

THE END OF THE EXPERIMENT: HOW ICANN'S FORAY INTO GLOBAL INTERNET DEMOCRACY FAILED

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ABSTRACT

ICANN's experimentation in running a representative and open corporate decision-making process to manage the domain name system has largely failed. This failure has manifested itself most explicitly by ICANN's retreat from its effort to enable the direct election of a subset of its Board members and, less explicitly, by the extent to which other efforts to engage the Internet user community in the decision-making process have proven ineffective. A systematic review of over 100,000 comments by public participants in ICANN, other inputs that the Board considered, and the Election of 2000 for five ICANN Board members, reveal that ICANN has never fully succeeded in integrating users into the governance model in other than an *ad-hoc* fashion. Instead, the Board appears largely to have based its decisions upon the recommendations of professional staff and of the powerful Supporting Organizations (SOs), in which users can participate. An Internet user approaching the ICANN process from the outside would have little way to determine how to participate meaningfully in the decision-making process.

Three lessons emerge from this study. First, ICANN's failure shines further light upon the need for an overhaul of its governance structure. Second, ICANN should clarify the way in which users can involve themselves in the decision-making process for managing the domain name system, arguably through the Supporting Organization process. Third, we should look beyond the ICANN model, which has never been the appropriate venue for experimentation in global decision-making, toward new ways to govern the technical architecture of the Internet in an increasingly networked, less clearly bordered world.

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I. Introduction.

Despite the failure of its experimentation² in novel forms of governance and representation of the global Internet user community, the Internet Corporation for Assigned Names and Numbers ("ICANN") will, at the very least, warrant a footnote in the history books.³ ICANN will deserve mention on several grounds. If nothing else, its inception in the late 1990s as the Internet morphed from a limited network of academics, technologists, civil servants, and other trailblazers into a widely used and incessantly discussed global phenomenon places ICANN in an intriguing role – the first substantial institution with a global reach and a mandate to coordinate a key aspect of the Internet's operations – at a fascinating moment in history.⁴ ICANN may also be worth remembering and chronicling as a *sui generis* institution that was at once obscure and a lightning rod for attention, and often criticism,⁵ from numerous government entities, including the United States Congress, Internet users around the world, legal scholars, and many others who have struggled with the question of who should govern the technical aspects of the Internet and how those persons should do so.⁶ If the reform process underway during 2003 continues on its desultory path, or if time runs out on ICANN's extension of its Memorandum of Understanding with the United States Department of Commerce, ICANN may well be remembered as a case study in organizational self-destruction.⁷

² See, e.g., <http://www.pfir.org/statements/icann> (describing ICANN as a "failed experiment").

³ This notion of the failure of ICANN's experimentation in "democratizing" its decision-making process is described in a number of places, including Dan Hunter, *ICANN and the Concept of Democratic Deficit*, 36 LOY. L.A. L. REV. 1149 (Spring 2003).

⁴ See, e.g., David Post, *Cyberspace's Constitutional Moment*, THE AMERICAN LAWYER, (November, 1998) <http://www.temple.edu/lawschool/dpost/DNSGovernance.htm> (accessed December 3, 2002).

⁵ Criticism of the ICANN structure even before ICANN got started in earnest. See <http://www.ntia.doc.gov/ntiahome/press/icann102098.htm> (accessed November 11, 2003) (in which J. Beckwith Burr of the United States Department of Commerce noted that "the public comments received on the ICANN submission reflect significant concerns about substantive and operational aspects of ICANN.")

⁶ See, e.g., Jason Krause, *ICANN Can't, Critics Say: Controversial Group that Oversees the Internet is up for Renewal*, ABA JOURNAL E-REPORT (September 6, 2002).

⁷ ICANN's woes, circa 2003, are legion. A series of nations, including Brazil, India, South Africa, China, and Saudi Arabia, "are growing dissatisfied with the workings of California-based ICANN" and have pushed for the intervention of the UN in the Internet governance process. See Frances Williams, *Plan for UN to Run Internet "Will be Shelved,"* FINANCIAL TIMES, November 9, 2003. Aside from this collateral attack by several governments on ICANN and the perpetual dispute over the representation question, a distributed denial-of-service attack on October 21, 2002, in which 7 of the 13 DNS roots were cut off from the rest of the Net, raised questions about ICANN's fitness to carry out its core mission, which has ordinarily not been a major source of controversy. The United States General Accounting Office issued a report in Fall, 2002, critical of ICANN's steps toward greater security protections for the root servers. And the departures of key staff in the past year, in particular CEO Stuart Lynn and Chief Policy Officer Andrew McLaughlin, also have led to the swirling of the vultures. See, e.g., Patrick Thibodeau, *Future of ICANN Remains Uncertain*, COMPUTERWORLD, <http://www.computerworld.com/governmenttopics/government/policy/story/0,10801,72034>

ICANN will also warrant attention as an ambitious experiment in seeking to empower the Internet user community, and the private sector at large, to manage a coordination function necessary for the stable operation of the Internet, a global network of networks.⁸ ICANN's novel, though ultimately flawed, structure has enabled management of the domain name system (DNS) by a coalition of private sector interest groups, with limited though growing input from formal states, and with broad input from individual users.⁹ From the perspective of some stakeholders and onlookers, ICANN was centrally about an experiment in democratic governance on a global scale,¹⁰ using the technologies, power and attractiveness of the Internet as key drivers.¹¹ ICANN has failed to attract and incorporate sufficient public involvement to serve as such a model. Those who sought to prove a point about Internet and democracy through the ICANN model have misplaced their emphasis, as ICANN's narrow technical mandate has not lent itself to broad-based public involvement in the decision-making process.

[,00.html](#) (accessed November 11, 2003). *But see* <http://www.icann.org/general/amend5-jpamou-19sep02.htm> (accessed February 18, 2003) (for the one-year extension of the MoU between ICANN and the United States Department of Commerce) and http://www.ntia.doc.gov/ntiahome/domainname/agreements/sepstatement_09162003.htm (accessed November 6, 2003) (for the three-year extension of the MoU beginning in 2003), which have allayed the most pressing fears, for the time being, that the United States Department of Commerce would pull its support for ICANN.

⁸ See, e.g., the parting statement of Board Member Masanobu Katoh, in which he is reported to have said that ICANN's participants should believe that "ICANN can be [a] 21st [century] model for [international] organization[s] dealing with technology and new economy." <http://log.does-not-exist.org/archives/000929.html> (accessed November 4, 2003).

⁹ See, e.g., Kenneth Cukier, *Why The Internet Must Regulate Itself*, FINANCIAL TIMES, October 31, 2003, at Comment Page (for the proposition that ICANN has enabled community-driven self-regulation and the importance of such a concept). Mr. Cukier has also posted the text of this article at <http://www.cukier.com/writings/FToct03.html> (accessed November 5, 2003).

¹⁰ See, e.g., ANDREW SHAPIRO, *THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW*, 57 - 59 (1999) (for an argument about the promise of the Net to play a role in "Disintermediating Politics"); Alinta Thornton, *Does Internet Create Democracy?* (2002) at <http://www.zip.com.au/~athornto/>; Mark Poster, *CyberDemocracy: Internet and the Public Sphere* (1995), at <http://www.humanities.uci.edu/mposter/writings/democ.html>; http://www.economist.com/surveys/displayStory.cfm?story_id=1534259 (accessed January 29, 2003) (for an argument regarding the expectations that the Net would transform politics and the disappointment in the reality that has ensued); and <http://www.commoncause.org/icann/introduction.htm#1.1> (accessed February 18, 2003). *But see* CASS SUNSTEIN, *REPUBLIC.COM* (2001). These writings do not necessarily focus on ICANN, but rather on the broader argument about the role of information and communications technologies in strengthening democratic institutions.

¹¹ There is substantial debate as to whether ICANN is, in fact, engaged in "governance" or in something else, an issue into which this paper will delve later. See *infra* note 53 and accompanying text. There is a tightly related debate as to whether ICANN makes "policy." Most observers at this point agree that ICANN indeed sets and carries out a certain set of limited policy directives related to the technical coordination of the Internet.

ICANN's experimental decision-making structure grows out of its brief, unusual history and from the tradition of informal technical standards-setting bodies. Established by a few individuals, a few private standards bodies, several corporations, and the United States Department of Commerce, ICANN was founded as a not-for-profit corporation based in California, USA in 1998.¹² ICANN has sought to operate as an "open" and "representative" body, striving toward a bottom-up decision-making process grounded in consensus and inclusion.¹³ The corporation was charged with the supposedly limited role of technical coordination of the Internet "for the benefit of the Internet community as a whole."¹⁴ In order to carry out its charge, ICANN has drawn upon the involvement of literally hundreds of thousands of persons around the world, much as its predecessor organizations did.¹⁵ In the fall of 2000, ICANN held a global, Internet-based election, open to all interested parties, to elect five of its 19 directors.¹⁶ Since that time, a committee of ICANN participants, as well as other outside observers, have conducted major studies of that election and drawn conclusions about how the organization's membership should participate in ICANN's business.¹⁷ Likewise, the former CEO and President of ICANN, M. Stuart Lynn, pursued radical reform of ICANN's structure.¹⁸ ICANN has faced an uphill battle since its formation to establish its legitimacy of authority.¹⁹

¹² <http://www.icann.org/general/articles.htm> (accessed December 3, 2002)

¹³ <http://www.icann.org/general/fact-sheet.htm> (accessed December 3, 2002).

¹⁴ *Id.*

¹⁵ ICANN can be seen, to substantial extent, as an outgrowth of IANA, the IETF and similar volunteer-driven standards bodies. This concept of ICANN's development is explored further below, in considering the principles on which ICANN was founded. Prof. Michael Froomkin and others have extensively examined the connections between ICANN and other pre-existing organizations with Internet standards development or management mandates.

¹⁶ http://members.icann.org/about_at_large.htm (accessed February 18, 2003). The main Web page of this site notes: "Site Closed: Maintained for Archival Purposes Only."

¹⁷ See <http://www.naisproject.org/> and http://www.atlargestudy.org/final_report.shtml (accessed February 18, 2003). The NGO and Academic ICANN Study comprises the collective views of a wide range of parties outside the ICANN structure. The At Large Study Committee's report took the form of a report to the ICANN Board, prepared by a broad-based group of persons active in the ICANN process. Both studies reviewed the election process and the future of the At Large Membership. Both studies recommended revised structures for ICANN, though both would have perpetuated some form of a semidemocratic structure. For a comparison of the two studies, see <http://cyber.law.harvard.edu/people/palfrey/ALSC-NAIS-comparison/> (accessed February 18, 2003).

¹⁸ *ICANN President Recommends a Roadmap for Reform*, February 24, 2002, <http://www.icann.org/announcements/announcement-24feb02.htm> (accessed December 3, 2002).

¹⁹ See Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187 (2000) ("If ICANN is to establish its legitimacy, it must be able to answer the charge that its exercise of authority is inconsistent with our ordinary understandings about public power and public policymaking.") Professor Weinberg's article in some respects is what prompted the close data analysis involved in developing this paper. In his article, Professor Weinberg posits that ICANN functions to large extent like an administrative agency, but without the backstop of judicial review when the agency's decisions go awry. Our review of how the

ICANN has offered a wide range of ways in which members of the Internet user community may participate in the organization's decision-making process.²⁰ The extent to which ICANN paid attention to that user participation is much less clear, as a review of 100,000 postings of the user input, and the decisions the input was meant to affect, reveals.²¹ Throughout ICANN's history, users have had the ability to post public commentary about general or specific issues before the ICANN Board.²² Users may attend or participate remotely in public meetings at which the Board, staff and other entities hold proceedings, make decisions, and announce the outcome of deliberations.²³ Users may volunteer for a variety of tasks, most notably through participation in the Supporting Organizations and Advisory Committees. Recently, the At Large Advisory Committee has played a central role in facilitating a certain degree of involvement of the user community.²⁴ While thousands of users since ICANN's founding have sought to participate through these means, it appears as though this extensive participation has affected few important decisions. It is also unclear as to whether such input would have resulted in better decisions by the Board in the event that user input had been taken into account more extensively by the Board members.²⁵

In addition to these relatively *ad hoc* means of participation by users, ICANN held an online global election in the Fall of 2000.²⁶ This election was the most ambitious of its several attempts to engage the world's Internet users in a common,

Board took account of user input, largely during the period between the publication of Professor Weinberg's piece and today, largely supports his theory.

²⁰ See generally <http://www.icann.org/participate/> (accessed November 3, 2003). In addition to formal involvement in ICANN's decision-making process, those interested in the outcome of its decisions have created a variety of watch-dog organizations, such as ICANNWatch, at www.icannwatch.org (accessed November 3, 2003), ICANNFocus, at www.icannfocus.org (accessed November 4, 2003), and others. One of the very difficult elements of an analysis of this sort is to determine who is a member of the Internet user community and who represents a given constituency. For the purposes of this review, I have sought to consider any statement made in a personal capacity, as opposed to representing an organization, to constitute the input of a member of the Internet user community. I acknowledge the multiple shortcomings of such an approach (for instance, some organizations may provide input to ICANN on behalf of its members who are members of the Internet user community at large), but have deemed my approach to be the cleanest and most defensible way to proceed.

²¹ See Section IV, below, for an analysis of these Internet user community data.

²² See <http://forum.icann.org/> (accessed November 3, 2003).

²³ See <http://www.icann.org/meetings/> (accessed November 3, 2003).

²⁴ See <http://alac.icann.org/> (accessed November 3, 2003).

²⁵ The most substantial shortcoming of this study is the extent to which it has been nearly impossible to gauge, with any degree of precision, public participation within the Supporting Organization structure. The most potent counter-argument to some of the contentions advanced herein is that ICANN has in fact succeeded in its goal of representing user interests through an open decision-making process when you consider the powerful – though not omnipotent – role of the Supporting Organizations. Plausibly, the argument goes, it is within these Supporting Organizations that broad-based consensus is reached, based on the substantive deliberation for which Prof. Froomkin and others have called.

²⁶ See <http://www.icann.org/announcements/icann-pr21sep00.htm> (accessed November 4, 2003).

open, democratic process.²⁷ Despite severely limited resources, ICANN ran an online election that enfranchised voters of every region of the world and drew more than 75,000 people to register to vote at the Internet-based polling booths set up by election.com for the purpose of electing five ICANN directors.²⁸ The relative success of this election at a tactical level is far overshadowed by the failure of ICANN's experiment in At Large representation and participation. The story of formal representation of the public on ICANN's board effectively drew to a close on December 15, 2002 as the elected directors' terms ended and the by-laws changed to end the experiment.²⁹ The shortcomings of this single experiment, which can be traced to a futile attempt to establish an unsustainable semidemocracy and a lack of widespread interest in the institution's highly technical mandate, should not stand for the proposition that Internet-based elections, activist movements or global democratic institutions, cannot or will not emerge.³⁰

The structure that ICANN adopted to fulfill its charter is a complicated hybrid.³¹ The structure is so complex, in fact, that there are few useful analogues.³² Would-be participants, and even academics with a lot of time on their hands, must work hard to seek to understand the decision-making process.³³ From a formal, legal perspective, ICANN is a corporation, governed by the laws of the state of California, USA, and more immediately, by its own charter and by-laws.³⁴ From an historical perspective, ICANN has certain attributes in common with a standards body, a partially volunteer-driven effort that joins interested persons in their individual capacity, a variety of corporate interests, and a substantial number

²⁷ See <http://www.wired.com/news/politics/0,1283,39130,00.html> (accessed November 4, 2003).

²⁸ See <http://members.icann.org/carter.htm> (accessed February 12, 2003).

²⁹ See <http://www.icann.org/general/abouticann.htm> (the existing At-Large Directors remain on the "transition board" until the next election under the reformed procedures) (accessed February 12, 2003).

³⁰ See <http://www.cpsr.org/cpsr/nii/cyber-rights/web/current-domain.html> (accessed February 11, 2003) (for reference to ICANN as a "semi-democracy").

³¹ See Lawrence R. Heifer *et al.*, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 WM. & MARY L. REV. 141, 178 (2001) (describing the ICANN structure as "Byzantine"). See also

<http://www.icann.org/general/abouticann.htm> (accessed February 18, 2003). The ICANN Web site formerly included a page of description about the structure and an organizational chart, but recently put up place-holders that read: "This page is currently under revision to reflect changes made during the ICANN evolution and reform process."

<http://www.icann.org/general/icann-org-chart.htm> (accessed February 18, 2003).

³² *But see, e.g.*, MILTON MUELLER, RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE (2002), 217 – 8 (arguing that while analogies are hard to draw, the best is to the radio frequency administration at the national level).

³³ The complexity of ICANN's structure, and the stumbling block to access that such complexity presents, is a problem in itself, to the extent that ICANN genuinely seeks broad public participation.

³⁴ See <http://www.icann.org/general/articles.htm> and <http://www.icann.org/general/bylaws.htm> (accessed December 3, 2002).

of academics from around the world.³⁵ From a functional perspective, though, ICANN has elements of a government entity, in this case an association of persons joined by a compact to make decisions about a particular process or series of interests, and functioning most like an administrative agency.³⁶ The Election of 2000, which polled the At-Large Membership to send five new members from five distinct geographic regions to the Board of Directors, strengthens the parallel between ICANN and a government form, particularly what political scientists call a "semidemocracy." ICANN has elements of each of these three structural forms, but none dominates. This hybrid organization is a matter of historical accident rather than the result of clear planning or the outgrowth of firm principles from the outset.

The outlook for ICANN's experiment in broad-based, global representation is very dim, particularly since the end of the terms of the five At Large directors and a major change in the corporation's by-laws in December, 2002.³⁷ ICANN's leadership maintains that it is "encouraging other forms of at-large organizations to self-organize and create and encourage a body of individuals who could provide the user input and public interest input into the ICANN process."³⁸ Visibility has been lessened yet further by the continued calls by members of the U.S. Congress, such

³⁵ Many of the key ICANN participants, including the Board of Directors, serve without pay. Long-time Chairman of the Board Vinton Cerf, among others, pays his own expenses to attend the quarterly meetings around the world.

³⁶ This issue, and others discussed in this paper, is debated at length in the back-and-forth writings of Joe Sims, ICANN's counsel and a partner at Jones Day, and his co-author Cynthia L. Bauerly, on the one hand, and Professor A. Michael Froomkin, on the other. See generally A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17 (2000); Joe Sims & Cynthia L. Bauerly, *A Response to Professor Froomkin: Why ICANN Does Not Violate the APA or the Constitution*, 6 J. SMALL EMERGING BUS. L. 65 (2002); A. Michael Froomkin, *Form and Substance in Cyberspace*, 6 J. SMALL EMERGING BUS. L. 93 (2002); Joe Sims & Cynthia L. Bauerly, *A Reply to Professor Froomkin's Form and Substance in Cyberspace*, 6 J. SMALL & EMERGING BUS. L. 125 (2002); Weinberg, *ICANN and the Problem of Legitimacy*, *supra* note 19. See also MUELLER, *supra* note 30, 218.

³⁷ See A. Michael Froomkin, *Habermas @ discourse.net: Toward a Critical Theory of Cyberspace*, 116 Harv. L. Rev. 749, 838 – 855 (2003) [hereinafter, Froomkin, *Habermas*]. Prof. Froomkin's article is surely the most ambitious paper written about the decision-making structure of ICANN and one of the more comprehensive considerations of where ICANN fits in the discussion of governance on the Internet. Among numerous arguments, Prof. Froomkin contends that the ICANN model, in light of Jurgen Habermas' standard for discourse ethics, pales in comparison to the Internet Engineering Task Force (IETF) model. Professor Froomkin's *tour de force* regarding standards-making in the Internet space and his use of Habermas' discourse theory of law is an important contribution to the field of Internet governance. Habermas' theory, and Froomkin's application thereof, has certain attractive elements, particularly with regard to the communicative power of discourse in influencing administrative decisions and the impacts that power has on how organizations responsible for Internet standards-making should best be organized. I disagree with Professor Froomkin with respect to some of his ultimate findings about the Internet and democracy, particularly in the manner in which he compares the IETF and ICANN models, yet am indebted to him for the depth of his research, the seriousness of his inquiry and the explicit links he draws to Habermas' thinking.

³⁸ See http://www.washingtonpost.com/wp-srv/technology/transcripts/archive_icann_062002.htm (accessed January 2, 2003).

as Senator Conrad Burns and Congressman Edward Markey, and leaders in non-governmental organizations, such as Zoë Baird, President of the Markle Foundation, to review ICANN's structure and mission. It seems certain, however, that the tension between ICANN's efforts to make itself representative in nature and its complex institutional structure – particularly its corporate form – will continue to create problems over time, if ICANN is not changed radically.³⁹ This paper explores ICANN's struggle with the issue of representation and the implications of that struggle for our efforts to develop a new means of governance of the technical architecture of the Internet. I apply some of the lessons that political scientists and legal scholars have learned about semidemocratic institutions, with a view toward what sorts of problems lurked beneath the semidemocratic structure that ICANN adopted and has, in large measure, cast aside.

