

# ICANN Inc.: Accountability and Participation in the Governance of Critical Internet Resources

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**Abstract:** This paper assesses the relationship between public participation and accountability in ICANN. It shows that ICANN tries to combine three distinct organizational models as a result of its global governance responsibilities: it combines elements of a private corporation, a bottom-up standards body and a government regulatory agency. The paper shows that the private corporation model has come to dominate the other two; however, ICANN lacks the normal forms of accountability to which private corporations are subject. ICANN has responded to accountability concerns by creating new opportunities for public comment, review, and participation. This paper questions whether participation is an adequate substitute for accountability. It analyzes three distinct reforms in ICANN's history to show how participation can displace accountability rather than improve it.

**Keywords:** Internet governance; ICANN; global governance; accountability; public participation

## ICANN THE CORPORATION

Several years ago the Harvard Berkman Center's John Palfrey characterized the mission and organization of the Internet Corporation for Assigned Names and Numbers (ICANN) as an inconsistent mash-up of three distinct institutional models (Palfrey 2004). ICANN, he wrote, simultaneously purported to be (1) a private corporation run by an all-powerful board of directors; (2) an open space for the development of bottom-up consensus about policy, similar to Internet standards organizations; and (3) a governmental regulatory body, with fair representation of stakeholder groups in a legislative process for the development of public policies that govern Internet identifiers.

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

To anyone familiar with ICANN's workings, the observation about mixed models rings true. ICANN constantly refers to its process as open, bottom-up, and consensus-based, drawing on norms derived from Internet standards organizations such as the Internet Engineering Task Force (IETF).<sup>1</sup> At the same time, its structure attempts to provide balanced representation of different constituencies or stakeholder groups as if it were a governmental legislative body; moreover, its processes are laden with public notice and comment requirements characteristic of a government regulatory agency. At the same time, ICANN is legally a private corporation (specifically, a California nonprofit public benefit corporation). All decision-making authority rests solely in the hands of a board of directors, whose relationship to its community is mediated by an increasingly large professional staff. The board has practically untrammelled authority to dispose of recommendations and policy proposals by its various advisory committees and supporting organizations. It can modify the bylaws governing its processes and structures almost at will. Most importantly, the board governs Internet identifiers by means of private contracts. While the substance of the contracts is influenced in some ways by general policies developed by its bottom-up representational organs, the critical details and implementations are negotiated bilaterally between the corporation and the private businesses that operate under the terms of those contracts.

Palfrey and others (e.g., Koppell 2005; Pommerening 2004) have implied that the strange combination of corporation, standards body, and government agency in a single institution causes both legitimacy problems and organizational turmoil. Consistent with these arguments, ICANN has gone through many structural changes and challenges to its legitimacy since its founding in 1998. It went through sweeping structural changes late in 2002 (Lynn 2002) and is now going through another round of reforms, which will be discussed in more detail below.

There is, however, an order underlying the apparent chaos. ICANN has learned to integrate its three organizational tendencies in a unique way. The key to understanding the interrelationship among them is to focus on the problem of accountability.

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1. The term "bottom-up" appears five times in the organization's own *ICANN Factsheet*, which states: "ICANN does not create or make Internet policy. Rather, policy is created through a bottom-up, transparent process involving all necessary constituencies and stakeholders in the Internet Community" (ICANN 2008).

Accountability—or the avoidance thereof—provides the key that unlocks many of the mysteries of ICANN's structure—including its strong emphasis on public participation.

ICANN is, first and foremost, a private corporation. This status dominates its approach to representation, participation, and accountability. Like any corporate entity, ICANN wants to be as autonomous as possible and thus strenuously resists being subjected to any external authority, be it a membership, a collection of governments, or an independent judiciary.

