can be recognized as At Large Structures. After six years of existence, only 82 such organizations have been accredited by ICANN, an average of about 16 per world region.<sup>10</sup> At least half of these organizations are local Internet Society chapters. Of the 15 ALAC members, two are elected for each world region by one of the five RALOs, and five are appointed by the Nominating Committee.

The At Large Advisory Committee (ALAC) is the only organ of the so-called At Large community that has any real and direct influence in the ICANN process. It gains this influence through its authority to appoint liaisons to the Board, the GNSO Council, and other ICANN committees, and through its power to appoint five members to the important Nominating Committee. Recently, ICANN announced that it would allow ALAC to appoint a voting member to the Board.<sup>11</sup>

ALAC seats are plums for those who seek recognition and status in the social ecology of ICANN. As anointed representatives of “individual Internet users,” ALAC representatives are flown to ICANN meetings at the corporation’s expense and given lodging and a per diem at the 5-star conference hotel. They have direct access to many Board members and are in regular communication with the high-level policy staff. Approximately five full time staff members devote their time to “supporting” or managing ALAC and the At Large community. Although precise budget figures are unavailable, it would be uncontroversial to estimate the annual cost of supporting the At Large as between \$1 and \$2 million.

The contrast between the approach before and after the “reform” is stark: a form of Direct accountability that enfranchised potentially billions of individual users was replaced by a committee of fifteen people and a Nominating Committee of about two dozen insiders. ALAC appoints people to NomCom, and NomCom appoints people to

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<sup>10</sup> At Large Structure application and certification process.

<http://www.atlarge.icann.org/applications?filter0=160>

<sup>11</sup> Prior to this ALAC merely put a non-voting liaison on the Board.



ALAC; a self-reinforcing circularity is one of the most prominent features of ICANN's participatory structures.<sup>12</sup> If we compare voting to the "At Large community" as a means of organizing public collective action, we see major, radical differences. True, both permit civil society to participate in ICANN – and both cost significant sums of money. But in the At Large, numerous gatekeepers and levels of indirection are superimposed on the process. The average member of the public, whose stake in domain name policy is small, is unlikely to have a strong enough incentive to devote the time it takes to become regularly involved in a complex, multi-tiered At Large community and attend numerous meetings or working groups – unless they see these structures as career opportunities. More importantly, the At Large approach makes civil society participation and input dependent upon support and management by the ICANN professional staff. Indeed, the At Large can be viewed as a kind of patronage system through which people who are loyal to the corporation can be recruited, rewarded and elevated while those who are not can be discouraged. There is no autonomy in the structure. For this reason, the At Large has been compared to a "company union."<sup>13</sup> A company union internalizes and subjects to corporate management the bargaining relationship between the corporation and its employees. It replaces what is supposed to be an independent collective bargaining relationship between employees and employer with a participatory structure defined and owned by the corporation.

There is also a bureaucratic imperative at work. Those who rise politically through the ALAC hierarchy tend to become advocates for increasing ALAC's share of budgetary resources and power in the corporation. To put it bluntly, ALAC becomes an advocate for ALAC, not necessarily for individual users. At any rate, the construct of "individual Internet user" as a category of representation is odd and ironic. In a democracy, individual citizens are considered to be autonomous agents with their own distinct interests. The diversity of those interests is recognized, as individual members of the *demos* are expected to self-form political parties or interest groups that correspond to their heterogeneous political positions. In ICANN, in contrast, the individual becomes an abstraction with a homogeneous interest that is "represented" indirectly by multi-layered and highly vetted processes.

### ***Flight from the governmental model: the GNSO Improvements***

In 2007, ICANN's Board Governance committee proposed another round of reforms that promised to create a more representative and consensus-based policy making process in its Generic Names Supporting Organization (GNSO).<sup>14</sup> These reforms were proposed in response to a surprisingly independent and accurate report assessing the GNSO produced by consultants from the London School of Economics.

The story of the reforms' implementation reveals the simultaneous interaction of the three organizational models identified by Palfrey. Consensual, bottom-up standards organization and representative governmental agency are both regularly invoked in the public dialogue around these reforms. But it is the private corporation model that, while

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<sup>12</sup> Indeed, for several years following the 2002 "reforms" the 15 members of the "interim ALAC" were appointed by the Board and/or the Nominating Committee because there were no RALOs in existence yet.