We have yet to develop a compelling theory of governance of the technical architecture of the Internet.⁴⁰ We ought to consider ICANN's story in this broader context of Internet governance, considering the role not only of individuals but also corporations and governments in the process of decision-making regarding these issues of global, and common, importance.⁴¹

The failure of ICANN's experiment in democratic governance suggests that its highly technical mandate rendered ICANN, as an institution, ill-suited to serve as the test-bed for a new, user-driven model of decision-making. As important as ICANN's mandate is, there are numerous technical aspects of the Internet that interest users more directly and substantially than the coordination of the domain name systems, as Professor Jonathan Zittrain has argued.⁴² The job of directing users to web sites in response to the entry of search queries on the web – run almost exclusively by private parties such as Google, AltaVista, Overture, Microsoft and others – has greater immediate relevance today to users than the port allocation managed by ICANN. Similarly, the exercise of authority by state actors and those they regulate, such as Internet Service Providers, to filter aspects of Internet traffic without warning *ex ante* or recourse *ex post* has far greater impact

³⁹ See, e.g., Damien Cave, *It's Time for ICANN to Go*, Salon.com, (July 2, 2002), at <http://www.salon.com/tech/feature/2002/07/02/gilmore/index2.html> (accessed February 18, 2003) (for a description by ICANN critic and Internet pioneer John Gilmore of the problems besetting ICANN in light of its present corporate structure).

⁴⁰ There are several very strong theories about who controls the Internet, though not a complete answer to the question about how we should govern the Internet's technical architecture. The definitive theory of control on the Internet is Professor Lawrence Lessig's description of architecture (or code), law, norms and market in cyberspace. Professor Lessig has developed this theory in a number of written works and has presented iterations of this idea numerous times. See LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE*, 88 ff. (1999). See also Viktor Mayer-Schoenberger, *The Shape of Governance: Analyzing the World of Internet Regulation*, 43 VA. J. INT'L L. 605 (2003) (for a description of a "blended" model of governance); Steven R. Salbu, *Who Should Govern the Internet?: Monitoring and Supporting a New Frontier*, 11 HARV. J.L. & TECH 429, 454 (1998) (for one of the earliest, and most enduring, discussions of Net governance). See generally ADAM THIERER AND CLYDE WAYNE CREWS JR., EDS., *WHO RULES THE NET? INTERNET GOVERNANCE AND JURISDICTION* (2003).

⁴¹ Harvard Law School Assistant Professor Jonathan Zittrain has made this point that ICANN's story ought to be set in the broader context of Internet governance, in a speech at Cardozo Law School, March 17, 2003, and in other contexts.

⁴² See *id.*

on what a user of the Internet experiences and what resources they can access through the network.⁴³ The institution that enables the user community meaningfully and directly to be involved in the decision-making process will likely have a mandate of greater accessibility and meaning to the Internet user community than ICANN's narrow mandate to coordinate the domain name system.

I explore these issues, in Section II, by reviewing in brief the history of ICANN, with particular emphasis on the principles set forth for the organization and the story of how the current hybrid structure came to be. In Section III, I review the decision-making structure of ICANN and the results of the Election of 2000, both of which buttress the notion that ICANN looks a great deal like a semidemocracy. In Section IV, I explore the extent to which the ICANN Board took into account Internet community user input, as articulated in postings to online message boards and official e-mail lists – albeit only a subset of the inputs to the Board – in making key decisions. In Section V, I consider ICANN's governance model in light of political theory, while seeking to suggest some of the results that may continue to play out in the event that ICANN retains some variant of the hybrid structure in use since inception. In conclusion, I point to some of the implications of this short history for ICANN itself and for the study of how best to govern the technical architecture of the Internet.

⁴³ See Prof. Jonathan Zittrain and Benjamin Edelman's multiple studies of Internet filtering by state actors and private sector entities at <http://cyber.law.harvard.edu/filtering/> (accessed November 4, 2003).

II. ICANN's Grounding Principles: The Private Sector Should Lead, but the Institution Must be Representative and Open.

A. First Principles.

The history of ICANN, and the principles on which it was founded, help explain the structure of the institution, the struggle over the issue of representation, and how they came to be.⁴⁴ The first principles on which ICANN was founded point to its fundamental problem: ICANN was set up to fail on its own terms, if it truly was meant to be judged on the extent to which the global Internet community was to be involved in an open and transparent decision-making process and, ultimately, represented. A close look at these first principles also reveals the extent to which multiple theories of openness collided in the ICANN model, resulting in confusion rather than the clarity that would have been needed to make good on its ambitious undertaking.

The story of ICANN's formation has been told, at least in part, by several scholars.⁴⁵ The most critical part of the story for these purposes is the fact that the founders of ICANN – a mix of academics, government officials, corporate executives, and technologists – agreed upon a set of principles that have proven to be mutually exclusive. Most difficult to reconcile, the founders agreed upon encouraging private sector leadership of a corporation required to operate in a manner that is "representative" of global interests and "open" in its management decision-making.⁴⁶ In striving for consensus, the founders may have set themselves up for failure by embarking on a mission that is impossible to achieve completely.⁴⁷

To a certain extent, despite Professor Mueller's quite thorough history and related efforts, the process by which the present ICANN structure and system was

⁴⁴ See generally Weinberg, *ICANN and the Problem of Legitimacy*, *supra* note 19.

⁴⁵ The most thorough history of ICANN is probably MUELLER, *RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE*, *supra* note 30. See also, Weinberg, *ICANN and the Problem of Legitimacy*, *supra* note 19; the Center for Democracy and Technology, <http://www.cdt.org/dns/icann/formation.shtml>; <http://members.icann.org/history.html>; Hobbes' Internet Timeline, <http://www.zakon.org/robert/internet/timeline/> (accessed December 3, 2002).

⁴⁶ See, e.g., Oversight Hearing: Domain Name System Privatization: Is ICANN Out of Control? Subcommittee on Oversight and Investigations of the U.S. House Committee on Commerce, Jonathan Zittrain, July 22, 1999, [http://com-
notes.house.gov/ccheat/hearings106.nsf/768df0faa6d9ddab852564f1004886c0/53d384d363224ef2852567b7005119bc?OpenDocument](http://com-
notes.house.gov/ccheat/hearings106.nsf/768df0faa6d9ddab852564f1004886c0/53d384d363224ef2852567b7005119bc?OpenDocument) (accessed December 3, 2002). See also Post, *supra* note 2, (regarding discussions of the goals of ICANN and their relevance to the governance of the institution).

⁴⁷ Many political thinkers, from Locke to Jefferson, have talked thought about the problem of scale in the context of organizational form. On a smaller scale, a form of organization allowing for a great deal of input is plausible. On a larger scale, living up to principles of representation and openness – as the representatives grow further away from those they represent – may be impossible to achieve. The global nature of ICANN sets bar particularly high in this regard.

developed has remained shrouded in secrecy.⁴⁸ The means by which many of the initial board members and officers were chosen is particularly unclear. The function fulfilled by ICANN, technical coordination of key aspects of the Internet's infrastructure, had historically been handled on an essentially *ad hoc* basis by a number of individuals and their loosely knit, consensus-driven standards bodies that operated much like the Internet Engineering Task Force (IETF).⁴⁹ ICANN's immediate predecessor, the Internet Assigned Numbers Authority (IANA), consisted essentially of Dr. Jon Postel of the University of Southern California and a very limited administrative staff, to whom outsiders offered input.⁵⁰ After decades of management of the domain name system, the job became too large for these loose-knit organizations, as increasing numbers of people wanted access to the system and to the levers of control.⁵¹ Disputes began to arise between these loose-knit organizations, the United States government,⁵² and private corporations such as Network Solutions, Inc., of Virginia, which had contracted to control the popular and lucrative ".com" top-level domain, as well as two other top-level domains.⁵³

Despite its global mandate, ICANN retains extremely close ties to one state, the government of the United States.⁵⁴ This reliance on a single state's grant of authority lies near the core of its legitimacy problems. ICANN emerged from a United States government initiative, in concert with members of the private sector and the technical Internet community, intended to resolve this brewing dispute.⁵⁵ The United States government briefly considered taking over the domain name system, but instead produced two preliminary documents in 1998, known as the "Green Paper" and the "White Paper" (which was also known as the "Statement of Policy: Management of Internet Names and Addresses" or the "DNS White

⁴⁸ See Jonathan Zittrain, *Book Review: What's in a Name?*, 55 FED. COMM. L.J. 155, 158 (2003).

⁴⁹ See Froomkin, *Habermas*, *supra* note 35, 782 – 815. Professors Froomkin and Mueller and others have done admirable jobs of retelling the IETF story and the segue that story affords into the ICANN era.

⁵⁰ See <http://www.iana.org/comments/comments.htm> (accessed December 3, 2002).

⁵¹ I revisit this notion that organizations must decide between a "consensus" approach and an "authority" approach to self-governance in Section II. In general, business law scholars suggest that larger groups of people with divergent interests and access to information call for delegating authority to a few leaders, while smaller groups with better aligned interests and access to information tend to work better by consensus.

⁵² The United States Government's involvement was primarily through the National Science Foundation in the first instance, during the IANA period, and the Department of Commerce thereafter. It is an interesting question as to how the NSF or the Department of Commerce derived their initial authority over the domain name system. For one analysis of this topic, see Joseph P. Liu, *Legitimacy and Authority in Internet Coordination: A Domain Name Case Study*, 74 IND. L.J. 587, 593 (1999).

⁵³ Network Solutions, Inc., has since been acquired by VeriSign, Inc., of Mountain View, CA, and then assets thereof sold again in 2003.

⁵⁴ See the various Memoranda of Understanding between ICANN and the United States Department of Commerce listed at <http://www.ntia.doc.gov/ntiahome/domainname/icann.htm>, especially the first such memorandum at <http://www.ntia.doc.gov/ntiahome/domainname/icann-memorandum.htm> (accessed November 11, 2003).

⁵⁵ See *id.*

Paper").⁵⁶ These papers set forth a series of policy prescriptions and principles to govern how the domain name system would be managed. At the most fundamental level, the Green and White Papers established that the United States government would not actively manage the domain name system, but rather would empower the private sector to lead.⁵⁷

In the wake of these policy pronouncements, representatives of IANA negotiated an agreement with the United States Department of Commerce in November, 1998.⁵⁸ Based upon this agreement, ICANN came into being through the formation of a non-profit corporate entity in the state of California, the charter and by-laws of which incorporated a series of principles that reflected the desires of the founders as well as of the United States government and its executives in the Clinton Administration.⁵⁹

Once formally established as a California corporation, ICANN's "interim" or "initial" board and officers are believed to have been hand-picked largely by the late Dr. Postel, who died abruptly in October 1998, through his authority at IANA.⁶⁰ In theory, the board membership was chosen with some view toward drawing together a representative cross-section of representatives of constituencies affected by the domain name system and including members from a range of geographic areas.⁶¹ The initial board was made up of a number of highly respected members of the Internet community, including chairwoman Esther Dyson, an experienced United

⁵⁶ The "White Paper" of June 5, 1998 can be found at http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm. The "Green Paper" of January 30, 1998 can be found at <http://www.ntia.doc.gov/ntiahome/domainname/dnsdrft.htm> (accessed December 3, 2002).

⁵⁷ See MUELLER, *supra* note 30, 1 – 10.

⁵⁸ See <http://www.ntia.doc.gov/ntiahome/domainname/icann-memorandum.htm> (accessed December 3, 2002).

⁵⁹ The role of the United States government in the domain name system management, which continues to this day, could profitably serve as the subject of an inquiry of its own. Critics of ICANN of non-US citizenship have repeatedly brought up the involvement of the Department of Commerce in aspects of ICANN management, particularly in terms of involvement in the contracting process between ICANN and Network Solutions, Inc. (now owned primarily by VeriSign, Inc.). A good archive of materials regarding the US Government's policies on Internet-related issues can be found at www.ecommerce.gov (accessed December 3, 2002). ICANN has periodically gone through a contract extension process with the United States Department of Commerce, most recently extending the MoU for three years, through 2006, subject to certain refinements of the agreement, on September 16, 2003. See, e.g., http://www.ntia.doc.gov/ntiahome/domainname/agreements/sepstatement_09162003.htm, (accessed November 4, 2003).

⁶⁰ See <http://cyber.law.harvard.edu/pil-99/icannt.txt>. See also the link from www.icann.org/general/abouticann.htm, which leads to <http://www.postel.org/jonpostel.html> (accessed December 3, 2002). See also Milton Mueller, *ICANN and Internet Governance: Sorting Through the Debris of 'Self-Regulation,'* 1 INFO. 497, 498 (Dec. 1999).

⁶¹ This characterization of the process by which ICANN was developed almost dangerously oversimplifies the story. However, there is a dearth of reliable information about the process; the record is replete with conspiracy theories, but short on official statements or reasonably objective historical inquiries.

States-based entrepreneur, journalist, and long-time leader of the technology world.⁶²

The formal role and governing principles of ICANN, as well as an explanation of the source of ICANN's authority, are set forth clearly in a Memorandum of Understanding between the United States Department of Commerce and ICANN (the "MoU"), as amended from time to time.⁶³ The MoU delineates a role for ICANN that is largely confined to managing technical Domain Name System ("DNS") functions, the numbering of Internet addresses, the coordination of port assignments, and assisting in the maintenance of the stability of the Internet.⁶⁴ ICANN was established to work with the United States Department of Commerce to ensure that the "private sector has the capability and resources to assume the important responsibilities related to the technical management of the DNS."⁶⁵ The project listed the following among its goals: encouraging international participation⁶⁶; providing expertise and advice on the allocation of IP number blocks and coordinating the assignment of other Internet technical parameters as needed to maintain universal connectivity on the Internet⁶⁷; collaborating on written technical parameters for operation of the authoritative root⁶⁸; and collaborating on a study and process to address operational requirements of the root names servers⁶⁹ and the security of the root server system.⁷⁰

⁶² See <http://www.edventure.com/esther.cfm> (accessed December 3, 2002).

⁶³ <http://www.ntia.doc.gov/ntiahome/domainname/icann-memorandum.htm> (accessed December 3, 2002) (as amended from time to time).

⁶⁴ The specific role set forth for ICANN, as compared to the work that IETF seeks to accomplish, is a key reason for my disagreement with Professor Froomkin's assessment of standards-making bodies (see Froomkin, *Habermas*, *supra* note 35). There is a substantial difference between what the IETF does in setting standards and what IANA and ICANN after have sought to do in managing the domain name systems and related technical tasks. These disparate functions call for different modes of organization, structure and discourse. This distinction is set forth nicely in a paper by Joseph Liu. Professor Liu, on the distinction between the proper mode for technical standard setting and management of the DNS, wrote that proposals to extend IETF-style decision making processes to ICANN fail to "... appreciate the fact that domain name problems are not purely, or even primarily, technical in nature. Rather, they are classic public policy questions, requiring the resolution of conflicting distributional and value chains. The public policy aspect of the domain name problem undercuts many of the assumptions that underlie the standard-setting model of coordination. The result is that attempts to use the current standard-setting process face serious legitimacy and implementation problems." Liu, *supra* note 31, at 589.

⁶⁵ See Memorandum of Understanding, section II.A.B., <http://www.ntia.doc.gov/ntiahome/domainname/icann-memorandum.htm>.

⁶⁶ See *id.* § II.A.1.

⁶⁷ See *id.* § V.C.1., <http://www.ntia.doc.gov/ntiahome/domainname/icann-memorandum.htm>.

⁶⁸ See *id.* § V.C.4.

⁶⁹ See *id.* § V.C.5a.

⁷⁰ Many of these same principles can be found in the Green and White Papers, from which some of the language was lifted into the MoU.

1. Representation.

Most important for this inquiry, the MoU specifically set a goal for ICANN of achieving "representation" through process, as set forth in the clause that follows:

"4. Representation. This Agreement promotes the technical management of the DNS in a manner that reflects the global and functional diversity of Internet users and their needs. This Agreement is intended to promote the design, development, and testing of mechanisms to solicit public input, both domestic and international, into a private-sector decision making process. These mechanisms will promote the flexibility needed to adapt to changes in the composition of the Internet user community and their needs."⁷¹

Those who initially conceived ICANN acknowledged the global nature of the network, the global implications of the technical management that they were undertaking, and the need to take into account the "composition" of the Internet community members – Internet "users" – and "their needs." In so doing, the founders of ICANN committed themselves to managing the organization in such a way as to achieve "representation" of a constituency arguably unparalleled in its breadth.⁷² The ICANN founders also established ICANN with a view toward testing new mechanisms for involving the public in a private-sector decision-making process. ICANN subsequently chartered a study by the Berkman Center for Internet and Society at Harvard Law School and requested comment by others on the topic of representation on numerous occasions.⁷³ The statement by the United States Department of Commerce, regarding the extension of the Memorandum of Understanding, on September 16, 2003, reiterates the use of the word "representative" in multiple contexts.⁷⁴

⁷¹ *Id.* § II.C.4.

⁷² See Weinberg, *ICANN and the Problem of Legitimacy*, *supra* note 19, 235 - 50 (arguing that it is extremely difficult to determine whether ICANN's process is truly "representative" of a global community of users).

⁷³ <http://cyber.law.harvard.edu/rcs/> (accessed February 11, 2003). There are numerous other examples of ICANN Board members discussing their commitment to "representation." See e.g., <http://cyber.law.harvard.edu/icann/cambridge-1198/Archive/transmembership.html> (accessed November 4, 2003). See also the statements of the ICANN leadership when abolishing direct representation at the meeting in Accra, Ghana at <http://www.icann.org/minutes/prelim-report-14mar02.htm> (accessed November 4, 2003) and as reported by Andrew Orłowski in *The Register* at <http://www.theregister.co.uk/content/6/24443.html> (accessed November 4, 2003).

⁷⁴ The statement by the United States Department of Commerce regarding the renewed MoU in Fall of 2003 notes that ICANN is intended to be "a sufficiently stable, transparent, representative, efficient, and sustainable management organization capable of handling the important DNS tasks well into the future" and that the Board Members chosen through the NomCom process are to be "representative."
http://www.ntia.doc.gov/ntiahome/domainname/agreements/sepstatement_09162003.htm (accessed November 11, 2003). See also http://www.ntia.doc.gov/ntiahome/domainname/agreements/amendment6_09162003.htm (accessed November 11, 2003) (in which the US Department of Commerce reiterates its commitment to "representation" through ICANN).

Despite – or perhaps because of – the articulation of this founding principle, much of the critique of ICANN to date has revolved around the problem of representation.⁷⁵ Representation has proven problematic, in no small part, as a result of the extremely high expectations set by the governing principles that the organization's leaders represent such enormous and dramatically varied constituencies and as a result of the lack of precision about what the term is meant to require of ICANN.⁷⁶ Opponents of ICANN have been quite vocal in their protestations, using a series of Web sites, bulletin boards, listservs, and the news media as their bullhorns.⁷⁷ Certain participants have concluded that corporate interests have been granted too much authority in the process.⁷⁸ Similarly, some have argued that the process favors American interests too greatly, a problem that has been a major focus of the Nominating Committee (NomCom) process of 2003.⁷⁹ Still others have accused the initial board of being too slow in the move to become a more formally representative body.⁸⁰ Few have argued, publicly at least, that representation should not be a governing principle of the organization. My argument is, in essence, that if ICANN commits to operating in a manner that it is representative of the Internet user community, ICANN should both clarify, and then make good on, its commitment.

2. Openness.

In addition to seeking to represent the global community of Internet users, the founders of ICANN committed to managing the DNS and making decisions in an "open" manner. Like the variety of possible means of "representation," a clash of several understandings of the meaning of openness has also contributed to the hybrid nature of the ICANN structure. The notion of openness is often cited in the early writings about what makes cyberspace distinctive. Openness as a concept – as in "open source" or "open access" or even "open law" – has taken on a nearly mythic status in cyberlaw writings. Professor Lawrence Lessig of Stanford Law School and Professor Charles Nesson of Harvard Law School, long-time collaborators, have written and spoken about the importance of the "open society"

⁷⁵ The work of David Johnson and Susan Crawford in "Why Consensus Matters: The Theory Underlying ICANN's Mandate to Set Policy Standards for the Domain Name System" and "The Idea of ICANN" is helpful to an understanding of this issue, both at <http://www.icannwatch.org> (accessed December 3, 2002). See also MUELLER, *supra* note 30, at 211–26.

⁷⁶ See Weinberg, *ICANN and the Problem of Legitimacy*, *supra* note 19, at 259–60.

⁷⁷ The Web sites hosting a vast and growing archive of information critical of ICANN include official ICANN sites (such as www.icann.org) as well as sites such as www.icannwatch.org and www.slashdot.org (accessed December 3, 2002). A simple search on www.google.com, for instance, with the term "ICANN" yields many other sources of critical information. See also the aggregator of ICANN weblogs at <http://aggregator.does-not-exist.org/> (accessed November 4, 2003).

⁷⁸ See <http://cookreport.com/icannregulate.shtml> (accessed December 3, 2002).

⁷⁹ See Harvard Law School, Internet & Society 1999, Class Discussion, September 9, 1999 (notes on file with paper's authors).

⁸⁰ See *infra* note 80 and accompanying text.

in cyberspace and the many threats to that ideal.⁸¹ The open society is held out as one manifestation of the great promise of the Internet – a digital commons in which free expression, widespread sharing of ideas across cultural and other boundaries, and empowerment of individuals are glorified.⁸² The idea of openness, with its many and various connotations, has tremendous resonance and multiple special meanings to the activists of the Net community.