When this paper asserts that ICANN is a corporation it recognizes that it is also a public benefit corporation, and that its mission and articles invoke the public interest as a guiding principle. Many if not most of ICANN's board members are sincerely devoted to setting policies that serve the global public interest. However, no matter how much ICANN's board and staff profess to act on behalf of the public, the fact remains that it is not *accountable* to the global public in any significant way. It is still fundamentally disconnected from most of the accountability mechanisms that normally accompany any of the organizational forms present in its constitution. In the absence of these moorings, the chief concern of a private corporation, whether for-profit or nonprofit, becomes its own survival, growth, security, and autonomy. The corporation's understanding of the public interest will, inevitably, be profoundly shaped by its own organizational imperatives.

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

Real accountability means that the will of the board and staff is held in check or even reversed when it conflicts with applicable law or the views of its constituents. Participation, in contrast, simply offers the board viewpoints that it can accept or reject depending on its own interests and perceptions. Furthermore, whatever participation takes place must flow through channels and procedures defined by the board and staff themselves. Any representational structure can be readily altered, either to win more support or participation from influential external constituencies or to avert threats to the corporation's autonomy and interests. Public participation can also offer the board and other staff members in the corporate hierarchy a way to identify key actors from the outside and co-opt them into the regime by offering benefits or elevated status in

the corporation—including the ultimate reward, a seat on the all-powerful board.

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

Participation can displace accountability rather than improve it; that is the thesis of this article. The rest of the article is divided into three parts. The first provides the conceptual underpinnings of the thesis, analyzing the various modes of accountability that might be applied to ICANN and showing in abstract terms how ICANN employs public participation and representation as substitutes for accountability. The second part describes this process in empirical-historical terms, analyzing three structural reforms that have taken place in ICANN since 2003:

1. replacement of direct election of board members with the At Large Advisory Committee and Nominating Committee
2. structural changes in the Generic Names Supporting Organization (GNSO)
3. replacement of the Commerce Department Joint Project Agreement with an Affirmation of Commitments

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

## MODES OF ACCOUNTABILITY

Accountability can be divided into four categories, which relate in different ways to ICANN's three organizational models. *Direct* accountability allows people to influence an organization by voting for its key decision makers. It affords them a special status, such as membership or citizenship, which brings with it voting and other rights. *Exit* accountability allows members or citizens to abandon the organization if its policies or performance become unacceptable. *External* accountability consists of an oversight or appeals process conducted by an independent entity with the authority to reverse the organization's decisions or impose sanctions on it for misbehavior. Finally, *voice* accountability allows members or citizens to directly participate in a process and express their opinions. This involves deliberating over, formulating, and promoting desired decisions and policies as well as protesting or criticizing undesired decisions

and policies.<sup>2</sup>

Voice accountability is arguably the weakest of the four, unless it is combined with the other modes. Engaging in deliberations or expressing one's view about policy has no guaranteed effect on the actual decisions taken. If voice accountability is completely detached from direct, exit, and external accountability, it has no effect on an organization other than what the organization's decision makers choose to give it.

Table 1 shows how these four types of accountability are related to the different organizational types embodied in ICANN. A blank cell indicates that the organizational form in the column does not or cannot rely on that mode of accountability.

**Table 1. Modes of Accountability Mapped to Organizational Models**

|   | Organizational models   |                    |  |
|---|---|--------------------|--|
|   | Corporation   | Standards body     | Government entity                        |
| Direct accountability                   | Shareholders (profit)<br>Members (nonprofit)                        |                    | Citizenship and voting<br>Representation |
| Exit accountability<br>(competition)    | Competitive alternatives (profit)<br>Refusal to support (nonprofit) | Voluntary adoption |  |
| External accountability                 | Conformity to laws and<br>regulations                               |                    | Rule of law, judicial review             |
| Voice accountability<br>(participation) |   | Open participation | Lobbying, public hearings                |

### Direct Accountability

Both shareholders in for-profit corporations and members in nonprofit corporations can exercise direct accountability by voting for or against board members—literally helping to remove undesired decision makers from office or to place desired candidates on the board. Membership or shareholder status may confer other legal rights as well, such as a right to receive more information or to participate in certain processes.