<sup>13</sup> See for example Appendix 3: Concurrence from Karl Auerbach, member of the ALAC Review Working Group, p. 34, Review of the At Large Advisory Committee, Final Report of the ALAC Review Working Group on ALAC Improvements, February 2009. <http://www.icann.org/en/reviews/alac/final-report-alac-review-28jan09-en.pdf>

<sup>14</sup> "Generic" is the awkward word used by the ICANN community to denote any top level domain names that are not two-letter country codes. Top-level domains such as .com, .org, net, .info, and .mobi are considered generic. About 2/3 of the world's domain name registrations are under so-called generic domains.



not explicitly or openly discussed during the reforms, emerges as dominant and drives the nature and direction of the changes.

## The GNSO prior to the reforms

The GNSO, while not well known to people outside of ICANN, is a central nexus of ICANN politics. It is a representational structure that is supposed to develop consensual public policies that govern generic top level domains. Consistent with the Palfrey thesis, the GNSO was created to be *both* a representational-legislative body *and* a bottom-up consensus development apparatus – an oxymoron that plagues its functioning to this day. The GNSO was forced to be representational because, at the time of ICANN’s founding, everyone realized that the rules and regulations affecting domain name – trademark conflicts and new top level domains would have profound effects on the distribution of costs and benefits among various parties. Thus, the interest groups involved in domain name policy demanded *representative* shares in the formulation of policies. This included, *inter alia*, big business holders of trademarks, the registration industry, civil liberties-oriented public advocacy groups, holders of country code TLD delegations, and the Internet technical community.

The GNSO has two main powers.<sup>15</sup> It appoints two members to the Board, and its Council initiates the policy development process that is supposed to govern the contracts governing generic domain names. From 2003 to 2009, the GNSO was composed of six constituencies. Two of these constituencies were domain name supply industry interests: Registrars and Registries. They are called “contracting parties” because their very existence as businesses depends on having contracts with ICANN and these contracts are the mechanism used by ICANN to govern them. Three of the other constituencies are basically large business entities: the Business Constituency, Intellectual Property Constituency, and the Internet Service Provider Constituency, which consists of large telecommunication companies. There was, finally, a Noncommercial Users Constituency (NCUC), which included public interest advocacy groups, universities, and education and research networks. NCUC often took a critical perspective on the demands of the other commercial interest groups. Each of these constituencies elects a certain number of representatives to a Council. Since 2003, registrars and registries have had weighted voting; for every seat on the Council they get two votes. In addition to the 18 Council members elected by constituencies, three more are appointed by ICANN’s Nominating Committee.

The GNSO Council was originally conceived as the legislative body in ICANN’s policy making process. It identified problems that need to be addressed, collected information and public comment on how to address them, formulated policies to fix the problems, voted on them, and, if the policy passed, passed it on to the Board for approval and then to the staff for implementation. Reflecting the dominance of the consensus standards-development model, however, the term “legislative body” is a term of opprobrium in ICANN. But in reality the whole point of the GNSO is to initiate rules and policies that govern the domain name industry. So if the GNSO is not a legislator then the Board and staff certainly are, and at minimum the Council is a legislative subcommittee that formulates the basic policy guidelines for the Board to consider and, if approved, implement through contracts.

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<sup>15</sup> <http://www.icann.org/en/general/bylaws.htm#X>



**Table 3: The GNSO Council Voting Distribution before reform**

Constituency	Council seats	Voting power	Grouping
Registries	3	6	Domain name supply
Registrars	3	6	
Intellectual property	3	9	Trademark defenders
Commercial users	3		
Internet service providers	3		
Noncommercial users	3	3	Public interest, nonprofit
Nominating committee	3	3	Mixed, independent
<b>Total</b>	<b>21</b>	<b>27</b>	

In theory, the voting distribution of the pre-2009 GNSO Council created a rough balance between “user” and “supplier” interests, with 12 votes assigned to registries and registrars, and 12 to the users and 3 Nominating Committee appointees thrown in for an independent perspective. Right from the beginning of the SO, however, there was a glaring imbalance in its structure. Trademark holders, commercial users and telecom firms are overlapping categories. They all include large commercial entities whose primary interest in domain name system policy is trademark protection. These “three” constituencies were, for all practical purposes, one big Constituency; they held joint meetings at ICANN and voted together as a bloc over 90% of the time. Thus, the GNSO gave trademark-oriented commercial interests three times as many votes as noncommercial user interests. Indeed, before the 2002 round of reforms, which gave the contracting parties double-weighted voting, these trademark-oriented interests even had more votes than the contracting parties combined.