At least three possible conceptions of what "openness" means have clashed in the development of the ICANN model.⁸³ First, activists have sought openness in the sense of an ability not only to see, but to participate in, the decision-making process. This activist sense of openness is roughly consistent with the view of certain scholars that ICANN ought to achieve openness in the sense of achieving a Habermasian ideal of a certain high level of discourse prior to reaching decisions.⁸⁴ Second, some conceive of openness as a variant of the leading free software guru Richard Stallman's non-propriety model of the development of intellectual goods, in which the form of the final outcome is what matters most.⁸⁵ Openness, in this second iteration, is about a sense of positive freedom to do whatever users want with the output of the process.⁸⁶ Third, yet others have set forth an Eric Raymond-style production model, in which openness is meant as a process by which a good end is achieved.⁸⁷

In the first sense of openness, ICANN is meant to be managed in a manner that allows people to see what is going on and to be heard when they express their opinions.⁸⁸ The activist understanding of "openness" largely hinges on the ability

⁸¹ See e.g., LAWRENCE LESSIG, RECLAIMING A COMMONS, Version 1.01, Keynote Address, the Berkman Center's "Building a Digital Commons," May 20, 1999, Cambridge, MA. See also the description of the Open Society Institute of the Soros Foundation at <http://www.soros.org/> (accessed November 3, 2003).

⁸² See generally LESSIG, CODE AND OTHER LAWS OF CYBERSPACE, *supra* note 38 (for the classic and most effective description of the promise, realities and future of cyberspace, as told part-way through the Internet explosion). See also Salbu, *Who Should Govern the Internet?: Monitoring and Supporting a New Frontier*, *supra* note 38.

⁸³ This concept of the three clashing senses of openness is directly attributable to conversations with, and the inspirations of, Professor Jonathan Zittrain during the development of this paper.

⁸⁴ The leading proponent of this position is Professor Michael Fromkin. See generally Fromkin, *Habermas*, *supra* note 35.

⁸⁵ Richard Stallman himself prefers the term "Free Software," or "Free/Libre/Open Source Software (FLOSS)," to the term "Open Source." Part of his reasoning is that the term "Open Source" is ill-understood, with too many conceptions of what it means, which is precisely the point I seek to make with respect to the many meanings of "openness" in the ICANN context. <http://www.openresources.com/documents/free-software-better/node3.html> (accessed November 6, 2003).

⁸⁶ *Id.*

⁸⁷ Eric Raymond, *The Cathedral and the Bazaar*, at <http://www.catb.org/~esr/writings/cathedral-bazaar/cathedral-bazaar/> (accessed November 6, 2003).

⁸⁸ The IETF arguably espouses such a principle. In "The Tao of IETF" and related descriptive documents, the organization's spokespersons describe openness in the sense of being "open to any individual." A sense of importance is placed on the open process as a good in itself, much as Fromkin argues in *Habermas*, *supra* note 35. However, the IETF might also express openness in one of the latter two senses as well, insofar as it promotes open rather

not just to see, but also to be able to affect, in meaningful fashion, the decision-making process at ICANN.⁸⁹ Much of the criticism that ICANN has sustained to date has been leveled by those who believe that they were either excluded from the process or else afforded too little meaningful voice in the development of the ICANN structure and system.⁹⁰ One ICANN participant described the point at which he lost faith in ICANN in procedural terms:

"My belief in ICANN died when, at the Geneva meeting, I was presented with an outline of what would actually happen, and watched that happen (specifically, but not exhaustively, watching an unelected board be appointed, then watching that board take its technical mandate and turn it into a regulatory vehicle)."⁹¹

This critic, Christopher Ambler, may have had his facts incorrect: there was no ICANN at the time, there has not been a Geneva ICANN meeting, and likely he is referring to an International Forum on the White Paper (IFWP) meeting in July, 1998.⁹² Nonetheless, his commentary suggests an activist understanding of the term "openness" in the ICANN context. Openness, to the critics of ICANN, meant not only that one could watch things happen, but that one could also participate in the process of reaching the decision later presented as a *fait accompli*.

In a related vein, other stakeholders have sought openness at ICANN in the sense of clarity and reliability of process.⁹³ This clarity is necessary for the purposes of empowering users who wish to contribute to the decision-making process, but also to businesses seeking to make investments based upon the regulatory environment set up by ICANN. This comment has arisen primarily in the context of proposals for the extension of top-level domains (gTLDs), in which those who are in favor of particular extensions seek to determine how much risk is associated with the investment necessary to propose a new gTLD.⁹⁴

than proprietary standards and software. <http://www.ietf.org/overview.html> and <http://www.ietf.org/tao.html> (accessed November 6, 2003).

⁸⁹ See Leon Koay and Michael Richardson, *Openness and Transparency*, Harvard Law School, at <http://cyber.law.harvard.edu/icann/workshops/LA/papers/openness.html> (accessed November 6, 2003) (in which the authors describe certain early criticisms of ICANN's lack of openness in terms of disallowing understanding of, or access to, the decision-making process).

⁹⁰ "ICANN Interim President Mike Roberts said most of the criticism of his group relates to 'process'..." *ICANN't Believe What They're Doing*, NATIONAL JOURNAL'S TECHNOLOGY DAILY (June 15, 1999) <http://cyber.law.harvard.edu/pil-99/icannt.txt> (accessed December 3, 2002).

⁹¹ Christopher Ambler, cambler@iodesign.com, Posting to the Fall 1999 Harvard Law School [names] listserv, forwarded by Jay Fenello, Thursday, October 14, 1999, 21:01:43.

⁹² See <http://cyber.law.harvard.edu/icann/ifwp-geneva-archive/> (accessed December 3, 2002).

⁹³ See, e.g., <http://blog.lextext.com/blog/archives/2003/10/30/5324.html> (accessed November 4, 2003) (in which Bret Fausett, counsel to NextDNS, argues in favor of "clarity" in the process of assigning new top-level domains).

⁹⁴ See <http://www.gtldregistries.org/mailing/gtld/200204/0014.html> (accessed November 6, 2003) (in which a trade organization refers to a "lack of openness" in the gTLD context). See also <http://www.icann.org/committees/ntepptf/new-gtld-action-plan-18oct02.htm> (accessed November 6, 2003) (for a description of the introduction of new top-level domains).

The second and third potential meanings of openness in the Internet lexicon – the Stallman-style and Raymond-style versions, for shorthand – have been less prevalent in the discourse but certainly present. The Stallman-style version of openness, in which the output is meant to be free, as in non-proprietary, is hard to square with the nature of what ICANN is doing. In the sense that ICANN seeks to allocate a series of necessarily proprietary resources, a non-proprietary series of outcomes is inherently difficult to achieve.⁹⁵ In order to maintain a stable system, ICANN can permit requests for cocacola.com to resolve to only one address on the Internet. This conceptual difficulty is revealed in the reaction to the Free Software Foundation's proposal, over Stallman's signature, to develop a .gnu top-level domain.⁹⁶ ICANN has not achieved openness in the sense of non-proprietary outcomes of the decision-making process.

In the Raymond-style conception of openness, the goal is to achieve the best outcome through a non-proprietary process.⁹⁷ It is in this sense of the term openness that ICANN might be most vigorously defended. ICANN has certainly enabled many members of the user community to participate, either through involvement in a Supporting Organization or by making comments directly to the Board, among other means, in the development of its process. Likewise, one might reasonably contend that the outcome of ICANN's work has been, at a minimum, acceptable, and surely far less bad than it might have been. If the notion of openness is that the development of goods ought to involve as many users as possible and then to produce as high-quality an output as possible – without prescribing precisely the manner in which the output is developed or prejudging its outcome – ICANN fares reasonably well.⁹⁸

Since the founding of ICANN, the officers and directors have continued to restate their commitment to "representation" and "openness."⁹⁹ At the very least,

⁹⁵ I have found no evidence to suggest that Richard Stallman himself argued in favor of an ICANN that is "open" in the sense that ascribe to him here. I mean only to refer to an important strand of understanding the term "openness" for which he has become a standard-bearer.

⁹⁶ <http://www.icann.org/yokohama/eoi12.htm> (accessed November 6, 2003). See also <http://slashdot.org/articles/00/07/12/1710226.shtml> (accessed November 6, 2003).

⁹⁷ As in the case of Stallman, I have no reason to believe that Eric Raymond has taken such a position with respect to ICANN, but rather credit him with development of a certain widespread strand of thinking about what the term "open" means.

⁹⁸ Stakeholder opinion is far from unanimous on this particular point. See, e.g., <http://www.pfir.org/statements/icann> (accessed November 6, 2003) (in which the authors rebut the notion that ICANN is worse than the alternatives to its management of the DNS.)

⁹⁹ For instance, ICANN President Paul Twomey is quoted as saying that ICANN is pursuing "a more open process" for creating new top-level domains. <http://thecre.com/icann/govern-oct2003-1.htm> (accessed November 4, 2003). See also <http://news.zdnet.co.uk/business/0,39020645,2132226,00.htm> (accessed November 6, 2003) (in which Twomey commits to an ICANN that is "very open and consultative with all the stakeholders.") See also Jonathan Weinberg, *Geeks and Greeks*, 4 – 5, at <http://www.law.wayne.edu/weinberg/geeksandgreeks.pdf> (accessed December 2, 2003) (in which Prof. Weinberg explores and contextualizes a series of statements regarding representation of the Internet user community).

the managers have continued to employ the rhetoric of these founding principles.¹⁰⁰ One sentence from the organization's public Web site bundles the principles together: "It is ICANN's objective to operate as an open, transparent, and consensus based body that is broadly representative of the diverse stakeholder communities of the global Internet."¹⁰¹ The recent leadership of ICANN has underscored this commitment to representation. M. Stuart Lynn, upon appointment as new president and chief executive, said, "ICANN, as I see it, takes its lead not from me but from the Internet community as a whole."¹⁰² One year into the job, Mr. Lynn issued a statement that, based on this guidance, the experiment that is ICANN should take a dramatically different turn, based on the Board's finding that "a purely private organization will not work."¹⁰³

Scaling has proven hard for ICANN.¹⁰⁴ As the number of constituents and the scope of responsibility of an organization grows, so too does the difficulty of managing in a manner that is representative, open, and driven by consensus.¹⁰⁵ Representation becomes more difficult as individuals grow further away from those who represent them, whether geographically or as a matter of sheer ratio (i.e., where one representative has a constituency of 100 rather than a constituency of an entire continent of hundreds of millions, in the case of North America, or even billions of persons, in the case of Asia). Similarly, openness, particularly in the sense of transparency, becomes harder with scale, as not all decisions can be made by a small group of directors and officers in front of the world at large.¹⁰⁶

¹⁰⁰ The United States Department of Commerce has used slightly different language to make a similar, though not precisely the same point, in its recent public statements when renewing the Memorandum of Understanding. For instance, the Department noted that ICANN needed to strive "to ensure transparency and accountability in its processes and decision making" and "to increase its responsiveness to Internet stakeholders." Transparency, accountability and responsiveness are akin to openness and representation, but clearly convey a slightly different set of goals.

http://www.ntia.doc.gov/ntiahome/domainname/agreements/sepstatement_09162003.htm (accessed November 4, 2003).

¹⁰¹ <http://www.icann.org/general/fact-sheet.htm>, *supra* note 11.

¹⁰² *New head of Web domain name group pledges to build consensus*, REUTERS, January 24, 2001, <http://www.dnso.org/wgroups/wg-review/Arc02/msg02123.html> (accessed December 3, 2002).

¹⁰³ *ICANN President Recommends a Roadmap for Reform*, *supra* note 18.

¹⁰⁴ See <http://www.dnso.org/wgroups/wg-c/Arc01/msg00909.html> (accessed November 6, 2003) (in which participants discuss one of the particular types of scaling problems facing ICANN with respect to the introduction of new gTLDs).

¹⁰⁵ If the user community is defined either as the absolute number of Internet users globally or as the number of domain names registered, ICANN's number of constituents has grown markedly throughout its history. Likewise, as ICANN has introduced new gTLDs and has added the UDRP process to its workload, so too has its substantive area of responsibility grown.

¹⁰⁶ ICANN has taken the laudable step of webcasting virtually all of the major sessions of its quarterly meetings at venues around the world so as to make its proceedings accessible to all who are interested, whether in real-time or on an archived basis. Webcasting, while an extraordinary technological advance in terms of providing for openness of meetings, nonetheless has its limitations. While access to a webcast is limited potentially by both bandwidth (particularly on the receiving side) and licenses to reach a certain number of end users, in the case of RealNetworks webcast production software, no ICANN webcast has yet

B. Does it Matter Whether ICANN Lives up to its Principles?

ICANN has caught the imagination of certain technologists, scholars, lawyers and businesspeople from various fields, but remains virtually unknown to the general public.¹⁰⁷ A vast majority of the roughly 600 million people who use the Internet to communicate via e-mail, gather information, or shop online appear to have little interest in the technical administration of the domain name system and the related issues that ICANN manages.¹⁰⁸ If many people who use the Internet neither know nor much care about what ICANN does, does it matter whether ICANN lives up to its founding principles? Moreover, does it matter what sort of governance structure ICANN has? One prevalent line of argument – that ICANN's work is so arcane and remote from the lives of most of the world's citizens – suggests that the answer to both of these questions is "no." However, in light of the importance of ICANN's work to the global economy and to the Internet, a network of increasing importance to the lives of persons in more than one hundred countries, the answer to both questions is "yes."¹⁰⁹ ICANN's structure and management are important because ICANN's mission is important, but also because ICANN was thought to have presented an extraordinary opportunity to experiment

hit server capacity. However, even the most aggressive, costly video webcast in 2001 can offer at best a more or less passive experience to those persons who watch live streaming audio and video and participate in real-time discussion. If the notion of "openness" is simply to be able to watch and listen, then the webcast is surely sufficient for those with sufficient access to a moderately fast Internet connection and relatively modern computer hardware and software. If the requisite "openness" involves an ability to participate in an interactive fashion beyond being able to submit real-time text-based comments (provided through a related application's interface), then webcasting may come up somewhat short. Without question, however, webcasting is a critically important element of ICANN's effort to make its proceedings accessible to a global audience. Over the past few years, ICANN has withdrawn some of the tools for participation related to these webcasts, however, such as IRC, the prompt posting of substantial meeting notes, and the ability to submit real-time comments, some of which have been read to the Board and all of which were previously posted as part of the meeting archives.

¹⁰⁷ The Markle Foundation commissioned a survey in which the lack of knowledge about ICANN is cited as a major concern. See Jerry Berman and Scott Harshbarger, "ICANN's Global Elections: On the Internet, For the Internet, A Common Cause/Center for Democracy and Technology Report on the ICANN At-Large Elections," (March 2000), ii, iv, at http://www.markle.org/news/icann_report.pdfhtm (accessed November 12, 2003) (in which the authors note "...nearly every member of the Internet community with whom we spoke, as well as respected outside observers, identified fundamental problems with the current plan for the election being put in place by ICANN. Some of these problems can be addressed through improvements in the proposed election process, but others are the products of conflicting goals for the election itself. These problems are compounded by the fact that most of the electorate envisioned by ICANN does not know what ICANN is or what it does. In short, what we found is a proposed election process for ICANN viewed with almost uniform skepticism by informed observers.")

¹⁰⁸ See, e.g., http://www.etforecasts.com/products/ES_intusers.htm (accessed December 3, 2002) (for one among many analyses of world-wide Internet usage, ordinarily pegged in the 500,000,000 – 600,000,000 range).

¹⁰⁹ For a consideration of why ICANN does or does not matter, see also Jonathan Zittrain's speech at Cardozo Law School, March 17, 2003, *supra* note 38.

with institution-building on a global scale, powered by a promising new medium. Furthermore, observers have posited that ICANN should serve as an experiment in strengthening participation and democratic institutions generally through innovative use of the Internet.¹¹⁰ To the extent that ICANN is being viewed as a potential test-case for innovation in democratic governance powered by technology, the outcome of, and lessons learned from, its experimentation are of significance.

ICANN is among the only organizations recognized formally, at least by the United States government, as empowered to administer certain critically important technical procedures that affect the entire Internet, a network that joins hundreds of millions of people across the world, and as such has prompted many powerful interests to become involved in its activities.¹¹¹ ICANN may well be "the most important Internet organization you've probably never heard of."¹¹² Evidence of the importance of ICANN's work is primarily qualitative in nature, but ample in quantity. Governments, naturally, have focused substantial attention on ICANN. On several occasions, members of the United States Congress have held hearings and issued public statements that, at least in part, question whether the Department of Commerce-backed ICANN, without sufficient legitimacy had garnered too much authority over what could arguably be considered a public resource.¹¹³ Several institutions of the European Union have focused on ICANN, reviewing questions of its implications for competition and data privacy, among other issues.¹¹⁴ Roughly seventy-five government representatives participate in

¹¹⁰ See e.g., Steven Hill, *ICANN: Secret Government of the Internet?*, IN THESE TIMES, May 15, 2000, <http://www.inthesetimes.com/issue/24/12/hill2412.html> (accessed February 6, 2003).

¹¹¹ Other important technical procedures that affect people's ability to access the Internet are administered by the ITU, which is formally recognized by 189 governments.

There is an important distinction between the role of ICANN, and before it IANA, and the role of the IETF. ICANN manages a technical system; the IETF sets technical standards. This distinction is essential to understanding why the two organizations might sensibly function differently. It also helps to undermine the argument that ICANN derives its legitimacy from the IETF, which should not properly be seen as its direct forebear.

¹¹² Dan Gillmor, *ICANN election carries hope of needed change*, COMPUTERWORLD, October 30, 2000, http://www.computerworld.com/cwi/story/0,1199,NAV47_STO53016,00.html (accessed December 3, 2002).

¹¹³ See, e.g., David McGuire, *Congressional Committee Launches ICANN Inquiry*, NEWSBYTES.COM (January 12, 2001) http://www.infowar.com/law/01/law_011501b_j.shtml (accessed December 3, 2002). It is worth noting that no substantial, formal Congressional action has been taken to reign in ICANN since its inception despite a series of individual calls for reform and review of the institution on a series of occasions, including during 2002. This inaction to date would suggest a lack of consensus as to (or, perhaps interest in) the propriety of ICANN's work and legitimacy of authority among recent and current members of Congress.

There is an interesting question, set aside here, yet to be fully examined in the literature of Cyberspace law: to what extent should we regulate the Internet as a global public utility (in the general sense of the term "utility"), and if so, what implications would that insight have on Internet law and regulations?

¹¹⁴ See Heise Online, *EU Plans ICANN Study*, <http://www.heise.de/english/newsticker/news/23317> (accessed November 6, 2003).

ICANN through the Governmental Advisory Committee (GAC).¹¹⁵ Academics, including members of the ICANN board, law professors, computer scientists, and public policy scholars, have written about ICANN and participated actively in its formation. The news media has covered its establishment and growth. Hundreds of articles in the trade press, such as *Wired*, *C|Net*, *The Industry Standard*, and *Red Herring*, both in print and on-line, have told the ICANN story to technologists; mainstream newspapers, too, from cities around the world have published stories for the casual observer.¹¹⁶

Much of the reason why people care about ICANN – and the manner in which it governs and is governed – revolves, not surprisingly, around a dwindling but nonetheless substantial amount of money.¹¹⁷ Among other things, ICANN oversees the process by which domain names are given out to businesses, non-governmental-organizations (“NGOs”), and anyone else who wants to establish a Web site on the Internet. The process of assigning and managing certain domain name registry systems turned NSI into a corporation for which VeriSign was willing to pay \$21 billion in 2000.¹¹⁸ A single domain name, *business.com*, is believed to have commanded a \$7.5 million sale price, albeit at the height of the mania surrounding Internet expansionism.¹¹⁹ Applicants for the rights to manage new generic Top Level Domains (gTLDs) anted up \$50,000 each to ICANN simply to put forward a proposal, with no claim to a return of the money in the event of failure.¹²⁰ Other aspects of ICANN’s work, such as setting certain technical standards, could have substantial additional commercial importance. Though valuations of domain name-related entities and contractual rights have fallen markedly over the past two years, ICANN’s work nonetheless draws commercial interest.

The fear of “mission creep,” and the related concern about ICANN’s governance activities, ranks among the reasons for interest in and concern about

¹¹⁵ See http://www.noie.gov.au/projects/international/DNS/gac/GAC_reps.htm (accessed March 18, 2001).

¹¹⁶ Citations are far too numerous to mention exhaustively here. See, e.g., *Internet Governance: Domain Strain*, THE ECONOMIST, March 10, 2001, at 64; Associated Press, *Web Domain Group Skirts Controversy*, THE NEW YORK TIMES, March 14, 2001, at C4.

¹¹⁷ The amount of money at stake with ICANN’s decisions in 2003 is surely lower than it was at the height of the dot-com boom, in March, 2000, for instance, though a future in which more and more money changes hands related to the reservation of more and more domain names across a broader range of gTLDs is yet conceivable. One might also consider the sale price of NSI to VeriSign (in the tens of billions) and the subsequent sale of assets of NSI by VeriSign (in the hundreds of millions).

¹¹⁸ See, e.g., Damien Cave, *Is VeriSign a Network Solution?*, SALON.COM (March 8, 2000) at http://www.salon.com/tech/log/2000/03/08/verisign_nsi/ (accessed January 29, 2003).

¹¹⁹ See, e.g., <http://register-an-internet-domain-name.com/> (accessed January 29, 2003) and Scott Rosenberg, *Their Names are Legion*, SALON.COM (March 10, 2000) http://www.salon.com/tech/col/rose/2000/03/10/domain_names/index.html (accessed April 7, 2001). A new round of gTLD proposals may be underway shortly as the seventh of the first round of the extensions of the gTLDs comes on line.