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

A standards body, on the other hand, typically lacks any form of direct accountability. Some formal standards organizations may have members who are empowered to

2. See Weber 2009 for an interesting discussion of the Aarhus Convention and guarantees of a right to participation in international organizations.

vote to select officers or approve policies. But these should be characterized as non-profit corporations rather than as open, bottom-up organizations like the IETF.

### **Exit Accountability**

Competition is an important accountability mechanism. If an organization performs poorly, members can exit it—thus directly and tangibly punishing an organization for poor performance and, assuming a better alternative can be found, improving their own condition. For-profit corporations are normally subject to strong forms of exit accountability: their products and services can also be produced by other organizations. Nonprofit private corporations, if they are not tax-supported, are also subject to significant exit accountability. Members and funders can abandon them and start alternative organizations or transfer their support to other organizations if they are not satisfied.

Standards bodies are also subject to powerful forms of exit accountability. In most cases, no one has to adopt the standards they produce. If they want to be relevant they have to produce standards that are widely supported and meet the needs of the relevant constituencies.

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

### **External Accountability**

A corporation is potentially subject to different layers of external accountability. It is subject to externally defined laws and regulations. Most liberal-democratic governments are subject to external accountability, too. Ideally, the actions of states are subject to review by independent judges who can reverse or modify their decisions if they contravene established law or basic constitutional rights.

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

## Voice Accountability

Voice accountability is typically the least important accountability mode in the private corporation model. Corporations are not set up to encourage open public participation in the making of their decisions and policies. The corporate form of organization sets up a boundary between the general public and the owners or shareholders, who make decisions by and for themselves. While corporations may respond to strong and concerted expressions of negative public opinion, it is mainly because such expressions threaten to trigger some form of exit or external accountability.

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

Governments, too, rely heavily on voice if they are democratic in nature. The public's wishes are expressed in forms such as lobbying, public hearings, protests, petitions, and monitoring of news. But in governments, voice as a mode of accountability is clearly subordinate to direct accountability, just as voice accountability is subordinate to exit accountability in private corporations. In a governmental context, voice is primarily a means of gauging demand for policies, laws, and regulations. If public officials assess that demand correctly, they will be rewarded at the polls; if they judge it incorrectly or disregard it, they will be punished at the polls. If governments are not subject to direct accountability, voice tends to be disregarded or even suppressed.

Standards bodies, on the other hand, derive almost all of their legitimacy and accountability from the exercise of voice. Based on consensus, they style themselves as expert meritocracies, if not as Habermasian discourse communities (Froomkin 2003a). As such they have every incentive to at least listen to all sides of a controversy before making a decision. As with private corporations, the incentive to incorporate voice is strongly dependent on the prospect of exit or competition.

## ICANN and the Modes of Accountability

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

**Table 2.** ICANN and the Modes of Accountability

|                         | Present in ICANN? | Comments  |
|-------------------------|-------------------|---|
| Direct accountability   | No                | No membership, very indirect forms of board appointment (Nominating Committee, Supporting Organization elections)       |
| Exit accountability     | No                | Almost no possibility of a competing DNS root   |
| External accountability | Weak              | California nonprofit public benefit corporation law; a nonbinding, costly independent review process                    |
| Voice accountability    | Yes               | Extensive opportunities for public participation and comment; open treatment of information; accessible staff and board |

As indicated in table 1, private corporations typically rely primarily on the direct and exit modes of accountability. They are also subject to external regulation depending on the degree of monopoly power they have or the degree of public dependency on their operations. Corporations are not structured to rely heavily on voice accountability—or, if they are, it is merely an extension of their concern with exit accountability (competition).