The current round of ICANN reforms started in September 2006, when the London School of Economics Public Policy Group released a report assessing the GNSO. The report was commissioned by ICANN itself, in line with its commitment to continually assess and improve its performance. After several months of data collection and interviews, the LSE released its report in September 2006.<sup>16</sup> While praising the GNSO’s ability to “make possible the policy development processes which provide the foundations for ICANN’s legitimacy as an open and global policy-making body for the Internet,” the report laid bare numerous flaws. One of them, revealingly, was that the ICANN Board paid little attention to the GNSO and had few institutionalized channels for communicating with it. So much for “bottom-up.”

The LSE report directed its most pointed recommendations at the GNSO’s Constituency structure. “The current pattern of Constituencies is relatively complex and no longer seems well-adapted to the needs of all stakeholders in the rapidly changing Internet community,” the report said. In particular, it noted that participation in the user constituencies was narrow and tended to be dominated by a small core of people: “The Constituencies show a mixed pattern of participation, with relatively high levels of involvement in two Constituencies covering Registries and Registrars, but relatively narrow participation in four others, covering business users, intellectual property, Internet service providers and non-commercial users.” Note well: the charge of nonparticipation was leveled *equally* at commercial and noncommercial users; this will become important later when we show how the Board selectively directed that charge at noncommercial users only. “There are some worrying signs,” the Executive summary went on, “of dominance of some constituencies by a small core of people and of low participation rates in policy development work by Constituency members.” The LSE report

<sup>16</sup> LSE Public Policy Group and Enterprise LSE, “A Review of the Generic Names Supporting Organization for the Internet Corporation for Assigned Names and Numbers,” September 2006. <http://www.icann.org/en/announcements/gnsso-review-report-sep06.pdf>



documented and legitimized longstanding complaints that there was no major distinction between the three business constituencies and that maintaining all three of them as separate constituencies simply multiplied the votes of the same interests.

In its recommendations, LSE suggested that GNSO be restructured into three basic groupings: the domain name registration industry (registries and registrars), business, and civil society. The Registration Interests group would merge the registry and registrar Constituencies into one. The Businesses group would merge the trademark, commercial users and ISP constituency into one. Civil Society would be populated by the kind of organizations that formerly went into the NCUC. The report suggested that this would be a cleaner and more flexible division of the world. And the threshold for “consensus” policy would be raised to 75% of the votes. The proposal balanced the distribution of voting power more evenly and raised the bar for policies to pass, giving two of the stakeholder groups veto power if they remained unified. There was no way around it: ICANN’s own hired experts were proposing a major redistribution of power in the GNSO.

ICANN’s Board Governance Committee formed a Working Group (BGC-WG) to consider the recommendations and make specific proposals for reform. Formed on 30 March 2007, the BGC-WG was dominated by what one might call “ICANN idealists” – people who favor a bottom up, consensus-oriented approach to policy making modeled on the institutions of the Internet technical community.<sup>17</sup> The BGC-WG operated for about a year. After several rounds of comments and modifications, it released its final recommendations in February 2008, which were adopted by the Board.<sup>18</sup>

The GNSO Improvements report of the BGC-WG proposed two main changes in the way the GNSO would work. One was to adopt an IETF-style Working Group model as the basis for policy making. The second was to regroup GNSO constituencies into four broader “Stakeholder Groups” and to restructure the GNSO Council and its voting along these lines. We discuss here only the second change. The final BGC-WG recommendations proposed to rebalance the GNSO Council along the lines suggested by Figure 1.