¹²⁰ ICANN reportedly collected \$2.35 million through the new proposal process. See Mary Mosquera, *Domain Name Space about to Burst Open*, TECHWEB.COM (October 31, 2000) <http://www.techweb.com/wire/story/TWB20001031S0018> (accessed December 3, 2002).

ICANN's management structure.¹²¹ ICANN stands alone among global institutions with any claim to legitimacy in managing certain affairs related to the core systems of the Internet. ICANN's leadership has consistently downplayed this risk of mission creep and advocated "tight focus" on a narrow mandate.¹²² While its mandate is indeed limited today to the naming and numbering schemes, some observers (including members of the House and Senate of the United States Congress) have stated their fear that ICANN could extend its influence to other governance tasks related to the Internet.¹²³ As remote as this possibility may seem and as believable as ICANN's leaders may sound, particularly as ICANN comes under increasing fire, this mission-creep concern may have merit even if ICANN *per se* does not extend its reach.¹²⁴ Cyberspace may be different enough from terrestrial space that some other institution may seek to establish a claim to govern other matters online, such as civil liberties that may cut closer to issues important to individual users of the Internet.¹²⁵ Related concerns, like the fear that industrial societies will be seized by a technical elite, also feeds into the interest in the management of ICANN despite its obscurity.¹²⁶

ICANN's management structure matters, too, in light of ICANN's global reach and because of the need to develop new modes of governance of the technical architecture of the Net in light of this reach.¹²⁷ Few issues have the ability to touch the lives of so many people across such a broad geographical and functional spectrum, even if the impact is indirect, as ICANN's mandate does. While the world's societies are certainly divided into technology haves and have-nots,¹²⁸ often

¹²¹ See, e.g., <http://www.commoncause.org/icann/roundtable/background.htm> (accessed November 11, 2003).

¹²² M. Stuart Lynn, *President's Report: ICANN – The Case for Reform* (February 24, 2002) <http://www.icann.org/general/lynn-reform-proposal-24feb02.htm> (accessed December 3, 2002).

¹²³ See JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 26 – 7 (1862) (in which Mill suggests that in considering a structure of governance, one should consider not just the legitimate scope of what the entity is intended to cover by its mandate, but also those areas to which the entity might extend its reach for bad reasons).

¹²⁴ Curiously enough, Congress itself may also contribute to this fear of mission creep by such proposals as the plan to mandate establishment of a ".kids" top-level domain. Such a plan would require decisions about what content is appropriate for what audiences and would, by necessity, involve monitoring and censoring certain speech. See also the discussion below in Section IV about the competing proposals for a new .kids domain.

¹²⁵ See Steven Hill, *ICANN: Secret Government of the Internet?*, *supra* note 55.

¹²⁶ See, e.g., HAROLD LOEB, *LIFE IN A TECHNOCRACY: WHAT IT MIGHT BE LIKE* (1933). See also <http://www.technocracyinc.org/MainIndex.htm> (accessed December 3, 2002).

¹²⁷ See, e.g., <http://www.pfir.org/statements/icann> (accessed November 6, 2003) (arguing that "an intensive, international study be started at once, with a mandate to propose detailed and meaningful paths for the Internet's development, operations, and management.")

¹²⁸ The global digital divide is yet another issue that warrants extensive study of its own. The relevance of the digital divide in the ICANN context has yet to be explored extensively in the Cyberlaw literature, though there has been some discussion of the limited participatory role of developing countries in ICANN, despite substantial effort to reach out to leaders in developing countries on the part of ICANN's staff, board and activists. The number of votes cast in North America and Europe, for instance, in the election in the Fall of 2002, dwarfed the number of votes cast in Africa. See generally www.benton.org;

along purely economic lines, the breadth of Internet usage and transactions across national boundaries continues to expand, though not at the rate predicted a few years ago. ICANN is an institution that has the potential to be relevant to the lives of persons in every country on the planet, in a way that few institutions in history have done.¹²⁹

This global reach highlights the potential importance of the ICANN experiment to the future of the governance of the Internet. Some people care about ICANN's management out of fear of expanding United States hegemony, the English language, or the power of multinational corporations.¹³⁰ Others see ICANN's potential reach as an opportunity to engage and energize Internet users across national borders into a global community and to test the Internet's ability to power global democratic institutions. Those concerned about how we will move forward with making technical governance decisions, particularly with the increased concern over abuse of the network by spammers and others, seek a new model for how to tackle this looming problem.¹³¹ For all of these reasons, the operations of ICANN and the outcome of its experiments in representation, in light of its founding principles, is worthy of scrutiny.

III. ICANN's Hybrid Structure and Complex Decision-Making Process.

ICANN's hybrid structure makes it difficult for users and academics alike to discern how ICANN reaches its decisions and how user input is incorporated into the decision-making process. These structural complexities, grounded in the conflicting meanings of its founding principles and its formation by a broad group of stakeholders, also make more challenging the assessment of whether ICANN has succeeded on its own terms. ICANN has elements of a standards body, a corporation, and a government entity. In a sense, though, ICANN is distinctly all three at once, rendering analogies hard to draw. This complexity renders each possibility, individually, unsatisfying on its own. This complexity also makes the lessons learned harder to draw.

A. ICANN as Standards Body.

At least some of the organizations that predate ICANN, such as the IETF, could be characterized as standards organizations, with greater or lesser degrees of formality in their decision-making processes. These loosely structured, volunteer-powered organizations traditionally have made decisions by consensus. The IETF,

<http://www.geekcorps.org/>; www.openeconomies.org/; <http://www.digitaldividenetwork.org/content/sections/index.cfm>; and <http://www.digitaldivide.gov/> (for broad-based discussions of the issue of the digital divide, though not explicitly in the context of ICANN) (accessed December 20, 2002).

¹²⁹ Arguably the United Nations, numerous other treaty-based organizations, certain NGOs, churches, and empires have had comparable global reach to that of ICANN.

¹³⁰ See, e.g., GEORGE MONBIOT, *CAPTIVE STATE: THE CORPORATE TAKEOVER OF BRITAIN* (2000). See also www.captivestate.com (accessed December 20, 2002). See also Williams, *Plan for UN to Run Internet "Will be Shelved," supra* note 7.

¹³¹ See *id.* See also Kiri Blakeley, *Spam: It's Worse Than You Think*, FORBES.COM, at http://www.forbes.com/2003/11/11/cz_kb_1111spam.html (accessed November 11, 2003).

for instance, took no votes and had no formal leaders, rather seeking "rough consensus" and deciding by listening to the "hums" of those persons present.¹³² Many of those active in ICANN today, particularly in the more technical capacities, come from the IETF tradition. Vestiges of the standards bodies' structure remain in ICANN. The traditionally powerful Supporting Organizations ("SOs"), which send members to the Board of Directors and have responsibility for providing guidance to the Board on issues under their jurisdiction, are staffed almost entirely by volunteers who often must pay their own travel to attend ICANN's far-flung quarterly meetings.¹³³ These Supporting Organizations have also been the venue for the most bottom-up decision-making aspects of ICANN's structure.

ICANN does not operate in the same manner as most standards bodies, however, such as the World Wide Web Consortium (W3C), the Internet Assigned Numbers Authority (IANA), or the IETF, in their classic forms.¹³⁴ ICANN, despite its rhetoric about bottom-up organization, has a Board of Directors which exercises ultimate authority over the administration of a technical governance system that millions around the globe implicitly agree to subject themselves to on a regular basis. As more individuals, corporations, institutions, and governments develop an interest in the domain name system, and as the Internet becomes more and more central to peoples' lives, the less adequate the membership model becomes. ICANN's increasingly formal and professional structure, including its CEO, staff, and Board of Directors, coupled with the attempted introduction of global elections, suggest a further move away from the standards bodies model of its predecessors.

B. ICANN as Corporation.

In a literal sense, ICANN is a corporation.¹³⁵ Established as a not-for-profit corporation in the state of California on September 30, 1998, its governance structure vests virtually all power in the Board of Directors, who may delegate authority to a series of full-time, professional officers, many of whom have had

¹³² See William A. Foster, *Registering the Domain Name System: An Exercise in Global Decision-Making*, <http://www.ksg.harvard.edu/iip/cai/foster.html> (accessed December 3, 2002). See generally <http://www.ietf.org/tao.html> (for a discussion of the principles, decision-making methods, and history of the IETF, a critically-important predecessor organization to ICANN) (accessed December 3, 2002). See also Professor Jonathan Zittrain's video-taped lecture on this topic at <http://cyber.law.harvard.edu/berkmancommons/icann.html> (accessed November 14, 2003) (accessible as a download or a stream and made available through the Berkman Commons, subject to a Creative Commons license).

¹³³ An archive of ICANN's meeting sites since its inception in 1998 can be found at <http://cyber.law.harvard.edu/icann/> (accessed December 20, 2002).

¹³⁴ There are, of course, many similarities between ICANN and the W3C and the IETF, such as the fact that SO staff and members pay their own way to ICANN meetings and that use of some of the ICANN resources is purely voluntary. The clear distinction lies primarily in the realm of how final decisions are made and opportunities for recourse in the event of disagreement.

¹³⁵ Basic structural information regarding ICANN can be found on an updated basis at <http://www.icann.org/general/abouticann.htm> (accessed February 7, 2003).

impressive careers prior to joining the ICANN staff.¹³⁶ As a not-for-profit corporation, there are no shareholders *per se*, though one might argue that the At Large Membership sought, unsuccessfully, to act in roughly that role for two years during which period it ostensibly was empowered to vote for some of the members of the board of directors.¹³⁷

Whether or not for-profit, the California corporation model seems particularly inadequate for a global organization purporting to "represent" a worldwide populace and multiple cross-border constituencies. ICANN fulfills a distinctly public mission, not a for-profit or an advocacy role or any other purpose for which the corporate structure makes apparent sense. ICANN also does not function like a traditional corporation, other than in terms of the role division between officers and directors and the limitation of liability.¹³⁸

The corporate form's reliance upon the laws of a single one of the United States is a substantial limiting factor for its applicability for ICANN's structure. The relationships between ICANN, the United States Department of Commerce, VeriSign, a for-profit corporation with its base of operations also in California, and other corporate sponsors, already raise questions about the United States focus of this global entity.¹³⁹ The corporate form holds ICANN back, to some extent, from expanding beyond its West Coast U.S. roots and toward true representation of the global community. The ICANN headquarters in Marina del Ray naturally attracts staff of United States heritage who are interested in living in California. Each member of the Board and Staff have traditionally spoken English, the predominant language of both the Internet and the state of California. ICANN's efforts to date to broaden the geographic and cultural diversity of its At-Large Membership and Board of Directors are laudable. But the gains may be limited, at least in part, by ICANN's formal corporate structure.¹⁴⁰

The study of business law suggests another critique of ICANN's structure and points to the manner in which ICANN's structure and grounding principles may be incompatible over the long term. Business law commentators, including Professor Stephen Bainbridge of UCLA, have shown that organizations choose one of two models for their internal governance: "consensus" and "authority." The consensus

¹³⁶ See <http://www.icann.org/general/articles.htm> and <http://www.icann.org/general/bylaws.htm> (accessed February 7, 2003).

¹³⁷ Non-profits can have "members," which are roughly equivalent to shareholders. ICANN, on pressure from the United States Department of Commerce, included a "reservation" in its bylaws for the contingency of a membership (Art. II of the ICANN By-Laws). <http://www.icann.org/general/archive-bylaws/bylaws-06nov98.htm> (accessed February 12, 2003).

¹³⁸ Academic theories of the firm come up short when applied to the ICANN corporate form. The Coase-style "Theory of the Firm's" focus on transaction costs appears almost entirely irrelevant. While perhaps marginally more apt, it is likewise hard to justify ICANN's corporate form along the lines of the "Nexus of Contracts" or "Web of Contracts" theories, especially given that the majority of stakeholders have made no contract with the ICANN corporate entity or with each other.

¹³⁹ VeriSign stepped into the role of Network Solutions, Inc., after the acquisition by VeriSign.

¹⁴⁰ It might well be the case that any global organization would be forced to struggle with these problems of geographic location of operations. However, ICANN's structure as a California-based corporation exacerbates, than mitigates, this problem.

model, the argument goes, is most gainfully employed when each member of the organization has the same information and members' interests are aligned. The consensus model can only work well in the absence of a serious collective action problem. The authority model, by contrast, vests decision-making authority in a central agency (in the corporate context, the Board of Directors), which founds its decisions on input from other stakeholders. The authority structure works best in instances in which members of the organization have varying amounts of organization and interests that are sometimes at cross purposes. The American corporate form provides, by statute, for an authority-style organization.¹⁴¹

ICANN, as a corporation, has the core structure of an authority-style organization, with the power to decide, after consultation, vested in the hands of a few. In a sense, this authority structure fits ICANN, if Professor Bainbridge and his colleagues are correct. The many stakeholders in ICANN – ranging from the individual Internet user to a large corporation to a non-profit civil liberties organization to the European Union – have wildly varying levels of information and interests.¹⁴² Even if these disparities were not true, the Internet community at large is virtually the definition of a collective action problem waiting to happen. These factors point toward the propriety of an authority structure for ICANN.

The problem arises with the superimposition of ICANN's legacy of seeking "consensus" and its grounding principle of "representation." ICANN's corporate structure is not well-aligned with certain aspects of its history and its stated goals. The teachings of business law scholars, extrapolated only a short distance, suggest that if ICANN must remain a corporation, even in form only, then it may be doomed to fail on its own terms.

C. ICANN as government entity.

ICANN also embodies elements of a government entity. As with other analogs, the parallel is not exact: ICANN lacks many of the traditional hallmarks of a government entity, such as enforcement powers. But ICANN's quasi-governance role, coupled with its stated goal of representation and the Election of 2000 and its usage of multiple attributes of the administrative agency model, renders the analogy to a government entity attractive, and, ultimately, somewhat informative.¹⁴³

The story of ICANN's formation can be told in a manner that resembles the formation of a state. In the political theory conception of thinkers like Hobbes, Locke, and Rousseau, people are born into a state of nature. While they are free in terms of having no sovereign, they enslave themselves through the anarchy that

¹⁴¹ STEPHEN M. BAINBRIDGE, CORPORATIONS LAW AND ECONOMICS V-2 – V-3 (2001).

¹⁴² ICANN's hybrid structure also involves a complex series of different vehicles for various individuals to voice their interests with varying levels of influence. It is quite relevant that the power afforded these vehicles are not equally distributed. For instance, the "consumer" has no official voting representative in ICANN whereas "trademark owners" have their own representative on the DNSO.

¹⁴³ As noted above, Mueller prefers this analogy of ICANN to a government. See also Weinberg, *ICANN and the Problem of Legitimacy*, *supra* note 19.

ensues.¹⁴⁴ In the Internet context, the first several years of mass Internet usage were characterized by a call to arms to keep the space free of sovereigns, much like a state of nature. Former Grateful Dead songwriter John Perry Barlow's "Declaration of the Independence of Cyberspace," written in Davos, Switzerland in 1996, is the classic example of such a call to arms. "Governments of the Industrial World ... are not welcome among us," Barlow wrote of Cyberspace. "I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us."¹⁴⁵ The seams of the state of nature begin to show, however, as the space becomes more and more crowded and interests begin to diverge. Fights ensue, which in turn are not easy to resolve amicably in the absence of a sovereign or other third party. In Cyberspace, fights have certainly ensued, on many grounds: disputes over technical governance of the Internet, use of certain domain names, and expansion of gTLDs are among the earliest of those fights. In order to establish positive liberties, people enter into a social contract to govern their collective lives, ordinarily vesting power in a sovereign. In the Cyberspace story, some of those frustrated by the state of nature entered into a series of agreements that created ICANN to lend order to the growing chaos.

This parallel, though inexact, has some merit. While Cyberspace is not physical space and the global community of Internet users is not joining a nation-state, certain Internet users have agreed to the ICANN system as a means of determining how to co-exist in at least some parts of Cyberspace. Those who acknowledge ICANN's authority, however far that authority may extend, are agreeing to the superimposition of a certain sovereignty and series of rules to live by with respect to the domain name system.¹⁴⁶ In particular, anyone who wishes to obtain and hold a domain name must agree to ICANN's sovereignty. Rather than thinking of a governing entity as a state *per se* with enforcement powers, the basic notion of joining into a social contract and submitting to a certain sovereign holds in the Cyberspace context.¹⁴⁷

The shortcomings of the parallel to a government entity are immediately apparent.¹⁴⁸ ICANN is not, strictly speaking, a government entity.¹⁴⁹ ICANN

¹⁴⁴ As philosopher Jean Jacques Rousseau wrote: "L'homme est né libre, et cependant partout il est dans les fers." JEAN JACQUES ROUSSEAU, *DU CONTRAT SOCIAL* 454 (C.E. Vaughan ed., Burt Franklin 1971) (1762).

¹⁴⁵ <http://www.eff.org/~barlow/Declaration-Final.html> (accessed December 20, 2002). *But see* LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 24 – 29 (Basic Books, 1999); Neil W. Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CALIF. L. REV. 395 (2000).

¹⁴⁶ This notion squares with Rousseau's philosophy of the emergence of the state: "Il y a donc dans L'État une force commune qui le soutient, une volonté générale qui dirige cette force, et c'est l'application de l'une à l'autre qui constitue la souveraineté." ROUSSEAU at 460.

¹⁴⁷ Another way of conceiving of ICANN as akin to a state is to note the extensive power of states through the GAC, all the moreso after changes to the ICANN by-laws after the September 11 attacks on the United States. *See* Wolfgang Kleinwachter, *From Self-Governance to Public-Private Partnership: The Changing Role of Governments in the Management of the Internet's Core Resources*, 36 LOY. L.A. L. REV. 1103, 1121 (Spring, 2003).

¹⁴⁸ *See generally* Weinberg, *ICANN and the Problem of Legitimacy*, *supra* note 19.

neither sought nor attained the consent of those it governed at the time of its formation or subsequently. As Professor Froomkin argues forcefully, ICANN sought to carry the legitimacy of the IETF forward but has failed to do so.¹⁵⁰ Its lack of any means of enforcing its decisions is a major divergence from the government model. Its scope is so limited that there is little room to argue effectively that ICANN governs people's lives in any meaningful sense in the way that most governments do. Its organization stems from neither a series of substantive rights nor a theory of procedure.¹⁵¹ Some critics of ICANN continue to cling to Barlow's circa 1996 theory that the Internet cannot or should not be "governed" in any way.¹⁵² And ICANN's leaders have consistently claimed that ICANN does not govern, but rather coordinates a technical system.¹⁵³

The ICANN Election of 2000 brings this issue of its parallel to a government entity into relief. Despite the incompleteness of the parallel, ICANN's increased efforts to achieve representation of the varied, global community of Internet stakeholders suggested, though briefly, a move toward a democratic institution. Other forms of organization, such as the corporation, often allow for input from constituents and rely on fiduciary duties rather than the notion of direct representation, as in a representative democracy. In the shareholder-manager scenario of a corporation, for instance, the board and officers have a fiduciary responsibility to the shareholders and have an obligation to increase shareholder value. However, the board and officers do not represent all or a subset of those who contributed capital. The relationship is better described by agency than by representation. The notion of a director specifically representing the interests of stakeholders and voicing their interests to the decision makers, as ICANN has effectively sought to do through the At-Large Membership and the elected Directors, draws the parallel of

¹⁴⁹ ICANN does ground its authority in a sole source contract with the United States government. More than 75 governments participate through the GAC. ICANN itself is not formally vested with the powers of a government entity, nor is it properly thought of as a treaty organization.

¹⁵⁰ See Froomkin, *Habermas*, *supra* note 35.

¹⁵¹ See e.g., Frank I. Michelman, *How can the People Ever Make the Laws? A Critique of Deliberative Democracy* in *ESSAYS ON REASON AND POLITICS: DELIBERATIVE DEMOCRACY* 152 (James Bohman and William Rehg ed., 1997).

¹⁵² But see LESSIG, *CODE*, *supra* note 83, 24 – 9 (arguing against the idea that the Net has a nature that is unregulable).

¹⁵³ For instance, ICANN Chairwoman Esther Dyson took issue with the use of the term "Internet governance" as being part of ICANN's job description. In response to a question posed by Ralph Nader and James Love, Dyson wrote, "... ICANN does not 'aspire to address' any Internet governance issues; in effect, it governs the plumbing, not the people." [Fix link: Formerly posted at <http://www.icann.org/chairman-response.htm>]. But see Andrew McLaughlin's comments, Harvard Law School, Internet & Society 1999, Class Discussion, September 16, 1999, as interpreted and recorded by scribe Benjamin Edelman: "McLaughlin: 'ICANN does technical coordination, not Internet governance.' That's the party line. But the truth is that technical coordination is in some ways a lot like governance. ..." See also *supra* text accompanying note 11. <http://cyber.law.harvard.edu/is99/scribes2.html>. See also www.gouvernance-internet.com.fr and similar sites, as well as articles such as *Internet Governance: Domain Strain*, *THE ECONOMIST*, *supra* note 44, for uses of the term "governance" in relation to ICANN in common parlance (all sites accessed December 20, 2002).

ICANN's structure closer to the government entity model and away from the corporate model.