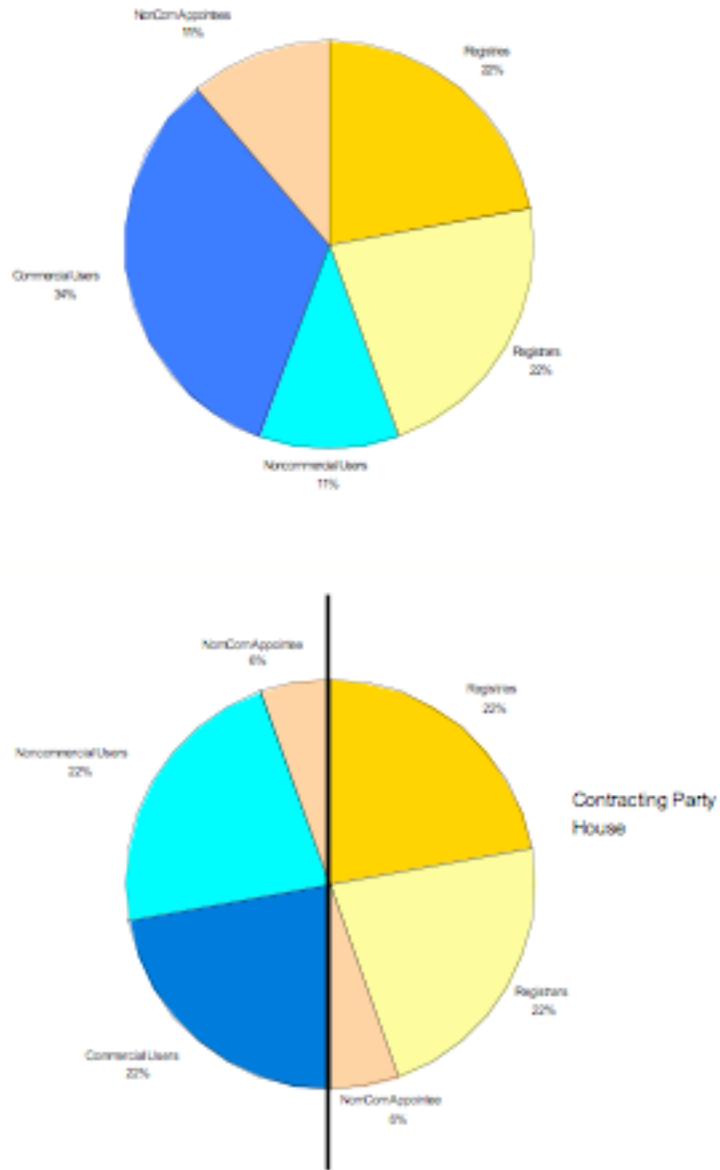
The Board clearly viewed the lack of participation in the GNSO as a threat to its legitimacy and wanted to encourage the entry of “new players.” But as the GNSO reforms were implemented, an intense form of political competition among *existing* players developed. The commercial interest groups lobbied strenuously against the reduction of their voting power on the Council. They did this by vocally attacking the net gains afforded to the Noncommercial Stakeholder Group, claiming that NCUC was small and unrepresentative.<sup>19</sup>

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<sup>17</sup> It was chaired by Roberto Gaetano and included six other Board members or liaisons: Rita Rodin; Vanda Scartezini; Raimundo Beca; Tricia Drakes; Susan Crawford; and Vittorio Bertola.

<sup>18</sup> REPORT OF THE BOARD GOVERNANCE COMMITTEE GNSO REVIEW WORKING GROUP ON GNSO IMPROVEMENTS, 3 February 2008. <http://www.icann.org/en/topics/gnso-improvements/gnso-improvements-report-03feb08.pdf>

<sup>19</sup> The charge was not supported by the facts. In mid-2009, the GNSO’s Business Constituency website listed 44 members (about the same size as the NCUC in mid-2008) and the trademark Constituency’s website listed 18 member organizations. The third commercial user constituency, the ISP Constituency, did not even publish a membership list and, reflecting its dormant nature, had no messages posted on its email list in the first seven months of 2009. As for diversity, 58% of the Business Constituency’s membership was based in the United States and nearly all others were in Europe. The London School of Economics Report showed that NCUC had the highest number of different people serving on the GNSO Council of any of the 6 constituencies in the time period 2001-2006. During that time NCUC had 15 different people serve on the GNSO Council. From 2003-2006 it had 8 changes of GNSO representatives, while the ISPs had the same three people on the Council and the BC only had 1 change in GNSO representation. In other words, the ISPs and Business Constituency had the same three people representing them on the Council for nearly all of the GNSO’s existence. The NCUC did however accept the need for broader participation and initiated a membership expansion campaign. This included a change in their charter to allow individuals to join the