ICANN is not purely a standards body, a corporation, or a government entity. It has elements of each, but none of these models suffices on its own to describe ICANN's current hybrid structure. This conclusion leaves open a vexing question, which has both positive and normative elements. What kind of institution is ICANN? And what kind of institution should it be? The answer to neither question is clear. For the purpose of analyzing the problem of representation within ICANN, one does not need answers, necessarily, to these questions. It is important, though, to recognize that ICANN strives to operate by clear founding principles in a highly complex structure – the complexity of which makes fidelity to these principles all the more challenging. That complexity also stood for a type of opportunity to test the Internet's ability to enable a new, more democratic and empowering – though ultimately unsuccessful – form of decision-making.

D. The ICANN Election of 2000.

The Election of 2000 lends a certain degree of credence to the argument that ICANN looks most like a government entity and has sought the legitimacy that such a model may afford. This one-time Election represented one manifestation of the struggle among ICANN's participants to craft the answers to the thorny questions regarding ICANN's structure. The lack of clarity surrounding ICANN's structure and the source of its authority offers room for those with an agenda to seek to impose their agenda on the organization. Those who champion the cause of the At Large Membership and elected Directors comprise one of the most vocal groups of ICANN participants.¹⁵⁴ Many of the members of this group are individual technologists or Internet users; some members of this group also work for large corporations, NGOs, or other powerful entities.

The activities of the former At Large Membership and premise behind the Elections of 2000 are largely consistent with the overall goals and principles of ICANN, particularly as they relate to representation and openness.¹⁵⁵ Any person with Internet access who wishes to become a Member had the opportunity to do so during an open enrollment period, by accessing the ICANN Web site and submitting a short form.¹⁵⁶ Instructions were translated from English into Chinese, Japanese, French, German, Korean, Portuguese, and Spanish. ICANN mailed a letter at a physical address to those who register online a letter to verify each member's existence as a discreet individual. The letters included PIN codes that could be used, prior to September 8, 2000, to activate membership and to register for voting rights.¹⁵⁷ Those who registered then had the right to vote in a global, online election to elect members to the Board of Directors. Candidates could nominate themselves, prior to an August 14, 2000 deadline, but then needed to secure support from either two percent (2%) of the At Large Members in her or his

¹⁵⁴ See, e.g., www.icannwatch.org (accessed January 3, 2003).

¹⁵⁵ See Mats Palmgren, *ICANN: Too Open and Too Closed?*, Wired.com, at <http://www.wired.com/news/politics/0,1283,34882,00.html> (accessed November 11, 2003).

¹⁵⁶ The open enrollment program for the Election of 2000 ran from February 25 until July 31, 2000. See <http://members.icann.org/rules.html> (accessed January 29, 2003).

¹⁵⁷ http://members.icann.org/about_at_large.htm (accessed January 29, 2003).

geographic region or 20 supporters, whichever is greater, as well as support from residents of two or more countries. In October, 2000, five directors were elected to the Board of Directors from distinct geographic regions (Africa, Asia and Pacific, Europe, Latin America and the Caribbean, and North America). These five directors served on the nineteen-member Board, with full and equal powers relative to other Board members, until their terms ended on December 15, 2002. The At Large Membership process is intended to enable any person who uses the Internet to have a formal voice in the management of ICANN in an effort to make ICANN more representative and open.¹⁵⁸ The Election of 2000 used an online interface and an Instant Runoff Voting system, using Election.com technology.¹⁵⁹

The mechanics of registering voters, running the nomination and campaign period, and the Election of 2000 itself ran more or less smoothly, though some voters experienced frustrations in the process.¹⁶⁰ During the registration period, some would-be members reported experiencing difficulties in hitting the ICANN server and in receiving and using their mailed PIN codes.¹⁶¹ At the time of the voting, "[a] few of the more than 76,000 at-large members discovered their online votes were not being accepted by the online voting booth, said ICANN's Chief Policy Officer Andrew McLaughlin." Contemporary reports suggested that 400 members may have been affected by this difficulty.¹⁶² It is unclear, however, if any of these voters then decided not to vote or in fact returned later to submit their ballot. These mechanical problems, while necessary to be addressed in future Internet-based elections, do not appear to be of such seriousness as to suggest that global online elections are unfeasible.¹⁶³

The At Large Membership drive and Election of 2000 were deemed a success by ICANN staff and by some observers at the time of their completion.¹⁶⁴ "With over 76,000 activated members," the ICANN site proclaims, "ICANN achieved its goal of a large, globally diverse membership."¹⁶⁵ Of the 158,000 persons who signed up for At Large Membership online during the summer of 2000, 76,000 persons activated their membership and established voting rights. Of those eligible to vote, 34,035 cast valid ballots.¹⁶⁶ Those voters represented a 45% turnout of those eligible and a 22% turnout of those who initiated the registration process. Of the world's estimated 375,000,000 Internet users at the time, less than one-one-

¹⁵⁸ See generally <http://www.icann.org/committees/at-large/at-large.htm> (accessed January 29, 2003) and related links.

¹⁵⁹ See <http://www.fairvote.org/irv/icann.htm> (accessed February 18, 2003).

¹⁶⁰ See http://www.markle.org/News/Icann2_Report.Pdf (accessed November 11, 2003) (for a comprehensive reviews of the mechanics of the ICANN Election of 2000).

¹⁶¹ See the Carter Center's news release at <http://members.icann.org/carter.htm> (accessed January 29, 2003).

¹⁶² James Evans, *ICANN election starts with small snag*, IDG NEWS SERVICE, October 2, 2000, <http://www.idg.net/> (accessed February 3, 2001).

¹⁶³ But see http://www.atlargestudy.org/roberts_paper.html (accessed February 12, 2003).

¹⁶⁴ See, e.g., http://www.markle.org/news/news_pressrelease_101100.stm (accessed January 29, 2003).

¹⁶⁵ <http://members.icann.org/index.html> (accessed January 29, 2003).

¹⁶⁶ These figures have been validated independently by the Carter Center, which observed the online election. The Carter Center's findings are summarized in a news release at <http://members.icann.org/carter.htm> (accessed January 29, 2003).

hundredth of one percent (0.009076%) voted in the ICANN Election of 2000, with only 130 ballots cast from the African continent.¹⁶⁷

The Election of 2000 resulted in the ascendancy to the ICANN Board of five individuals from the five geographic regions, as promised, to fill just over one quarter (1/4) of the ICANN Board seats. Nii Quaynor of Ghana won with 67 of the 130 ballots cast from the Africa region. Masanobu Katoh of Japan won with 13,913 of the 17,745 votes cast from the Asia / Australia / Pacific region. Andy Mueller-Maguhn of Germany won with 5,948 of the 11,309 votes cast in Europe. Ivan Moura Campos of Brazil won with 946 of 1,402 ballots cast in the Latin American / Caribbean region. Karl Auerbach of the USA won with 1,074 of the 3,449 votes cast in North America.¹⁶⁸ These representatives of the At Large Membership have played an active role in ICANN management since their election, including vocal participation at the ICANN Board Meeting.¹⁶⁹ Two of these directors, Auerbach of North America and Mueller-Maguhn of Europe, had longstanding records as outspoken critics of ICANN's management prior to their election to the Board.¹⁷⁰

Both ICANN itself and outside organizations conducted formal studies of the Election of 2000 and of the At Large Membership. The two most important of these studies – ICANN's own At-Large Membership report and a report led by academics and the Center for Democracy and Technology – reached markedly different conclusions about what the election experiment suggested for ICANN's future.¹⁷¹ ICANN formed an At Large Membership Study Committee on 26 January 2001¹⁷²

¹⁶⁷ See *supra* note 37 (citing previous NUA data).

¹⁶⁸ All results come from a special section of the Election.com Web site reserved for the ICANN Election of 2000, found at <http://www.election.com/us/icann/icannresult.html> (accessed January 29, 2003).

¹⁶⁹ A review of the scribes' notes, posted from the Berkman Center's web site at <http://cyber.law.harvard.edu/icann/>, of Board meetings between 2000 and 2003 will give a sense of this dynamic. I have not sought in this project to determine the relative effectiveness of any Board member, or class of Board members, of ICANN.

¹⁷⁰ Examples of Mueller-Maguhn and Auerbach's criticism of ICANN are legion. A short review of Scribe's notes (at <http://cyber.law.harvard.edu/icann/melbourne/>, accessed January 29, 2003) of the March, 2001 Board meeting in Melbourne, Australia, will reveal some of the issues that cause them concern. For an independent report of this concept, see, e.g., <http://mishpat.net/cyberlaw/archive/cyberlaw59.shtml> (accessed January 29, 2003); Declan McCullagh, *ICANN Elects Iconoclasts*, WIRED NEWS, (October 12, 2000) <http://www.wired.com/news/politics/0,1283,39385,00.html> (accessed January 29, 2003). [Add cite to Mueller's chart of extent of criticism.]

¹⁷¹ ICANN's At-Large Study Committee report, issued as a final document on November 5, 2001, can be found at http://www.atlargestudy.org/final_report.shtml (accessed January 29, 2003). The NAIS Study, issued August 31, 2001, can be found at <http://www.naisproject.org/report/final/> (accessed January 29, 2003).

¹⁷² <http://www.icann.org/announcements/icann-pr26jan01.htm>. See generally <http://www.atlargestudy.org/> (for background information regarding the At Large Study Committee). See also the charter of the At Large Study Committee, accessible at <http://www.icann.org/committees/at-large-study/charter-22jan01.htm> (accessed January 29, 2003).

with a goal of reporting back to the Board of ICANN in November, 2001.¹⁷³ ICANN's planned formal two-year review, intended to consider the propriety and the role of the At Large Membership, was roundly criticized as too slow and as potentially undercutting the At Large Membership itself, the latter of which critiques proved accurate.¹⁷⁴ The Center for Democracy and Technology, an NGO in Washington, D.C., in collaboration with Common Cause, a well-respected Non-Governmental Organization based in the United States, has also begun a formal study.¹⁷⁵ These studies, however, managed neither to address the core issues of representation within ICANN nor to clarify the meaning of representation within the ICANN structure.

On some level, the ICANN Election of 2000 was historic. A *sui generis*, not-for-profit corporation held elections for five Board members in which 76,000 people from most parts of the globe participated using Internet-based technology.¹⁷⁶ Those who organized the election were conscious of their effort's possible place in history:

"The At Large Members of ICANN will be participating in a historic first -- a worldwide online election to choose Directors for the Internet's private-sector technical coordinating body."¹⁷⁷

ICANN's feat is remarkable on its face.¹⁷⁸ ICANN's election of five of 19 directors, with a goal of creating a "representative" organization, however, is unsettling when considered from the perspective of political theory.

¹⁷³ "The Committee plans to submit final recommendations to ICANN's Board in November of this year". E-mail to At Large Members, entitled "ICANN At Large Membership Study Committee," February 28, 2001 (on file with the paper's author).

¹⁷⁴ See Karl Auerbach's reaction in David McGuire, *ICANN Board Member Rips At-Large Membership Study*, NEWSBYTES.COM (February 2, 2001) <http://www.newsbytes.com/news/01/161442.html> (accessed February 5, 2001).

¹⁷⁵ See *supra* note 14.

¹⁷⁶ But see MUELLER, *supra* note 10, 217 - 8 (arguing that ICANN is not best seen as a *sui generis* institution).

¹⁷⁷ http://members.icann.org/about_at_large.htm (accessed January 29, 2003).

¹⁷⁸ But see ICANN then-CEO Mike Robert's statement down-playing the Election's significance. "Well-meaning people all over the world are mistakenly calling this a 'global election' and not noticing that we're a small company with a limited mission." Ben Edelman, Scribe's Notes to the July 16, 2000 ICANN meeting in Yokohama, <http://cyber.law.harvard.edu/icann/yokohama/archive/scribe-icann-071600.html> (accessed January 29, 2003). It is interesting to note this mixed rhetoric from ICANN: that its role is at once "limited" and "historic" (from its Web page regarding the Election of 2000 cited in *supra* note 77). This contradictory rhetoric suggests a deep ambivalence about ICANN's mission that may have serious and complex implications.

IV. Certain Limits of Public Input in Decision-Making at ICANN.

ICANN's leadership has expended a great deal of effort to live up to its first principles of representation and openness. However, an initial systematic review of public input on a series of key issues suggests that users could not reasonably presume that their input would have substantial impact on the decision-making process of ICANN's Board, even in cases in which the majority of users agreed on a given issue.¹⁷⁹ In some instances, input from the user community may have had

¹⁷⁹ Methodology: After selecting publicly archived mailing lists and forum.icann.org as the focus of our research, we wrote a collection of perl scripts that systematically downloaded and sorted approximately 100,000 mailing list emails and forum comments. The data we gathered do not reflect all discourse that took place in the mailing list and forum.icann.org spaces; some archives are no longer available online and human error may have led to the omission of other undiscovered data sets. We collected data from all of the forum.icann.org web-pages published before 1 July 2003 and all of the mailing lists with archives on the DNSO/GNSO web pages.

After downloading and sorting the data, we performed a Channel Analysis, in which we graphically inspected the data from a variety of sub-populations to find out whether a random sample was appropriate. We determined mathematically that the public comments that we reviewed represented a Pareto distribution. We then selected, based on what we saw, four issues that we determined to be fairly representative of the types of decisions that ICANN has made.

In analyzing each of our four target issues, we decided at the outset whether it was feasible to analyze every available comment within our population of interest or to sample from the population. When fewer than 400 comments were made regarding an issue, we included all of the comments in our analysis. When more than 400 comments were posted, we randomly sampled from the population of comments. Sample sizes were calculated at 95% confidence levels with a confidence interval of plus/minus 5%. If a distribution was particularly skewed — when a few users post a significant portion of the comments — we sampled the data twice: once for the opinions of the majority of users and once for the opinions of the heavy users. The sample sizes for these bifurcated populations were calculated at the same power levels as the original sample sizes. For all of the instances where this was a concern, we discovered that the users dominating the conversation were predominantly posting off-topic messages or "flames" irrelevant to the serious consideration of a given matter. We have sought to include only comments that we deemed to be substantive in the presentation of our issue analysis data.

Researchers familiar with the issues but generally unfamiliar with the individuals posting comments to the message boards coded each comment within the context of the issue being analyzed. What the rater looked for in each post directly reflected the issue that was being discussed on that particular board. If, for example, the message board was intended to gauge support for the implementation of VeriSign's proposed Wait-Listing System, comments were tabulated as supportive of the proposal, in opposition towards the proposal, or off-topic. If a rater experienced difficulty determining the intention of the posting user, a second rater was brought in to collaborate and, in all cases, consensus was reached as to the intention of the user. We performed a quality-assurance check of our data analysis, in which a researcher other than the initial researcher reviewed the raw and compiled data. Prior to this publication, I presented draft, initial findings of these data in three settings: before a group of Internet law professors in August, 2003; at a seminar on Internet governance at the Kennedy School of Government in October, 2003; and at a research meeting of Berkman Center for Internet and Society at Harvard Law School's fellows in November, 2003.

an impact upon the outcome of a given decision, but the data suggest that the Board tended to rely heavily upon staff recommendations and upon the input of the Supporting Organizations, in which users may also participate.¹⁸⁰ The Internet user community could not reliably expect that their input through these online forums would result in Board consideration of their interests. In other instances, too few public comments were posted to provide a strong indication of Internet user community support.¹⁸¹ These findings reaffirm, at least to a limited extent, the intuition of the many critics who have called into question the extent to which ICANN has lived up to its founding principles of representation and openness. In light of these findings, reform of the ICANN decision-making structure should, at a minimum, clarify the channels for input from the user community to the decision-makers and ensure that user expectations about the effect of their input are met.

A. Public Input through the Election of 2000.

The Election of 2000 is the most obvious example of the direct involvement of the user community in the ICANN decision-making process. The Election also stands for one meaning of "representation," insofar as the five elected Directors nominally directly represented the Internet user community in their respective five geographic areas. Insofar as these elected representatives served for only one term, held only a subset of the Board seats, and do not seem to have wielded substantial influence as a voting bloc during their tenure, public input through this method of direct representation was sharply limited.

The Election of 2000 fundamentally fell short of pointing the way toward an effective new model of using the Internet to promote better democratic decision-making on a global scale. Those who signed up for At-Large Membership and then voted in the Election of 2000, have reason to believe that their vote, in a long-term sense, had little effect, particularly given the pull-back of the electoral process. This failed experiment did more to risk of the demoralization of the members of the user community who sought to participate than it did to advance the cause of "representation" on the ICANN Board of Directors.¹⁸²

¹⁸⁰ Users in many instances chose to contribute their ideas through the Supporting Organizations, though such input, through a variety of mechanisms, is extremely difficult to parse out from the input of large group interests, such as the Intellectual Property community.

¹⁸¹ Consider, for instance, the thin volume of commentary on the reassignment of .org from VeriSign to a new operator. It is hard to know whether to blame ICANN or the global Internet user community for the fact that there was such anemic public commentary posted about such an important issue. One hypothesis is that users recognize that even their substantive comments are ignored by ICANN's Board. On the contrary, however, users have continued to post commentary regarding ICANN's reform proposals well after the reassignment of the .org top-level domain came up for a vote before the ICANN Board. In any event, the paucity of comments in some cases points to the inadequacy of these online forums alone to solicit and incorporate Internet user community input in the decision-making process of such an institution.

¹⁸² The sense of demoralization implied here is not precisely aligned with, but is a variant of, Professor Frank Michelman's famous take on "demoralization costs" in the context of United States takings clause jurisprudence. Frank Michelman, *Property, Utility, and Fairness*:

B. Public Input through the ICANN Public Forums and other Direct Means of Communication with Decision-Makers.

ICANN has opened a range of Internet-based channels through which members of the global Internet user community at large may submit comments to ICANN's leadership about matters general and specific. Two of these channels served as the focus of this consideration of public participation at ICANN: the public, Internet-based mailing lists and the topically-oriented web-posting spaces, such as <http://forum.icann.org/>. These channels have been widely used as a means of participation and have been largely archived online, allowing for a relatively reliable data set for analysis.¹⁸³ This study involved a review of approximately 100,000 messages between late 1998 and July 1, 2003. We chose four topics of broad interest to the Internet community for analysis. On these four topics, we considered both the direct user input to the ICANN Board of Directors as well as the other forms of input that the Board considered, such as recommendations from the SOs and from outside experts. This review demonstrates that users can not reasonably presume that their input through these two channels, even when the user community overwhelmingly supports a certain position, might affect decision-making by the ICANN Board of Directors. Based upon this review, it is plain that these public forums for global user community participation do not contribute meaningfully to an open and representative ICANN decision-making process.

The four topics considered closely in this study are: 1) the introduction of new top-level domains in 2000 (both contested and non-contested extensions); 2) the VeriSign Global Registry Services (VGRS) proposal; 3) the reassignment of the ".org" domain from its legacy provider to a new provider; and 4) and the proposal for the reform of the ICANN management structure. We chose these topics for a variety of reasons, including the relative interest shown by the Internet user community in their outcome as demonstrated by the number and seriousness of the public comments and for the extent to which these topics represent four types of decisions that ICANN periodically makes in fulfilling its mandate of technical governance.

The bottom line of this review is that public commentary in favor of, or against, a certain proposal before the Board does not correlate strongly to an outcome either for or against that proposal. In several instances that we reviewed,

Comments on the Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165, 1183-1201 (1967).

¹⁸³ Critics of the methodology involved in this research point to this data set as the wrong place to look for the answers to questions about public participation in ICANN. To some extent, this critique is right on: there are many means of public participation in ICANN, and the public mailing lists and online discussion forums are among the least important compared to, for instance, the Supporting Organizations. These data are analyzed here because they are reliable and can be quantified, as compared to the much harder to analyze, less direct public inputs through the Supporting Organization process. The fact that more than 100,000 posts have been published by thousands of Internet users around the world represents at least some effort on the part of the posters to engage in the ICANN decision-making process.

the Board in fact voted against the position adopted by the majority of users who commented through the public forums that we reviewed. Other types of input to the Board, such as the recommendation of a relevant Supporting Organization or of a hired technical reviewer, correlate more strongly, though not perfectly, to a certain outcome by vote of the Board of Directors.

First, we considered the process for introduction of new top-level domains in 2000.¹⁸⁴ ICANN's initial introduction of new top-level domains was eagerly awaited and hotly contested, as 47 applicants submitted proposals for new TLDs.¹⁸⁵ There were two classes of TLD proposals: those that were uncontested, in which only one applicant sought a given new TLD, and those that were contested, in which more than one applicant sought a given new TLD. In each instance, the proposed new TLD was evaluated via a "threshold" review to sort out those proposals that met initial technical and financial requirements. One of those criteria was public comment. ICANN's Board considered each proposal against a series of criteria, ultimately choosing seven new TLDs. In some cases, new TLDs chosen had substantially more favorable than negative public commentary, as in the case of the .coop TLD. In others, such as the contested .biz consideration, ICANN's Board chose the only proposal, that of JV Team LLC (now NeuLevel) with more negative than positive public commentary. Certain proposals that met the threshold reviews and received more positive than negative commentary from the public, such as .dir and .geo, were not chosen as new TLDs. Finally, certain proposals with a substantially more positive public commentary than negative commentary but which did not meet the threshold standards, such as .law, were not chosen as new TLDs. No particular pattern of support or non-support based on public commentary emerges from these data.

Second, we analyzed the process by which ICANN considered VeriSign's proposal for a new wait-listing service.¹⁸⁶ During a special meeting of the Board on August 23, 2002, ICANN voted to implement the VeriSign Global Registry Services (VGRS) proposal. The public commentary was overwhelmingly opposed to the introduction of the wait-listing service. The Names Council, adopting a report developed by the DNSO Transfers Task Force, also recommended against this proposal. ICANN's general counsel mentioned certain endangerment of legitimate business interests in the event of adoption of the wait-listing service proposal, but did not directly oppose the proposal. Despite the strong objections expressed by those who submitted public commentary and the opposition of the Names Council and the DNSO Transfers Task Force, the ICANN Board decided to support the VGRS waiting-list service proposal.

Third, we reviewed ICANN's reassignment of the .org domain from VeriSign to a new operator.¹⁸⁷ On October 14, 2002, the ICANN Board selected a proposal from the Internet Society as the basis for the successor operator of the .org domain. On this topic, the ICANN Board sought input from four recognized

¹⁸⁴ See generally <http://www.icann.org/tlds/> and <http://www.icann.org/tlds/app-index.htm> (accessed November 11, 2003).

¹⁸⁵ ICANN's second round of new top-level domains began in 2003, rendering the review of the first round particularly relevant.

¹⁸⁶ See <http://www.icann.org/bucharest/vgrs-wls-proposal-20mar02.pdf> (accessed November 11, 2003).

¹⁸⁷ See <http://www.icann.org/tlds/org/> (accessed November 11, 2003).

groups¹⁸⁸ who contributed to the staff evaluation of eleven applicants. The Internet Society received strong reviews from these recognized groups. The public commentary, which was relatively sparse, favored an applicant that failed, IMS/ISC. IMS/ISC did not meet the technical requirements set forth by Gartner. The Internet Society received more positive than negative comments, but at a less favorable ratio than IMS/ISC. In this instance, the public comments may have played a minor role in the Board's choice of Internet Society as successor for the .org domain, but the anemic level of public participation¹⁸⁹ meant that the technical advice of Gartner likely had the largest impact on the Board's decision.

Finally, we considered the proposal to reform ICANN's structure in 2002.¹⁹⁰ This reform process began in earnest with then-president Stuart Lynn's "Case for Reform" of ICANN in February, 2002 and continued through the publication of a Blueprint for Reform,¹⁹¹ which summarizes the findings of the Evolution and Reform Committee.¹⁹² While there was no single board vote in favor of or against a single element of reform, ICANN has moved roughly in the direction of Lynn's reform proposal. Throughout this process of reforming ICANN, the public commentary has been almost universally opposed to Lynn's reforms and the reforms that the Board has implemented, such as the move away from an At Large Membership and toward a less-direct method of public participation in choosing Board members. Much of this opposition expressed anger at the notion that ICANN was abandoning all elements of representative democracy and further empowering states. The At-Large Advisory Committee ("ALAC"), chaired by Esther Dyson, which was designed to represent the user community, submitted a final report that proposed recommendations quite similar to the Lynn proposals. There is no evidence that the Board has taken the Internet user community's input, other than in soliciting input through the ALAC, into consideration throughout this ongoing reform process.

Our review of Internet user community input through the public commentary process is not the only consideration of this general topic. A study by Professor Ethan Katsch and Dr. Alan Gaitenby, researchers at the University of Massachusetts, focused on the specific ICANN process called the Request for Reconsideration.¹⁹³ The policy allows that "Any person affected by an action of the Internet Corporation for Assigned Names and Numbers ('ICANN') may request review or reconsideration of that action by the Board of Directors." Katsch and Gaitenby concluded, "If there are problems with the process, the problem is more with ICANN than with any users of the process."¹⁹⁴ The study found that of the

¹⁸⁸ The four groups were: Gartner, a US-based technology consultant, which evaluated each bidder's proposal along technical lines; NCDNHC, which considered "usage" criteria; ICANN's general counsel, which considered legal and policy implications; and the Academic CIO Evaluation Team, which also considered technical criteria.

¹⁸⁹ See *supra* note 179.

¹⁹⁰ See <http://www.icann.org/general/lynn-reform-proposal-24feb02.htm> (accessed November 11, 2003).

¹⁹¹ <http://www.icann.org/committees/evol-reform/blueprint-20jun02.htm> (accessed November 11, 2003).

¹⁹² <http://www.icann.org/committees/evol-reform/> (accessed November 11, 2003).

¹⁹³ <http://www.ombuds.org/reconsideration/> (accessed November 6, 2003).

¹⁹⁴ *Id.*

twenty-six Requests for Reconsideration to which ICANN responded with a formal decision, all but one was rejected.¹⁹⁵

Our review of the correlation between public input and Board decisions is neither a complete study – as there are many more data that could be considered, particularly with respect to the Supporting Organizations – nor a statement about whether the Board reached a sound decision on any given matter. The Board may in fact have reached the right decision in every instance in terms of fulfilling its narrow technical mission. The same might be said of ICANN's decisions in the Request of Reconsideration process. From the perspective of appearing to live up to the principles of representation and openness, however, the ICANN Board's performance was weak on the issues that we reviewed closely. Given the rhetoric of its founders and its leadership more recently, ICANN must confront, one way or another, the frustration felt by Internet user community members when they feel they have not been heard, despite assurances to the contrary.¹⁹⁶

¹⁹⁵ *Id.*

¹⁹⁶ See, e.g., http://www.circleid.com/print/320_0_1_0/ (accessed November 4, 2003) (in which a user voices frustration related to the lack of responsiveness to his concerns about the second-round process for extending new top-level domains).

IV. Why ICANN's Semidemocratic Structure was Doomed to Fail.

The combination of ICANN's curious structure and its unconvincing attempts at representation of the global Internet user community has left ICANN in the awkward, unsustainable position of a semidemocracy. ICANN's semidemocratic structure poses serious problems for the organization over the long term. These problems could take the form of capture by powerful interests, a group of elected Directors who do not represent the Internet community at large, a disengaged user community, and difficult transition periods. Finally, its semidemocratic structure has left ICANN without a solution to its problem of legitimacy of authority.

A. ICANN as Semidemocracy.

In the wake of the Election of 2000, ICANN's mixed Board of Directors – with five elected and 14 non-elected directors – rendered the organization partway between the authoritarian and pluralist models, a zone occupied by semidemocracies. Even without the directly elected directors, ICANN's hybrid structure is semidemocratic. This Authoritarian-Pluralist model is characterized by a situation in which "the party or other governing group retains a monopoly on political power but is willing to grant a measure of political and cultural freedom at the individual, group, and regional levels."¹⁹⁷ One way in which to retell the story of the development of ICANN is that the non-elected Board members (including both the original appointed Board members and the SO-chosen Board Members) continued to retain all political power, though they temporarily acceded to the demands of the user community to permit some directly elected representatives to join the board, before removing those directors after only a single term.¹⁹⁸

The authoritarian-pluralist model fits ICANN particularly well not just in light of the Election of 2000, but also from the perspective of ICANN's corporate form. The Board of Directors retains absolute control over the decision-making process (or "monopoly power" in the sense that a political scientist uses the term, though

¹⁹⁷ Muthiah Alagappa, *The Asian Spectrum*, JOURNAL OF DEMOCRACY 6.1 29, 33. Accessible online at <http://www.cla.wayne.edu/polisci/krause/Democracy/sources/alagappa.htm> (accessed January 29, 2003).

¹⁹⁸ It is important to distinguish between at least three classes of ICANN Directors: those Directors chosen initially in 1998, likely by Dr. Jon Postel; those Directors sent to the Board by the SOs; and the At Large Directors elected by the At Large Membership in the fall of 2001. This critique of ICANN is not intended to suggest that any class of Directors, or any individual Director, is inherently bad, but rather to point to the complexities and possible problems caused by ICANN's hybrid structure and relative the sources of authority of these classes. For instance, assuming that other criteria were met and if one could conclude that the SOs achieved global representation of the Internet community, and subsequently establish fair, open and regular election practices, there is no inherent reason to suggest that this model should not be used to elect ICANN Directors. One very clear reason to support an entirely SO-elected Board, for instance, could be to ensure that the technical community is looking after what it ultimately a technical process. But there is no reason to believe that the SOs inherently represent the technical community, much less the broader global Internet community; the requisite sources of authority and legitimacy for the SOs have not been clearly established.

not in the sense that an economist or lawyer might use the term). However, the Board has the flexibility to grant some measure of freedom to act to the managers and to other stakeholders, such as the Supporting Organizations. For instance, the Board delegates certain spending powers to the managers, up to which caps the managers do not have to seek board permission for the expenditure, much like the operation of an ordinary corporate or non-profit board would relate to its managers. The staff and outside counsel can negotiate on behalf of the Board with key partners, such as VeriSign, and present agreements for consideration, discussion, and subsequent approval to the Board, as they did at the Melbourne Board meeting in March, 2001.¹⁹⁹ Similarly, the extent to which the Supporting Organizations are empowered to present to the board and to make certain recommendations suggests at least the possibility of persons other than the Board and staff members participating in the governance process.²⁰⁰

One take on the Election of 2000 and its aftermath is that ICANN should be lauded for its move toward semidemocracy. The view of those who believe that a direct representation model is the best structure for ICANN is that the Election of 2000 was a first step in the right direction. The logical progression would be for ICANN to gravitate from a fully appointed Board to a fully elected Board. In that progression, the Election of 2000 would be followed by a subsequent election to bring the next four elected members onto the board. After the experiment has proven itself a success, ICANN might move toward electing all its board members via the At Large Membership. ICANN could capitalize on the success of its most recent elections to build greater legitimacy across the globe through a model of deliberation and inclusion.²⁰¹ ICANN would be empowering the Internet user community to participate in the governance process. This incremental and hopeful view, however, is unconvincing in light of historical experiences with semidemocracies; it is also highly unlikely at this point that ICANN will, or should, move toward a pure democracy model.²⁰²

From the other end of the spectrum, the harshest view of the Election of 2000 posits that ICANN's move toward semidemocracy is nothing more than an instance of "placative politics."²⁰³ The ICANN Board, the theory goes, has sustained so much criticism from a vocal opposition in the press, on the Web, and in meetings

¹⁹⁹ This description is not intended to imply that the ICANN staff present an up-or-down proposal that the Board must decide upon immediately. As in most corporations, the Board has the opportunity to discuss proposals, ask for additional input and advice, propose changes, table the proposals, and act on them at their collective discretion.

²⁰⁰ The specific powers of the SOs is an interesting topic in its own right. For instance, consider the extent to which recommendations by the SOs that meet certain standards may have been adopted by the Board under the By-Laws. <http://www.icann.org/general/archive-bylaws/bylaws-23nov98.htm> (accessed February 12, 2003).

²⁰¹ See Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* 67 – 94 (Seyla Benhabib ed., 1996).

²⁰² See *infra* pp. 52 – 3.

²⁰³ "Placative politics" is intended to convey a political *modus operandi* that intends mainly to placate, but not necessarily to empower, those with a stake in the outcome under consideration. This notion was developed in this context during a series of conversations with Professor Jonathan Zittrain.

that they sought a means of placating the user community. The most obvious such means is to enable the user community to elect representatives to the board who, even when voting in a bloc, cannot effect change within the institution. The sole aim of such an election process is to placate the vocal critics – perhaps even landing some such critics in positions of nominal authority – with no intention of ceding any real power to the user community. Potentially, once the elected representatives behave poorly or interest in electing powerless representatives wanes, the Board can revert to its pure non-elected form.²⁰⁴ Even without fully reverting to a non-elected Board, the placative approach might manage to squelch public interest in ICANN. In Harvard Law School Professor Roberto Mangabeira Unger's terms, placative politics involve "...the adoption of rules and practices maintaining society at a relatively low level of political mobilization" with the aim to secure "property against populism."²⁰⁵ A number of ICANN critics, fearing a similar lack of commitment toward moving further in the direction of direct representation, called for the immediate resignation of the board's "squatters" and for the election of the next four board members through the At Large Membership system.²⁰⁶

The political history of the second half of the twentieth century suggests that either model could be right.²⁰⁷ Those who think in terms of American and democratic triumphalism tend to think of semidemocracies as mere way-stations between authoritarian or totalitarian regimes and the ultimate end-state of representative democracies. History offers a few such transitions of various completeness, including but not limited to a number of Eastern European states and certain countries in South America in the late twentieth century.²⁰⁸ Of these examples, Chile and Brazil may serve as the best examples of the gradual transition through semidemocracy toward an ultimately democratic regime.²⁰⁹ South Africa over the past decade presents a particularly graphic example, though with a spin on the same notion of transition. In South Africa, the change took the form of a fairly abrupt movement from exclusion to inclusion of racial minorities rather than a gradual transition from autocratic to democratic structures without an explicit racial

²⁰⁴ Again, one must consider whether the representatives of the SOs are properly thought of as "representing" anyone. To the extent that the SOs continue to send members to the Board, the semidemocratic structure arguably remains intact, even absent the directly elected representatives.

²⁰⁵ ROBERTO M. UNGER, *DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE*, 264 (1998)

²⁰⁶ See, e.g., the arguments set forth by Professor Froomkin at <http://personal.law.miami.edu/~froomkin/boardsquat.htm> and <http://personal.law.miami.edu/~froomkin/boardsquat2.htm> (accessed January 29, 2003). See also David Maguire, *ICANN Antagonist Calls for Board Resignations*, NEWSBYTES.COM, (October 27, 2000), <http://www.Newsbytes.com/news/00/157364.html> (accessed March 27, 2001); <http://www.icann.org/announcements/icann-pr27oct00.htm> (accessed January 29, 2003) (regarding the apparently arbitrary extension of four of the directors' terms into 2002 rather than having those directors resign and be elected by the At Large Membership).

²⁰⁷ See generally PAUL BROOKER, *NON DEMOCRATIC REGIMES* (2000).

²⁰⁸ See generally RICHARD P. BELLAMY & DARIO CASTIGLIONE, *CONSTITUTIONALISM IN TRANSFORMATION* (1996).

²⁰⁹ Andreas Schedler, *Concepts of Democratic Consolidation* <http://136.142.158.105/LASA97/schedler.pdf> (accessed January 29, 2003). See also Unger; ELISABETH JEAN WOOD, *FORGING DEMOCRACY FROM BELOW: INSURGENT TRANSITIONS IN SOUTH AFRICA AND EL SALVADOR* (2000).

component.²¹⁰ Examples from East Asia, such as Malaysia and Singapore, by contrast, may lead to the conclusion that semidemocracy is a "final" or semi-permanent stage rather than merely a phase in a long-term transition.²¹¹

The effort to apply the political histories of modern nation-states and their progressions to the study of ICANN is fraught with problems and is ultimately inconclusive. The difficulty of using case studies of this sort traces back to the fact that the parallel between ICANN and a nation-state is imperfect. ICANN is a new institution, and potentially a new *kind* of institution, filling a void rather than a groundswell to replace an old institution with a new one.²¹² Even if the parallels hold up under scrutiny, examples from political history present an unclear conclusion as to whether semidemocracies are way-stations or end-points. The period between the Election of 2000 and the end of the elected directors' terms at the close of 2002, however, has seen a pull-back at ICANN away from the expansion of democratic decision-making, not a continued push in the pro-democratic direction. ICANN itself is rapidly becoming an example of the perils of the semidemocratic structure.

²¹⁰ TIMOTHY D. SISK, *DEMOCRATIZATION IN SOUTH AFRICA: THE ELUSIVE SOCIAL CONTRACT* (1995). See also WOOD, *FORGING DEMOCRACY FROM BELOW*.

²¹¹ I find it hard to analogize further between ICANN and these political historical examples, in part because it is a challenge to know whether ICANN is headed toward or away from a democratic model. At the point at which the first five directly elected representatives of the At Large membership joined the Board, one might have made an argument that ICANN was inclining away from an authoritarian model and toward a democratic model. Since the end of the At Large election experiment, it appears as though ICANN is zig-zagging in precisely the opposite direction. One of the central themes of this paper is the ICANN should stop careening and start again from the beginning by establishing new principles, determining a defensible source of authority and adopting a structure that suits its mandate.

²¹² One might argue that the parallel between states in transition and ICANN has merit, given that many of these insurgencies are viewed as popular uprisings against entrenched economic interests, just as the rise of the At Large Membership and ICANN Elections could be seen as the Internet community striking back against entrenched economic interests of the registries, registrars and other Internet corporate interests.

B. Problems facing ICANN as a Semidemocracy.

If the most recent statement from the United States Department of Commerce when renewing its Memorandum of Understanding with ICANN for the next three years is to be believed, ICANN likely will not pursue radical reform of its structure but rather will persist with some variant of its hybrid form.²¹³ From the perspective of political theory, such persistence may not be a good idea. Political theory offers a picture with less ambiguity than political history and provides support for the harsher and less promising view of ICANN's semidemocratic, hybrid structure. ICANN's particular semidemocratic structure may have led, and may continue lead, to problems that can be categorized into two tiers of concerns. The first-tier concern – capture without recourse – seems to be the most likely and the most worrisome outcomes, while second-tier concerns are worth noting but present less likely and less acute potential problems.

1. The first-tier concern: Capture and no recourse.

The fear of capture represents the most prevalent concern regarding any organizational structure without strong democratic safeguards or other obvious methods of checks and balances.²¹⁴ A semidemocratic regime, in an instance in which the broad community may not affect policy even if they act as a single voting bloc, is inherently subject to capture. Without effective and reliable means of replacing the leaders of the organization in the event that they do not act in the best interests of the broader community, the semidemocratic structure, as any effectively authoritarian institution, affords no recourse in the event of capture. In ICANN's case, the Board of Directors may or may not have adequately represented the interests of the global Internet community. Whether the Board did or does manage to achieve representation with some elected directors or otherwise is

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http://www.ntia.doc.gov/ntiahome/domainname/agreements/sepstatement_09162003.htm, (accessed November 4, 2003) (in which the Department of Commerce suggests that ICANN ought to continue to seek reform, but also "to complete the transition of DNS management to the private sector").

²¹⁴ Professor David Post puts this fear of capture without recourse in terms related to the checks and balances in American-style constitutional parlance. "Who wields this power, and what keeps them from exercising it arbitrarily and oppressively -- are questions of the deepest importance for the continued development of a vibrant Internet." Post, *supra* note 4. Post's comments have particular resonance in light of the fact that ICANN's semidemocratic structure has even fewer checks and balances than a traditional corporation. In the ordinary corporate form, if the Directors act in a manner that is not considered to be in the best interests of the shareholders, the majority of shareholders have the ultimate recourse of voting the directors out and voting in shareholders whom they believe will better represent their interests. Likewise, under the administrative agency model, a process of judicial review provides such a check on the activities of the agency's officials. No such ultimate power resides in the broader community of ICANN's stakeholders, despite the founding documents' insistence on ensuring that the organization function in a manner that is representative of the global community of Internet users. The only such check, plausibly, resides in the United States Department of Commerce's ability to cut off its grant of authority through the Memorandum of Understanding.

irrelevant for this analysis; in the event that the Board either now or at some point in the future does not represent the Internet community well, the community has no effective means of replacing those directors.²¹⁵ The only recourse available to the Internet community would be self-help; in this instance, the Internet community could work around ICANN, either by building an alternative network or by ignoring its allegedly illegitimate authority.²¹⁶

This fear of capture of ICANN is ordinarily expressed in terms of corporate interests, or the loosely-defined intellectual property constituency at large, taking control of the institution, leaving the broader community without recourse. Corporations, both based in America and abroad, have demonstrated their serious interest in ICANN. ICANN's financial statements for the six-month period ending in December, 2000, revealed that the ICANN corporation's creditors, for instance, include heavy-weights Cisco Systems, Inc., Deutsche Telekom AG, Inc., MCI Worldcom, Inc., and 3COM.²¹⁷ Several Board members, including chairman Vint Cerf and former At Large Board representative Karl Auerbach, have been employed by two of these creditors during their respective terms as directors. In addition to creditors who supported ICANN during its cash-poor infancy, registrars and registries are required by contract to make payments to ICANN. ICANNWatch.org, for instance, directs visitors to the payments that VeriSign, for \$250,000 per year, and the registrars, up to \$3.5 million per year, make to ICANN as demonstrative of corporate interest in ICANN.²¹⁸ In light of these corporate loans and payments to ICANN and other factors, the ACLU has made clear its position that ICANN's structure presents a substantial risk of capture by corporate interests.²¹⁹

Two counter-arguments undercut, but fail to mitigate completely, the fear of capture posed by the semidemocratic structure. First, the Supporting Organization structure may help to prevent capture by any given constituency and to ensure user input into Board decision-making. The Supporting Organizations have traditionally sent nine of the nineteen directors to the Board. Within the Supporting Organizations, individual Internet users, academics and others play a substantial role; through the SOs, these arguably public-spirited individuals may represent the community interest effectively when they elect directors and make potentially-binding recommendations to the ICANN Board.²²⁰ The new NomCom process may

²¹⁵ One might argue that the SO structure, or the new NomCom arrangement, allows for a means for the community to represent itself, though such a route is far from certain and lacks complete transparency. Also, the notion of who belongs to the Internet community is a problem that has long plagued ICANN. For instance, do governments and corporate interests stand on a similar footing as domain name holders, or yet further removed, non-domain-name-holding Internet users?

²¹⁶ The nascent challenge to ICANN presented by new.net, an alternative domain names system backed by idealab! and others, might represent one such example of self-help.

²¹⁷ <http://www.icann.org/financials/financial-report-fpe-31dec00.htm> (accessed January 29, 2003). In addition to concerns about corporate control or capture of ICANN, this list of creditors also suggests that ICANN has historically been literally indebted to a group of exclusively Western, and almost exclusively United States-based, entities.