**Figure 1: GNSO Council distribution of voting power before and after BGC-WG reforms**

The ambitions of ALAC added another wrinkle to the complex politics. The Chair of ALAC and a few others saw the expansion of the NCSG Council seats as an opportunity to expand ALAC’s influence within the ICANN structure. They thought of themselves as the representative of users in ICANN and viewed NCUC as a threat or obstacle to that special designation. Three ALAC members supported the formation of a new “Consumer constituency” that would be composed almost entirely of At Large Structures that were members of various RALOs. Likewise, a group of religious conservatives also proposed a new constituency. Organized under CP80, a Mormon

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constituency (before, only organizations had been eligible). This shift was immediately effective at attracting new members and increasing participation. Individuals who were associated with large organizations, such as universities, often had found it difficult to get the official organizational approvals from a remote organizational hierarchy to act as their “official representative” in an organization as obscure and narrowly focused as ICANN. Now, people within those organizations who were interested in domain name policy could join NCUC. New organizations also joined. By mid-2009 its membership had tripled.



group that strives to utilize ICANN and other Internet governance agencies to regulate pornography, they petitioned to form a “Cyber-safety constituency” in the new NCSG. Given the proposed structure of the NCSG favored by the staff and Board, any new constituency of this sort would split the 6 votes of noncommercial users evenly among the constituencies, creating a zero sum game among the groups.

In revamping the GNSO the Board showed a kind of obsession with getting new civil society actors involved in its activities. Its staff actually flew around the world attempting to convince major consumer advocacy organizations to join the At Large or to form a new constituency in the NCSG. Time and again, these consumer organizations told ICANN that they were focused on other issues and institutions, and that domain names were not a significant enough priority for them to devote staff and financial resources to attending ICANN meetings or tracking and participating in their complex processes. Ultimately, when the ALAC group’s petition to form a Consumer constituency was posted for public comment, not a single consumer organization in the world filed comments supporting it. Due to strong staff support for the ALAC initiative, however, the Board came very close to recognizing the proposed Consumer constituency.

In the end, the political fights were resolved by a series of top-down decisions made by the Board and staff. On July 30, 2009, the Board declared, without relying on any objective standard, that the noncommercial interests organized under NCUC were “not sufficiently representative” to receive the expanded number of seats on the Council. This was done, Board members admitted privately, to mollify the enraged trademark and business interests. In its bylaw amendments implementing the GNSO reforms, it allowed the NCUC to elect only 3 of the 6 seats assigned to the new Noncommercial Stakeholders Group, and arrogated to itself the authority to appoint the additional three seats for the next two years at least. The Board refused to recognize CP80’s Cybersafety Constituency (whose proposal was very unpopular among the technical community) and deferred action on the Consumer constituency.

The Board’s appointees to the NCSG were instructive. One of them was an NCUC member from Tunisia who was supported by and probably would have been elected by the noncommercial groups anyway. But the other two were strongly tied to commercial interests or to pro-trademark perspectives on domain name issues. One was the President of the International Telecommunications Users Group (INTUG) – an overtly business-oriented group that promotes the interests of large corporate consumers of telecommunication services. The other was the trademark lawyer for the American Red Cross. While Red Cross is a legitimate and important noncommercial organization, the approach to domain name policy taken by its trademark lawyer would mirror that of the business-oriented intellectual property constituency in most if not all cases.

The point here is not to debate the merits of the particular selections. It is to call attention to the near-absolute discretion the Board had (and still has) over its supposedly bottom-up, representational structures. The staff personally recruited two of its appointees to the NCSG Council seats, and the Board showed that it can reach directly into these structures and shape them to suit its own sense of what is in the interest of the corporation and what is a proper political balance among the various contending forces involved. One should not confuse this process with an open, bottom-up consensus-development process, nor should one confuse it with a democratic, governmental representational structure. Instead, one must view it as a private corporation actively managing its relationship to the community of people who are forced to deal with it by virtue of its exclusive control of the domain name system.