²¹⁸ <http://www.icannwatch.org/> (accessed January 29, 2003).

²¹⁹ See <http://www.technews.com/news/01/160718.html> and <http://www.aclu.org/congress/I011601a.html> (accessed March 27, 2001).

²²⁰ See *supra* note 126.

assist in this fashion as well. While such individuals do participate in the ICANN governance system, there is no reason to believe either that they would have the ability to protect against capture or to be swayed to support those who would capture the organization. A second counter-argument to the fear of capture centers on the fact that a semidemocracy is no more at risk of capture than any other authoritarian structure. While true on one level, the concern about semidemocracies and capture still stands. Moreover, the placative element of the semidemocratic structure may render participants less on the alert to the possibility of capture than in a pure authoritarian system, potentially resulting in fewer preventative measures taken to stave off the capture scenario.

2. Second tier concerns.

A series of secondary concerns regarding ICANN's semidemocratic structure include the costs and inefficiencies of such a structure; the reduced ability of the organization to adapt to changing circumstances; the tendency toward nepotism rather than merit-based promotion, which reduces the quality of key actors over time; a reduced ability to handle the inevitable periods of transition effectively; and, potentially, a lost opportunity problem. Finally, ICANN's semidemocratic structure is conceivably harmful in the sense that it does nothing to address a central problem facing the organization: tracing or establishing its legitimacy of authority.²²¹

Cost and inefficiency.

ICANN's semidemocratic system brings with it a series of costs and few offsetting benefits. An essentially meaningless electoral system, which elects a minority of the directors and risks alienating the community at large, cost ICANN the money that it paid to Election.com to outsource the election, ICANN's own staff time, the opportunity costs of the time and money devoted by ICANN and its supporters to the election process, and the time that the Board of Directors may spend once possibly drawn off course by representatives who may fail to represent the broader Internet community. A grant from the Markle Foundation of \$200,000 provided some support for the At Large Membership process and Election, though many costs, such as the mailing of 120,000 letters with PIN codes, were not covered through this grant funding.²²² The counter-argument suggests that the cost to ICANN of running the At Large Election is not great relative to its overall budget. The cost of enabling, but then ignoring, public commentary is unknowable, but is certainly a non-zero amount. In the event that any cost to an organization

²²¹ There are other potential concerns about semidemocracies that are not discussed in this paper. One important potential concern is the theoretical argument that complex forms tend to be less stable than pure forms of governance, but the empirical evidence seems unclear. See, e.g., Marc Stier, *Are Democracies Stable?*

http://www.stier.net/writing/stable/stable_text.htm (accessed February 25, 2001).

²²² See <http://www.icann.org/committees/at-large/markle-proposal-21oct99.htm> (accessed January 29, 2003). See also Ben Edelman, Scribe's Notes to the July 15, 2000 ICANN meeting in Yokohama, <http://cyber.law.harvard.edu/icann/yokohama/archive/scribe-icann-071500.html> (accessed January 29, 2003).

with a public function is allocated to an activity that may have a net negative impact to the organization or to the public at large, such a cost is unjustified.

Less effective reaction to change.

ICANN's semidemocratic structure may result in its management being less responsive to the need for change than its counterpart organization with a more effectively representative mechanism. In a short-term sense, semidemocracies fail to incorporate the need for change into policy-making in real-time, as the lines of communication between the governed and the governors get pinched and become plagued by static.²²³ In a longer-term sense, a semidemocracy is less able to change its practices and its structure in needed ways to respond to changing times.²²⁴ Professor Unger suggests that certain forms of governance, which could include the semidemocracy, exhibit this shrunken transformative ability.²²⁵

This shrunken transformative ability could manifest itself in a number of potentially damaging ways for ICANN. Semidemocracies, for instance, have a hard time recovering from a decline in the perception of the organization's legitimacy of authority.²²⁶ In the event that the election process is believed to be meaningful, the leaders can hold a legitimate election to begin the process of restoring belief and trust in the system. True authoritarian leaders, by contrast, can act quickly to alter organizational structure by fiat or make policy decisions to restore economic conditions, the most effective means for an authoritarian leader to restore a belief in their legitimacy of authority.²²⁷ The leaders of the semidemocracy would have at their disposal neither the surer path of the true democracy nor the efficient path of the true authoritarian to address a crisis of legitimacy. This concern does not, however, seem to be an acute one for ICANN, in light of the many policy changes of substantial magnitude in its short history.²²⁸

²²³ One might reasonably posit that an organization such as ICANN that uses advanced information and communications technologies extensively might not be as prone to such a problem as less technologically-inclined organizations.

²²⁴ *But see* the commentary of Joe Sims, ICANN's outside counsel, who has argued that ICANN may not want to be able to change quickly: "This objective [maintaining the stability of the DNS] requires slower, not faster, decision-making and incremental change." <http://www.icann.org/comments-mail/comment-bylaws/msg00025.html> (accessed January 29, 2003).

²²⁵ UNGER, DEMOCRACY REALIZED, 265.

²²⁶ *See* Alagappa, *supra* note 79.

²²⁷ *See id.* at 35 (discussing East and Southeast Asian authoritarian regimes which rely on economic development as a main source of their legitimacy).

²²⁸ Consider, for instance, just the several versions of appointing Board members over the past five years: from the initial "divine right of kings approach," to a process primarily involving the SOs, to a semi-elected Board, to a non-elected Board, and, most recently, to a revamped NomCom procedure for those Board members not nominated through the SO process. *See* <http://www.icann.org/committees/nom-comm/> (accessed November 7, 2003).

Danger of nepotistic, rather than meritocratic, promotion.

The promotion of new directors in a semidemocratic system is more likely to be based on nepotism than on meritocratic consideration.²²⁹ ICANN's critics are particularly attuned to this danger given the organization's history. The initial members of the Board of Directors were appointed by one man, Jon Postel, or at most by a small group of insiders with a vested interest in the composition of the Board.²³⁰ In a semidemocracy, the community at large has little or no recourse when nepotism results in appointment of persons to positions of power who do not act in the best interests of the community as a whole. A simple cost-benefit analysis suggests that those responsible for the appointment may prefer to appoint a leader based on allegiance to the appointer rather than to the community at large if the potential benefits of future decisions outweighs the outrage or other predictable abuse from the community at large. In ICANN's instance, this problem may not be a severe one. The track record of ICANN's Board appointments has been laudable, given the talent and commitment, albeit not perfect diversity, of the group of Board members.²³¹ Moreover, the structure of the Supporting Organizations, which send members to the Board of Directors, may result in greater consideration of merit, rather than nepotism, in the Board appointment process. However, the concern remains valid to the extent that the ICANN structure provides little in the way of safeguards to prevent nepotistic rather than meritocratic promotion.

The relative homogeneity, as opposed to diversity, of leaders in a semidemocratic structure tracks this concern about nepotism, rather than merit, holding the upper hand. One of the hallmarks of well-run democracies is the variety of leaders with different qualities who assume positions of influence. This diversity of strengths is less likely to be the case in semi-democracies or authoritarian regimes. For ICANN, this hypothetical tendency toward homogeneity, as opposed to diversity, presents a problem in light of the mandate to represent the global community of Internet users.²³² Diversity may take the form of a breadth of ethnic, cultural, geographic, professional, or other backgrounds that may result both in a better decision-making process and in a greater likelihood that the world's Internet users are truly being represented in some fashion through ICANN. Given ICANN's global reach and founding principles, this inclination of semidemocracies against fostering such diversity should be taken seriously.²³³

²²⁹ <http://www.nato.int/acad/fellow/97-99/galkin.pdf> at 18.

²³⁰ Given the timing of Postel's death at the time of ICANN's formation, it is almost certain that Joe Sims, the influential counsel to the entity, played a significant role in the initial board's make-up.

²³¹ Some ICANN critics do not laud Board choices to date, particularly complaining that corporate interests are too well represented at the expense of the Internet user community.

²³² One could argue – perhaps persuasively – that ICANN has to date done an admirable job of avoiding homogeneity and tended toward diversity. This point is a theoretical one, that semidemocracies over time tend toward homogeneity, rather than an actual or historical one, intended to deride ICANN.

²³³ ICANN has faced a serious diversity problem since its founding. One prevalent critique of ICANN has been the dearth of involvement from persons from developing countries. ICANN has made enormous efforts in this particular regard, led by Chief Policy Officer Andrew

Transitions are handled clumsily.

Semidemocracies struggle with transitions. ICANN is no exception to that rule. Political scientists believe that democracies manage to achieve orderly, scheduled transitions better than semidemocracies or authoritarian regimes do.²³⁴ The semidemocratic approach to transitions often involves a two-step on the part of the existing leaders: to act in an open enough fashion to appease those who seek involvement and openness, but also to act quickly and decisively enough to affect the necessary, or desired, transfer of power. In ICANN's case, this failure to make transitions promptly and elegantly has manifested itself in the organization's first several years of operation. For instance, the original appointed Board was intended to stay on for one or two years, and then to be replaced by a Board chosen half by the Supporting Organizations and half by the "membership."²³⁵ Today, three of the original Board members remain on the current Transition Board, while only five new members have been elected and subsequently are in the process of leaving their seats on the Board.²³⁶ The semidemocratic structure lends itself to such awkward transitions, unlike its purer structural counterparts. ICANN has shown no likelihood of overcoming the transitional problems of its semidemocratic structure, even as the December 15, 2002, Board transition raised precisely these concerns.

The semidemocratic structure does nothing to address ICANN's legitimacy of authority problem.

Even if none of the possible negative predictions derived from political theory have come to pass, ICANN's semidemocratic structure has failed to help address one of ICANN's long-term problems: a perceived lack of legitimacy of authority.²³⁷ A convincing articulation of the derivation of an organization's legitimacy of authority is critical, over the long term, to the organization's ability to carry out its mandate.²³⁸ The lack of a clear answer to the question of where its power comes

McLaughlin, an expert in information and communications technologies in developing countries, among others. The recently-announced NomCom process is meant in part to address this substantial concern.

²³⁴ One might profitably compare the corporation's process of transferring power with the process of transferring power of a state. Such a comparison's value to this inquiry into the relative merits of ICANN's structure and democracy on the Net would be limited by the effectiveness of the analogies between ICANN and the government and corporate structures.

²³⁵ See generally <http://personal.law.miami.edu/~froomkin/boardsquat.htm> (accessed January 3, 2003) (for a discussion of the Board's failure to transfer power as originally anticipated within a one- to two-year timeframe).

²³⁶ The three original members who remain on the ICANN Board as of January, 2003, are Hans Kraaijenbrink, Jun Murai, and Linda Wilson. <http://www.icann.org/general/abouticann.htm> (accessed January 3, 2003). The five elected representatives today serve as interim members until the new Board is constituted.

²³⁷ See Weinberg, *ICANN and the Problem of Legitimacy*, *supra* note 19.

²³⁸ See generally SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991) (for a discussion of the importance of legitimacy of authority within democratic states); ROUSSEAU, 454 – 8 (on the source of legitimacy of authority).

from has plagued ICANN from its inception.²³⁹ To the extent that its power flows from an agreement with the United States government, ICANN will continue to face increasing difficulty in asserting its authority credibly in a extra-United States context. To the extent that the authority flows from the Internet user community, the semidemocratic structure will likely undermine, not build, a sense that the broader community is involved in the decision-making process and voluntarily ceding power to the ICANN Board. Most likely, ICANN's authority flows from a complex – and possibly unknowable – combination of sources: from Jon Postel, from the United States government, from the many constituencies who use the Internet, and from the Internet community as a whole.²⁴⁰ However, the semidemocratic form may do more harm than good in terms of addressing this problem, especially as the Internet community has continued to become disengaged in the decision-making process and literally disenfranchised.

The Internet Community Never Takes Responsibility for ICANN; or, the Lost Opportunity Problem.

The final, and most controversial, concern related to ICANN's semidemocratic structure is that the Internet community never becomes actively involved in the management of the domain name system or other functions that ICANN is intended to address.²⁴¹ In a semidemocratic structure, where individuals are able to participate in the process but never have decision-making authority or take on real responsibility, the Internet community at large never comes into its own. As one political theorist puts it, "in the domain of public affairs people could never outgrow their childhoods."²⁴² ICANN has entered its awkward teenager phase a few years early and is off track to reach the full potential of its adulthood.

On the simplest level, this problem represents a lost opportunity to develop, through ICANN, a model for governance of the technical architecture of the Internet. While ICANN is not intended by its mandate to foster global democracy, its founding principles state explicitly that it is intended to achieve a representative system of coordination of the Internet. The stronger form of the argument is that ICANN is meant to demonstrate, as the IETF did before it, that Internet users are capable of governing themselves. If individual members of the Internet community never take on responsibility for ICANN's work, political scientists predict, the

²³⁹ The United States Department of Commerce made a fairly unconvincing try at establishing legitimacy of authority for a global institution in the "Authorities" section of its MoU with ICANN at <http://www.ntia.doc.gov/ntiahome/domainname/icann-memorandum.htm> (accessed January 29, 2003). See *supra* note 15 and accompanying text.

²⁴⁰ Herbert Burkett, in a short piece about ICANN and legitimacy, posits that its authority is grounded in three sources: the At Large Membership, interest groups, and national governments. See <http://www.gmd.de/People/Herbert.Burkert/NEW/Zurich-E.pdf> (accessed March 26, 2001).

²⁴¹ In some senses, this "lost opportunity" point is Professor Froomkin's main thrust in *Habermas*, *supra* note 35. ICANN, given its special claim to legitimacy and its global reach, ought to, but does not, pass Habermas' demanding test based on discourse ethics.

²⁴² RONALD DAHL, *DEMOCRACY AND ITS CRITICS*, 105 (1991). See also <http://www.nato.int/acad/fellow/97-99/galkin.pdf> (accessed January 29, 2003).

community will never come to participate in a responsible manner. ICANN's authority figures would continue to bear full responsibility for the organization's activities without the benefit of an engaged global community of Internet users. This loss to ICANN would mean it would lose the active participation of people who might volunteer their time, present useful ideas, and help spread the word among the broader community that might help to develop the legitimacy of authority that ICANN has lacked since its founding. In short, ICANN might never be able to become the truly representative body that its founding principles suggest it ought to become.

This lost opportunity, the argument goes, might also have other ramifications across Cyberspace. To date, the Internet has been effectively self-regulated in certain areas that traditional jurisdictions fail to reach.²⁴³ In Barlow's Cyberspace, for instance, Internet users self-govern to the extent that governance is necessary.²⁴⁴ Though Barlow's corners of the Net are being encroached upon, sovereign governments have yet to reach many communities online that exist without regulation, such as those that participate in or conduct discussions on Usenet groups, in discussion forums across a broad range of topics, or those who use the "Darknet."²⁴⁵ To the extent that the Internet community does not grow into the responsibility it is intended to take on through the ICANN process, a reduction in the ability to self-modulate or self-govern might ensue among the broad community of participants.

Worse than preventing the Internet community from coming into its own, the ICANN semidemocratic structure may result in mass frustration and a "checking out" on the part of rational Internet community members. Rational choice theory suggests that voters make a calculation when they decide whether or not to vote: as André Blais notes, "she decides to vote if, in her view, the benefits of voting are greater than the costs; if, on the contrary, the costs are greater than the benefits, she decides not to vote."²⁴⁶ Semidemocracies suffer from a rational choice theory problem. In the first election, participants may or may not recognize that their time and effort to vote outweigh the benefits of voting. In the event that their elected representatives prove powerless or embarrassing or fail to represent them well because of flaws in the election process, those same participants becoming increasingly unlikely to vote in subsequent elections.

Despite its shortcomings, rational choice theory has relevance to ICANN as a semidemocracy and the semidemocratic structure's effect on the Internet community. Rational choice theory is far from a perfect explanation of voting choice decisions. It fails to address the "paradox of voting," which is that even when participants could not rationally believe that their vote could matter (say, as a voter from either side of the aisle in the Presidential election in Massachusetts at the end of the twentieth century, with its nearly guaranteed outcome of choosing the Democratic candidate by a wide margin), large numbers of people still turn up

²⁴³ For instance, consider standards-setting bodies like the IEEE, the W3C and the like.

²⁴⁴ See *supra* note [56] and accompanying text.

²⁴⁵ See Peter Biddle, Paul England, Marcus Peinado, and Bryan Willman, *The Darknet and the Future of Content Distribution*, MICROSOFT CORPORATION RESEARCH WHITE PAPER at <http://crypto.stanford.edu/DRM2002/darknet5.doc> (accessed November 11, 2003).

²⁴⁶ ANDRE BLAIS, TO VOTE OR NOT TO VOTE: THE MERITS AND LIMITS OF RATIONAL CHOICE THEORY, 1 (2000).

at the polls.²⁴⁷ Nonetheless, there are elements of rational choice theory that still have merit. There is some calculus that many rational voters use to determine whether to participate in an election. One of those factors, for many (though not all) voters, is whether or not their vote may have an impact now or in future. In ICANN's instance, to the extent that voters recognize that their vote could not possibly have an impact on the outcome of domain name system coordination, rational actors will decide not to vote in future Internet-based elections.

Several outcomes follow from rational apathy besetting ICANN elections and related forms of participation. ICANN may suffer if the "rational" Internet users do not vote but the "irrational" do vote, in the process electing representatives from the fringes of the Internet community. The election of fringe candidates to the ICANN Board may result in the transaction costs associated with their participation without any offsetting benefit to the organization from their work. Another potential side effect of mass frustration is factionalization, one of the key fears of the founders of the United States Constitution.²⁴⁸ Faction, the argument goes, ensues because of the fractionalization of the voting populace, which is artificially limited by the fact that certain rational voters decide not to vote. A third possible outcome is that when rational voters stop participating, ICANN's Board and managers lose touch with large segments of the Internet community and therefore have no chance of acting in a representative fashion. By keeping the lines of communication open between the community and the Board and officers, those who care about ICANN will spend less time complaining about one another and more time working together to solve common problems. Just as important, these placative politics result in a disengaged politics, the opposite of an energized politics. An energized politics is desirable because it involves and fosters high-level civic involvement and serves as an antidote to impasse in tough situations.²⁴⁹ Finally, the less impact that voting has on decision-making and the fewer rational voters who participate, the less efficiently the organization can incorporate public input.

The "lost opportunity" argument against a semidemocratic structure is vulnerable to attack from the vantage point that it is not, in actuality, a lost opportunity for ICANN constructively to disenfranchise the broader Internet community. The average Internet user, after all, has limited technical knowledge compared to the average ICANN staff person or Board member. Even in the aggregate, the Internet community is unlikely to contribute to the process of fulfilling ICANN's mandate. ICANN's staff and Board might well make better decisions without the distraction of extensive commentary from an astonishingly fragmented user community. Moreover, ICANN is not intended to foster global

²⁴⁷ *Id.*, 2 ff.

²⁴⁸ See generally THE FEDERALIST NO. 10 (James Madison) (for arguably the most famous articulation of the fear of faction and its possible causes and effects; Madison, however, notes that pure democracy presents the greatest risk of faction).

²⁴⁹ UNGER, DEMOCRACY REALIZED 263 – 77 (on the impact and importance of a high-energy politics). A high-energy politics is one of the original promises of the Internet, according to many observers from the political sciences.

democracy; its job is to perform a technical coordination and care-taking function.²⁵⁰

This critique, however, incorporates at least three presumptions that may not be accurate. First, the critique presumes that those who are appointed into positions of responsibility will be more talented and more capable of carrying out ICANN's mandate than other members of the Internet community. Second, this critique presumes that those appointed members would be not only able but also willing to try to understand and represent the broader community in the decision-making process absent any apparent controls on their willingness and ability to do so. Third, this critique presumes that ICANN's role is purely technical and that ICANN's exercise of authority lacks any meaningful social impact. That these three presumptions may or may not be accurate today does not mean that they will play out throughout the organization's – or the Internet's – future. In addition, this critique fails to consider the fact that ICANN relies heavily on many volunteers. To the extent that the volunteers who do participate are less capable than other would-be participants who have opted out of the process based on a calculus that they do not wield meaningful influence, ICANN's performance could suffer. Finally, in the semi-democratic structure, ICANN's leaders will still have to address the input from the broader community, but that input will include fewer good, creative ideas than would otherwise reach the decision-makers in a situation of an energized politics.

The lost opportunity problem is, however, ultimately unsatisfying as a critique of ICANN. The broad principles set forth at the outset for ICANN in its founding documents give rise to the plausible reading that ICANN bears a responsibility for proving a point about the Internet's ability to create more responsive, democratically-governed, global institutions. Several years into the experiment, however, it is clear that ICANN is not the right institution to prove such a point. As intriguing as the goal of proving democratic governance via the Internet is, ICANN should be structured and managed in such a way as to be most effective at achieving its core mission.

²⁵⁰ Joe Sims, ICANN's outside counsel, wrote in a posting to the ICANN Web site, "The more direct influence that the general population -- even the general user population -- is given over the actual decision-making processes of ICANN, the more risk to the prime objective of continued stability, and the more pressure there will be for the only realistic alternative: control of ICANN by some form of multi-national body, where we would likely get stability all right, but combined with more control. Less freedom and less innovation. The fact that the global community of national governments has so far allowed and even encouraged this private sector approach is quite remarkable, and owes great credit to the United States government for its leadership in this regard, but this forbearance [*sic*] is neither pre-ordained nor guaranteed." <http://www.icann.org/comments-mail/comment-bylaws/msg00025.html> (accessed January 29, 2003).