Indeed, all the political contention over the composition of the GNSO Council tends to detract attention from the subordination of the GNSO’s policy making role to the Board and staff. When the GNSO’s laboriously developed policy on adding new top level domains met with organized resistance from trademark advocates, the Board created an



*ad hoc* group known as the Implementation Review Team to propose sweeping revisions in the GNSO's proposed policies and procedures.<sup>20</sup> The staff and President have also taken the initiative in adjusting policy regarding the regulation of the economic relationship between registries and registrars. In their "implementation" of the new gTLD program they commissioned economic consultancy studies and proposed contractual terms that would liberalize certain aspects of registry-registrar regulation. Again, the point here is not whether these initiatives produced better or worse policy but that most of the key policy decisions are made through direct lobbying and bargaining with the Board, not through bottom up intermediary structures.

### ***Flight from external accountability: The Affirmation of Commitments***

The third ICANN reform discussed here is the Affirmation of Commitments (AoC). It is a new agreement released September 30, 2009 involving the U.S. Commerce Department and ICANN. The AoC replaces the Joint Project Agreement, under which the Commerce Department exercised ongoing supervision of ICANN on a unilateral basis. U.S. unilateralism was a very sensitive geopolitical issue, and many in the Internet community welcomed its demise. The AoC represents an important step away from unilateral U.S. control of ICANN, and in that respect could open the door to a more globalized form of accountability eventually.

The main argument for letting the JPA expire was that ICANN was supposed to be a global institution and a special form of oversight by one government was inconsistent with that mandate. The problems with unilateral oversight were not hypothetical; from its intervention to kill the .xxx top level domain to DNSSEC implementation to the issue of Whois and privacy, the U.S. influenced ICANN policy in numerous ways. The argument against letting the JPA expire, however, was always about External accountability. Even those who opposed U.S. unilateralism and thought the JPA was a dysfunctional form of oversight expressed doubts about the wisdom of eliminating this one remaining tether to a public authority. In the AoC we see the end of one form of External accountability. What does it put in its place? The answer is predictable: more "community participation."

The AoC establishes three-year review cycles in four areas of concern: 1) accountability-transparency-public interest; 2) security-stability-resiliency; 3) competition-consumer trust-consumer choice; and 4) Whois (which is grouped under the consumer trust heading but has its own review process). These reviews are conducted by panels appointed by agreement of the Chair of ICANN's Governmental Advisory Committee (GAC) and the ICANN Board Chair or President. The review teams develop *nonbinding* recommendations, and the Board must act on these recommendations within 6 months. Each review panel must include the GAC Chair, the ICANN Board chair or President, and representatives of ICANN's Supporting Organizations and Advisory Committees. They can also include a sprinkling of independent experts.

The actual process for conducting these reviews is not defined at the time of this writing. But statements by the GAC chair at the Seoul ICANN meeting (October 2009) indicate that once again, the public will be offered Voice instead of any new form of External or Direct accountability. As GAC chair Janis Karklins stated, "In my view, the review [should not be confined to] the review teams, but should be a community review. And we need to construct the process in a way that [the] community is involved from the

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<sup>20</sup> The report of the IRT can be found here. <http://www.icann.org/en/topics/new-gtlds/irt-draft-report-trademark-protection-24apr09-en.pdf>





very beginning to the very end in the review process.”<sup>21</sup> The characteristic approach of making transparency and participation the solution to all problems was evident, as Karklins went on to say:

“Now, in my view, the work of review teams should be transparent to the extreme. ...I mean they should be live video streamed or video cast. [So] that everybody who wants to be present in the room should be present live in the room. So that there shouldn't be any hidden moments when team does something that the community is not informed [about]. In my view, this is the way how to ensure that there is no competition for being on these teams, because everybody will be ...present in the room in meeting.”<sup>22</sup>

So, once again, the public will be afforded every opportunity to express their opinion about ICANN's performance and to observe the process of evaluation. Missing from the equation, however, are any objective criteria upon which to base the reviews (e.g., law), and any specifics about who will have decision-making power to rectify any deficiencies. As always, it is the Board and the Board alone with decision making authority; the review panel recommendations are nonbinding.

One again, circularity characterizes the process. The review panels mandated by the Affirmation are selected by two people at the top of the decision making chain in ICANN; moreover, the people selected as reviewers are required to be representative of ICANN's existing policy making organs. In other words, the people who are being reviewed constitute the team of reviewers; and the review process reproduces the structure and politics of ICANN. A circular self-evaluation process is proposed instead of any real external accountability.

This form of participation, moreover, may end up as a substitute for other accountability mechanisms. ICANN's success in convincing the U.S. Commerce Department to end its Joint Project Agreement and replace it with the new Affirmation of Commitments seems to have cut short ICANN's effort to develop new accountability mechanisms. Proposals made by the previous President's Strategy Committee to institute new accountability measures have been interrupted.<sup>23</sup> It remains to be seen whether this is simply an artifact of the change of Presidents or whether the whole accountability-strengthening exercise was a driven primarily by ICANN's attempt to free itself of the JPA.

## **Conclusion: Understanding ICANN, Inc.**

Although Palfrey was right about the presence of three distinct organizational logics or models within it, the story of ICANN's organizational evolution since 1999 is a story of how the corporate governance model has assimilated and subordinated the other elements. What makes ICANN Inc. troublesome is neither its “private” nature nor its “corporate” nature *per se*, but the way it has monopoly control of a resource space critical to an entire global infrastructure while being completely disconnected from the normal accountability mechanisms that guide and constrain other corporations. Although it is a nonprofit, it has no membership with specific interests that pay its dues and elect its officers to serve a well-defined mission – unlike, say, the Regional Internet Registries. Although it takes in a large and growing amount of revenue and stands at the center of a number of highly contentious commercial interests, it has no competitors, nor does it

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<sup>21</sup> Transcript of Seoul ICANN meeting, Consultation on the Affirmation of Commitments, Wednesday, 28 October 2009 - 17:30 - 18:30. <http://sel.icann.org/node/7481>

<sup>22</sup> Ibid.

<sup>23</sup> See the records of the “Improving Institutional Confidence Consultation” on the ICANN web site, which included proposals for a strengthened appeals process, a vote of no confidence, and some other measures. <http://www.icann.org/en/jpa/iic/draft-iic-implementation-26feb09-en.pdf>



have corporate shareholders with the legal right and the economic incentives to see that it performs properly. Unlike a government, it has no citizens enfranchised to share in its power through election and representation. Unlike an intergovernmental organization, it is not composed of member-states with direct forms of accountability over it.

In the absence of these basic moorings, ICANN's mission will be to maintain and strengthen itself, by managing its relationship to the community of people who are forced to deal with it by virtue of its control of the DNS. The "self" that it maintains and strengthens is its staff and a slowly expanding, self-selecting network of insiders (including government officials) who climb its organizational ladders to obtain influential positions. It optimizes for its own autonomy, stability and revenue.

The concept of "participation" plays a central role in maintaining this process. ICANN invites comment and participation ceaselessly. It offers it to civil society, to governments, to technologists, to business – an exhausting array of opportunities to "get involved." Participation is ICANN's chief legitimizing principle. But none of these forms of participation provide the participants with any clear accountability mechanisms. Indeed, each of the reforms discussed in this paper involves offering more participation at the price of less formal, less clear accountability.

We need to think harder about the implications of a global governance private corporation that permits and even encourages civil society involvement but acts to co-opt ambitious or acquiescent civil society actors and maintain significant top-down controls over their participation. While this institutional model is in many ways more open and probably also more responsive than the traditional inter-governmental international institution, we need to be aware of its dangers and flaws. Most importantly, we need to reassess the importance of public participation relative to harder forms of public accountability. Participation may not be an adequate substitute for accountability mechanisms, and "more participation" may not be the answer to all of a global governance institution's problems.

It could be worse. The presence of participatory channels into ICANN is better than having its important governance responsibilities conducted without such public participation. To criticize participation as an end in itself is not to advocate shutting off those avenues entirely; to criticize ICANN's lack of accountability is not to support a reversion to more traditional forms of governance by means of international inter-governmental organizations. These criticisms should, however, push us towards the discovery and implementation of new forms of globalized direct accountability and perhaps, also, a more relaxed attitude toward Exit alternatives such as competing root systems.