V. Conclusion.

"...[G]lobal and national politics, and the honest search for the broadest possible consensus of all interested stakeholders, have combined to produce an ICANN drafted by committee. As could be expected, the result is not a perfect instrument for anything, including its prime objective [to maintain the stability of the DNS]."²⁵¹

- Joe Sims, Esq. (Counsel to ICANN;
partner at the law firm of Jones, Day)

The best way to manage the domain name system and the best way to prove that the Internet user community can be involved in the decision-making process on issues of global importance are not one and the same.²⁵² These two issues have been conflated in the debate over ICANN's decision-making structure. ICANN's failure to achieve representation of the user community leads to the conclusion that its structure ought to be reformed in such a way that is tailored to achieve its narrow mandate. Regardless of whether ICANN can right itself, we are left with the continuing need to establish a compelling theory of governance of the technical aspects of the global Internet.

Three key points emerge from this analysis of ICANN's experimentation with governance structures. First, ICANN must continue to pursue substantial structural reform – more substantial than the marginal reforms proposed by ICANN's leadership to date – to emerge from its semidemocratic phase, with a goal toward selecting the organizational structure most suited to its narrow mandate. Second, ICANN ought to clarify the way in which users can meaningfully involve themselves in the decision-making process to mitigate the risk of demoralization and to get the most out of the input offered by the Internet user community in a manner that is constructive rather than distracting. Such reform should also involve assurances that individuals know the extent to which their participation, through various channels, will be considered by the decision-maker. Third, we need to look past ICANN's troubled story and toward emerging issues of how to govern the technical architecture of the Internet in an increasingly networked world.²⁵³

A. ICANN should pursue meaningful structural reform.

ICANN's structural reform could proceed in a variety of ways. Least likely, ICANN could become more like a representative democracy, either through further

²⁵¹ <http://www.icann.org/comments-mail/comment-bylaws/msg00025.html> (accessed January 29, 2003).

²⁵² The Berkman Center for Internet & Society at Harvard Law School's "Representation in Cyberspace Study" on behalf of ICANN might in fact render the organization for which I work vulnerable of the accusation that it made precisely this mistake in 1999. See <http://cyber.law.harvard.edu/rcs/> (accessed November 4, 2003).

²⁵³ See Kleinwaechter, *From Self-Governance to Public-Private Partnership: The Changing Role of Governments in the Management of the Internet's Core Resources*, *supra* note 146, 1124 (arguing that "[w]e live in a transitional period where the old governance system, rooted in the concept of the sovereign nation-state, is increasingly complemented by an emerging new governance system.")

empowering "shareholders" within the corporate structure or by adopting a new institutional format. ICANN could seek to give the user community, through the ALAC²⁵⁴ or the NomCom²⁵⁵ or otherwise,²⁵⁶ greater voice in the decision-making process and move the organization closer to the Internet user community and further from the United States government and corporate interests. The Election of 2000, despite its glitches, suggests that global online elections might be feasible on a large scale from a purely tactical perspective, at some cost and provided further study and refinement and presuming increased interest in public participation in ICANN.²⁵⁷ As a government moves from autocracy to democracy, so too could ICANN move from corporation with an appointed Board to a global organization with a purely elective Board, or at least a Board whose members each are intended to represent a specific constituency through the SOs. ICANN's charter, by-laws and founding documents provide no explicit road map to guide such a transition and the trend seems clearly to suggest movement in precisely the opposite direction. The Board would have to re-adjust ICANN's by-laws in order to morph the organization in a more representative direction.

A move by ICANN to a model with greater user involvement – including but not limited to becoming a representative democracy – would have certain advantages, particularly in terms of establishing greater legitimacy, but also substantial shortcomings. The structure of ICANN would almost certainly become aligned more directly with the grounding principles of representation and openness. ICANN could plausibly overcome its legitimacy of authority problem. The Internet community might well develop into an energized, engaged global force, a development that could have numerous side benefits, both for ICANN and for global society at large. It is at best unclear, however, that the result of a purely democratic structure would be an organization better able to fulfill its core mission: to maintain the stability of the Internet. It is similarly unclear that the constituencies represented in the current iteration of ICANN would be fully represented, a concern that may be mitigated by the fact that they arguably can be represented via individuals who comprise those constituencies.²⁵⁸ Also, certain very important issues that ICANN addressed have not attracted substantial public commentary, despite the total of over 100,000 messages posted to public online forums.²⁵⁹ A pure representative democracy model is far from a perfect answer, at present, to the question of the best structure for ICANN. In addition, there is no meaningful movement in favor of adoption of a more democratic model, making such a reform highly unlikely, even were it desirable.

²⁵⁴ See <http://alac.icann.org/> (accessed November 4, 2003).

²⁵⁵ See <http://icann.org/committees/nom-comm/> (accessed November 4, 2003).

²⁵⁶ See, e.g., http://www.markle.org/news/ICANN_Final_Sept18.pdf, 8 (accessed November 4, 2003).

²⁵⁷ Significant concerns about authentication, security and related network-wide concerns continue to face those who seek to run large-scale Internet elections.

²⁵⁸ This representation could work in one of two ways. If the corporate Internet interests, for instance, felt under-represented, they could organize their staff, shareholders and other interested parties to vote in ICANN elections. Similarly, those interests could nominate their own staff to serve on the ICANN Board, just as Karl Auerbach of Cisco Systems did during his term.

²⁵⁹ See Section IV, *supra*.

At the center of the possibilities spectrum – and least appealing of all – ICANN could opt to maintain the awkward *status quo*, despite continued political opposition to its current structure.²⁶⁰ Mr. Lynn's proposed reforms of February 24, 2002, and the reform efforts pursued by the Board since that time, though substantial in their way and though the details still need to be hashed out and better understood with time, would fit in this band of the spectrum.²⁶¹ The NAIS and At-Large Study Committee reports of 2001, though critical of ICANN and urging further involvement of the user community at large, also supported variations of the hybrid *status quo*.²⁶² The perils of the semidemocratic structure are substantial and well-documented. To the extent that ICANN perpetuates a semidemocratic structure, its leaders would be well-advised to consider, and seek to avoid, the pitfalls that political scientists and historians predict for semidemocratic institutions. Changes at the margins of ICANN's structure, or even a heightened awareness of the structure's flaws, may mitigate or even prevent certain adverse consequences from coming to pass. The attention paid to ICANN's every move – by members of the press, on Internet message boards and newsgroups, and in e-mail-based newsletters such as the widely read "Politech" by C|Net reporter Declan McCullagh²⁶³ and web logs by the likes of Bret Fauser²⁶⁴ and Dan Gillmor²⁶⁵ – functions as a very important check on ICANN's ability to act in a manner adverse to the interests of the global Internet community. This method of public awareness may be yet more effective if Internet users recognize the shortcomings of ICANN's structure, such as the danger of capture, and adjust their monitoring behavior accordingly.

Third, ICANN might move to a purely autocratic model. The existing Board of Directors might simply appoint new board members or extend their tenure as terms expire, pursuing a "divine right of kings" approach to governance. The At-Large Advisory Committee, Nominating Committee, and the Supporting Organizations could play a purely advisory role.²⁶⁶ This approach would avoid some of the problems of semidemocracy, such as the possibility of only the "irrational" participants voting members of the fringe onto the Board and the added costs of functionally meaningless elections. This reversion approach would likely fail to provide any relief on the problem of legitimacy of authority, would represent a

²⁶⁰ Given the statements of the United States Department of Commerce in September 2002 and September 2003 about the need for ICANN to change in order to comply with the terms of the Memorandum of Understanding, a scenario with no further reform seems unlikely. However, the renewal of the Memorandum of Understanding, with its continued emphasis on hand-off of the job of DNS management to the private sector, suggests that marginal reform within the current corporate structure may yet be likely.

²⁶¹ <http://www.icann.org/general/lynn-reform-proposal-24feb02.htm> (accessed February 7, 2003). Mr. Lynn stepped down after a two-year term, so his influence in terms of prompting future reform is virtually nil.

²⁶² See <http://www.naisproject.org/report/final/> and <http://www.icann.org/at-large/final-report-05nov01.htm>, *supra* note 171.

²⁶³ <http://www.politechbot.com/> (accessed January 3, 2003).

²⁶⁴ <http://icann.blog.us/> (accessed January 3, 2003).

²⁶⁵ <http://weblog.siliconvalley.com/column/dangillmor/> (accessed January 3, 2003).

²⁶⁶ Similarly, the Supporting Organizations could continue to select some board members, though this approach would obviously retain an element of complexity.

back-tracking on core founding principles, would not include adequate recourse in the event of capture or bad decision-making, and would leave ICANN open to the critique that an opportunity to develop an engaged global Internet community had been squandered completely. However, this autocratic approach might well be most efficient way to structure ICANN in order to carry out its mission.

ICANN has a fourth option as well, which is to explore a new model for the organization's structure.²⁶⁷ One often-mentioned option is to create a new multi-lateral treaty organization, which would draw together all nations with an interest in the Internet domain name system into an agreement to establish an ICANN successor organization.²⁶⁸ Similarly, ICANN could be folded into an existing treaty organization, along the lines of an existing United Nations entity, such as the World Intellectual Property Organization, one of the UN's sixteen specialized agencies, or the ITU.²⁶⁹ An attractive variant of these proposals would be for a multi-lateral treaty organization's Board or special committee to vest authority in a group of professional managers with a fixed series of criteria for performance and the possibility of periodic removal by the Board.²⁷⁰

A multi-lateral treaty-based organization could help ICANN to establish legitimacy of authority, especially insofar as the formal grounding in states would expand beyond the United States Department of Commerce and would eliminate the problems associated with being a corporation based in California, USA. However, a treaty organization structure could bring with it additional bureaucracy, attendant transaction costs, and potentially some of the legitimacy of authority problems of the semidemocratic structure.²⁷¹ The treaty organization model would give up on the notion of the private sector leading, which might or might not be a large sacrifice. More worrisome, this approach would remove the decision-making process further from the Internet user, unless creative mechanisms were developed

²⁶⁷ See, e.g., <http://www.byte.org/heathrow/heathrow-declaration-v0r0d5-032502.html> (for a discussion of reform proposals and new ideas for ICANN's structure) and <http://www.icann.org/committees/evol-reform/links.htm> (for an updated listing of proposals and ideas) (accessed February 7, 2003).

²⁶⁸ Oversight Hearing: Domain Name System Privatization: Is ICANN Out of Control? Subcommittee on Oversight and Investigations of the U.S. House Committee on Commerce, Jonathan Zittrain, July 22, 1999: "An international treaty organization is one possible way that governments could come to agreement on how this particular aspect of the Internet should be run. My personal guess is that this would be the likely outcome if ICANN were to fail. It's not clear to me that such an organization would make policies any more in touch with the Internet at large than a well-function[ing] ICANN can. More important, as the historical context suggests, the power of the root derives from the fact that a critical mass of system administrators and 'mirror' root zone server operators choose to follow it." Zittrain, *supra* note 43.

²⁶⁹ <http://www.wipo.org/about-wipo/en/> (accessed January 29, 2003).

²⁷⁰ The description of such a model is a fitting subject for another paper. The advantages of a system of this sort include grounding ICANN in an agreement that includes multiple states rather than a single state; could align the interests of the managers and Board with the interests of the global Internet user community more directly than the current system; and would retain some element of private sector involvement, as sought by the founders.

²⁷¹ Those who administer related systems, such as the telephone number system, for the ITU, would almost certainly disagree with this critique of the treaty-organization model, citing their own relative efficiency to the ICANN model.

to incorporate feedback from the Internet user community and the Non-Governmental Organization (NGO) community. Such an outcome would fail to achieve the goal of creating "more pluralistic models for Internet governance" as Zoë Baird, President of the Markle Foundation, has forcefully argued.²⁷² In the event that ICANN were to shift to a treaty-based model or to a more traditional structure with cleaner lines and crisper decision-making processes, the experimental nature of ICANN would surely be lost, but the result of such a governance structure might well, on balance, be best for the Internet and its users.

Stuart Lynn was right: "ICANN needs reform: deep, meaningful, structural reform, based on a clearheaded understanding of the successes and failures of [ICANN's history to date]."²⁷³ The Department of Commerce echoed this sentiment, stating that "finalizing the future shape of ICANN is an urgent priority."²⁷⁴ However, the incremental change, such as the change proposed by President Lynn and others after him, offers only the prospect of incremental improvement to an organizational structure in need of true overhaul. Joe Sims, too, is surely correct: not only was ICANN drafted by committee, but this problem plays out in Technicolor in ICANN's structure and in the problems raised by ICANN's apparent lack of clarity around the issues of representation and openness.²⁷⁵ The relentless focus on process, since the moment ICANN was founded, rather than on the substance of its mission, is counter-productive. Sooner rather than later, ICANN should break with its history and seek an organizational structure that is at once true to its principles and capable of enabling its managers to achieve their core mission: to preserve the stability of the Internet. And sooner rather than later, the question of what to do about ICANN's crisis ought to be separated from both the effort to build stronger democratic institutions using Internet technologies²⁷⁶ and the continued search for a compelling mode of governance for the technical architecture of the Internet.

B. ICANN should clarify its governing principles and ensure that users know how best to participate and how, if at all, they will be heard.

ICANN has done a laudable job of enabling the global Internet user community to offer input, but has done a poor job of making clear how the decision-making process works and the precise role of user input in that process. The process has shifted constantly and all but the most attentive followers lose track of the latest changes. If the proper way for users to have a meaningful voice

²⁷² Zoë Baird, "Governing the Internet: Engaging Government, Business, and Nonprofits," *FOREIGN AFFAIRS*, Volume 81, No. 6 (November/December 2002).

²⁷³ Lynn, *supra* note 261.

²⁷⁴

http://www.ntia.doc.gov/ntiahome/domainname/agreements/sepstatement_09162003.htm (accessed November 4, 2003).

²⁷⁵ Diane Cabell, Esq., a key author of the Berkman Center for Internet and Society at Harvard Law School's report on representation at ICANN, appropriately asks whether this problem is a necessary result due to the attempt to structure representation based on hard-to-define "interests," rather than being based on "individuals" or other more clearly defined entities.

²⁷⁶ See the introduction to Froomkin, *Habermas*, *supra* note 35.

in the process is through the Supporting Organizations, that guidance should be made clear to users. If commentary to the public forums is unlikely to play a role in decision-making, users should be made completely aware of this fact. ICANN risks further demoralization of the global Internet community by continuing to mislead users about the extent to which the process is representative and open and the extent to which user input will affect the decision-making process. Even if the answer is that users ought to find other ways to participate in the technical governance of the Internet, such an answer would be better than a regime of placative politics with lip service toward, but no meaningful consideration of, user input. Openness, in the sense of clarity of process, should be a critical starting point of any structural reform.

ICANN's structure must ultimately reflect the principles and goals that the global Internet community sets forth for it, or else reset expectations for what ICANN is meant to accomplish.²⁷⁷ If ICANN is intended to be a dynamic, experimental, energizing organization that fulfills a critical function for a global public resource, its organizational structure should be altered to reflect those intentions. If ICANN is intended to be a simple not-for-profit focused on a narrow goal – unencumbered by higher-minded principles and goals – then the organizational structure should be simplified to reflect those intentions. The current hybrid structure, even absent extension of the global public franchise, seems to please virtually no one. This outcome, Joe Sims notes, may be the necessary result of compromise. Most troubling, though, the current hybrid structure, even absent the five elected directors, serves to frustrate ICANN's ability to live up to its founding principles, obscures the user community's ability to understand how best to participate in the decision-making process, and risks continued alienation of the broad Internet community. ICANN is fascinating as an experiment in ways to achieve the goal of representation and input of the global community of Internet users, but it must at some point settle into an organizational structure with a predictable, sustainable process of governance on which stakeholders can rely for the purposes of determining a rational investment of time and resources.

C. We ought to turn our focus away from ICANN and toward developing a compelling model for governance of the technical architecture of the Internet.

Our attention should turn away from how ICANN is managed and toward the broader issue of how we govern those elements of the technical architecture of the Internet that have greater interest to the majority of Internet users.²⁷⁸ ICANN was

²⁷⁷ The Evolution and Reform Committee's proposal, <http://www.icann.org/committees/evol-reform/blueprint-20jun02.htm>, as ratified by the ICANN Board in June of 2002, suggests a means of reform but little clarity in terms of resetting expectations and rebuilding the organization (accessed February 7, 2003).

²⁷⁸ It is here that I part ways with the public-spirited arguments of Common Cause and others that "representation" through direct voting of Board members is essential to ICANN's success. I agree with many of the principles stated in Section 1.1 of the Common Cause Executive Summary of the NAIS Report, for instance, but not with the recommendation in Section 1.4 that "a voice for members directly within the decision-making Board" is a good

the wrong-test case for proving that the Internet could foster global democracy. We should look to the ICANN experiment in global democratic governance for lessons to guide future attempts to use the Internet to foster more open, representative, legitimate institutions that draw upon civil society and the Internet community at large.²⁷⁹

A new generation of global organizations, charged with mandates covering broadly compelling subject matter and making use of Internet technologies, might yet emerge.²⁸⁰ ICANN, doomed by its own tortured history and limited by the inaccessibility of its subject matter, as suggested throughout this analysis, is highly unlikely to become a model of this sort and should no longer be looked to as a beacon, unless and until it undergoes truly meaningful reform.²⁸¹

To the extent that governments, standards bodies, corporations or new genres of organizations seek to use the Internet to strengthen global public involvement in their decision making, the participants' involvement should clearly be meaningful, not placative, and users should be able to understand how and to what extent their input is considered.²⁸² The failure of the ICANN experiment bears with it a threat: that the Net cannot and will not live up to its promise to invigorate

idea within the context of ICANN as a semidemocracy. See, e.g., <http://www.commoncause.org/icann/execsum.htm> (accessed November 11, 2003).

²⁷⁹ See Froomkin, *Habermas*, *supra* note 35, 852 – 854. Professor Froomkin assesses some of the lessons learned from ICANN but carries this particular ball only a short distance.

²⁸⁰ A new model might also be possible based on collaboration among existing organizations, such as the ITU and ICANN. See <http://www.itu.int/ITU-T/tsb-director/itucann/ICANNreform.html> (accessed February 7, 2003).

²⁸¹ One statement of a series of alternate means of using the Internet to re-energize democracies is set forth by Stephan Coleman and John Gotze, *Bowling Together: Online Public Engagement in Policy Deliberation*, at <http://bowlingtogether.net/bowlingtogether.pdf> (accessed November 11, 2003).

²⁸² There are a series of arguments that might run counter to this suggestion that participation must be meaningful and effective in order to be advisable. Professor Frank Michelman argues, quite convincingly, that there may be fundamental reasons why we can never perfectly translate the ideal of deliberative democracy into practical effect, even in the most wonderfully conceived constitutional democracy. Frank I. Michelman, *How can the People Ever Make the Laws? A Critique of Deliberative Democracy*, *supra* note 52, 150. Professor Michelman is almost certainly right. If we doubt that we ever can achieve the ideal in any event, but believe that there is value in making the effort, then, one argument might run, we may as well try wherever we can. In the ICANN scenario, this extension of the Michelman argument does not apply precisely. First, ICANN is not a state and certainly not a constitutional democracy, so the parallel to his argument is inexact on those grounds. Second, part of the problem with the ICANN structure historically has been the rhetoric and the appearance of deliberative democracy without much of a reality behind it. The structure allows for almost no incentive on the part of Board members to vote for positions that have been reached through deliberative means or for decisions that plausibly stand for the position of the Internet community at large, other than a desire to do what those Board members think is right. The argument in this paper is not that the public should have no voice in the ICANN decision-making process, but rather that the public should not be given only the semblance of a voice which is in reality just background noise. Such a semblance of a voice is worse, in effect, than establishing at the outset that the public has no formal role in the decision-making process. It is precisely for this reason that public participation in ICANN has foundered, rather than expanded along with the expansion of the namespace.

democracies and broad representation within organizations. That message is not the right message to take from the ICANN story, but continued failures of this sort would threaten to turn this mistaken belief into a self-fulfilling prophecy.

The global Internet community still faces the hard questions that faced us in 1998, as ICANN came into being: who governs the Internet and how? Can, and should, Net users govern themselves? What is the role of traditional sovereigns and of powerful market players? If the private sector is still to lead, the private sector must learn to partner effectively with governments and civil society and to lead in a manner that guarantees meaningful public participation. Together, these parties should seek to develop new, open and transparent governance models. Internet technologies still hold promise in terms of making new models possible and effective, though we ought to learn from the ways in which ICANN's use of methods such as simple bulletin boards, e-mail listservs, and direct election of Board members has come up short. The failure of ICANN to live up to its founding principles calls renewed attention to the need for experimentation in using the Internet to foster stronger democratic institutions. ICANN needs to reboot, to establish a new set of principles for its operation, and to develop a structure from the ground up that enables it to carry out its narrow technical mandate. While it ought to be inclusive of the user community, ICANN should not be organized to prove a point about democracy on the Internet; as an organization that manages a technical function, and does not set standards or do much that interests or engages a broad swath of Internet users, ICANN is ill-suited to that end. The focus of attention of those who care about democracy and technology should shift away from ICANN, which is almost certainly now beyond repair, and toward the many greener fields in cyberspace.