While the concept and definition of civil society is problematic,<sup>24</sup> civil society influence and participation in international institutions is important. In global governance, there is no institutional structure to provide democratic governance through a global citizenry. The concept of civil society thus serves as a kind of proxy for the global public interest.<sup>25</sup> Without civil society, business and government make deals that serve narrow special interests. If ICANN's actions are to serve the public interest, it must provide civil society and individual users of the Internet some kind of representation and influence that corresponds to the stakes they have in its policies and practices. And yet the practical and organizational challenges associated with reflecting the interests of large numbers of people with small stakes in an outcome are well known from collective action and

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<sup>24</sup> Civil society is a complex concept that cannot be explored in detail in this paper. In "multi-stakeholder" governance institutions such as ICANN, it is usually understood as the third leg in a three-legged stool that involves business and government. More broadly, it stands for the economic and political interests of the individual *qua* individual, and especially for the noncommercial and human rights aspects of policy.

<sup>25</sup> It is widely recognized that nation-states do not do an adequate job of indirectly representing the public interest in global governance, although it is outside the scope of this paper to develop that argument fully.



institutional theory. (Olson 1965; Ostrom and Ostrom, 1975) Direct participation in all of ICANN's processes is not, by itself, the answer for true public accountability. We need to revisit the concept of membership in ICANN and strengthen ICANN's Independent Review Process. Other forms of accountability, such as a recall or Board members and a replacement of the Nominating Committee, should be considered as well.

Returning to Palfrey's article, its title and conclusion are, upon reflection, quite strange. The title announces "the end of the [ICANN] experiment." But the experiment that is ICANN has not ended. If anything, ICANN has grown in significance since his paper was written. Palfrey concludes the article with the puzzling statement "Those who care about democracy and technology should shift their attention away from ICANN, which is almost certainly now beyond repair, and toward the many greener fields in cyberspace." Whether or not ICANN is truly "beyond repair," the admonition to "shift attention away" from it invokes the image of an ostrich with its head in the sand – the false and dangerous belief that things can't hurt you if you refuse to pay attention to them. ICANN is still an important institution in cyberspace, with control of critical resources. Either we must take responsibility for repairing it; or mount efforts to shift its governance responsibilities elsewhere; or encourage the growth of technologies or institutions that can bypass it and undermine its authority. It is hard to conceive of a rationale by which those who care about free and fair Internet governance can simply ignore it.

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## References

- Froomkin, A. M. (2003a). [Habermas@discourse.net](mailto:Habermas@discourse.net): Toward a critical theory of cyberspace. *Harvard Law Review*, 116(3), 749.
- Froomkin, A. M. (2003b). ICANN 2.0: Meet the new boss. *Loyola of Los Angeles Law Review*, 36 Part 3, 1087-1102.
- Klein, H. (Ed.) (2001). Global democracy and the ICANN elections. *Info* 3, no, 4.
- Koppell, J. G. S. (2005). Pathologies of accountability: ICANN and the challenge of "multiple accountabilities disorder". *Public Administration Review*, 65(1), 94-108.
- Mueller, M. (2002). *Ruling the root: Internet governance and the taming of cyberspace*. Cambridge, MA: MIT Press.
- NAIS (NGO and Academic ICANN Study). (2001). *ICANN, legitimacy and the public voice: Making global participation and representation work* No. 2004)The Markle Foundation.
- Olson, M. (1966). *The logic of collective action: Public goods and the theory of groups*. Cambridge: Harvard University Press.
- Ostrom, V., & Ostrom, E. (1971). Public choice: A different approach to the study of public administration. *Public Administration Review*, 31(2), 203-216.
- Palfrey, J. G. (2004). The end of the experiment: How ICANN'S foray into global Internet democracy failed. *Harvard Journal of Law & Technology*, 17(2)
- Pommerening, C. (2004). The development of governance structures for the Internet. principles and practices in the case of the internet corporation for assigned names and numbers (ICANN). *Dissertation Abstracts International, A: The Humanities and Social Sciences*, 64 (10), 3831-A. (Available from UMI, Ann Arbor, MI. Order No. DA3107914.)
- Weber, R. H. (2009). *Shaping internet governance: Regulatory challenges*. Zürich: Schultess Juristische Medien.