ICANN's pattern is the exact opposite. It has no membership or shareholders to provide direct accountability. There is no credible exit option, aside from the costly, unlikely "nuclear option" of forming an alternate domain name system root. Despite having effective monopoly power over an essential facility, this private corporation is subject to rather limited forms of external accountability as well. This is explained by ICANN's unique mission: to provide a new form of global governance. In the nation-state system, the supply of external accountability in a transnational context is difficult and complicated. Either the corporation must be regulated by one national government (in which case the norms and laws involved will have no legitimacy outside that state) or it will require an international treaty (which involves governments in a host of costly, time-consuming negotiations and potentially undesirable or difficult-to-resolve political tradeoffs).<sup>3</sup> ICANN does have an independent appeals process based on a private arbitration model, known as the Independent Review Procedure (IRP),<sup>4</sup> which could be considered a form of external accountability. But the IRP is by design non-binding. Moreover, it is quite expensive if pursued seriously.<sup>5</sup> Thus it is at best a very

3. The "political oversight" debate engendered by the World Summit on the Information Society (2002-2005) provides a clear example of how contentious any attempt to apply external accountability to a global Internet governance agency can become.

4. This procedure is defined in Article IV, section 3 of the ICANN Bylaws.



weak form of external accountability.

In contrast, when it comes to voice accountability, ICANN far exceeds the standards of other international, intergovernmental organizations. With its extensive participatory mechanisms, it is more open than many national or local governmental agencies. No other private corporation known to this author opens up its processes to this degree. Thus, even though it is a private corporation it relies extensively, if not exclusively, on voice accountability.

What explains this unusual pattern? The answer proposed in this article is that ICANN's board and management employ participation (voice accountability) as an alternative to, and substitute for, the other forms of accountability. ICANN's massive emphasis on public participation can be interpreted as a kind of overcompensation for the glaring absence of direct, exit, and external accountability. The underlying logic is: "if you cannot control the corporation, be the corporation" or "if you do not like what we do, get involved and help us to do it differently." If larger and larger numbers of people can be convinced to exercise voice accountability within the corporation, ICANN can claim that its policies and actions are legitimate and accountable to the public because a broad and representative slice of the global public participated in formulating them.

This is not to suggest that this strategy of substitution is a conscious one intended to deceive or mislead the community of actors around ICANN. Rather, it is a logical response to the tensions created by the existence of three distinct organizational models in ICANN. ICANN consists of an all-powerful board with the legal and organizational authority to rule from the top down, yet this board coexists with norms and expectations derived from a bottom-up standards organization and a voter-accountable government agency. Given this board's utter independence from the normal forms of accountability associated with the corporate model and its obvious self-interest in remaining free of the other forms of accountability, ICANN has learned to develop ever more elaborate and extensive forms of participation as a response to the problem of accountability.

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

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

## ACCOUNTABILITY IN ICANN: HISTORICAL OVERVIEW

In 1998, as ICANN was being created, several factions argued that the only solution to the accountability problem was for ICANN to become a membership organization and for its members to directly elect the board. U.S. officials from the Clinton administration who oversaw the process agreed with this argument—despite the utter hostility with which the initial incorporators of ICANN, Jon Postel and Joe Sims, reacted to the suggestion. In its negotiations with the fledgling ICANN, the U.S. Commerce Department ultimately required it to develop a membership that would elect half of its board (Mueller 2002, 183-84).

### **The Flight from Direct Accountability: From Elections to ALAC**

Much of the scholarly and policy literature about the ICANN elections of 2000 (Klein 2001; Marlin-Bennett 2001; McDowell and Steinberg 2001; NAIS 2001; Weinberg 2001) discusses democracy in cyberspace and asks whether the elections were a success or a failure. This article is not concerned with that issue. Whatever the merits or flaws of elections as a means of placing people on the ICANN board, ICANN abolished its membership and its ability to directly elect board members near the end of 2002. In the place of individual membership, ICANN's board created the At Large Advisory Committee (ALAC) and the Nominating Committee. This was one of the first and most important structural changes in ICANN (Froomkin 2003b). It was the first step toward reconciling the inconsistencies in the three organizational models Palfrey identified and marked the ascendancy of the private corporation model. It was the beginning of the process of substituting participatory structures and corporate patronage relationships for direct modes of accountability. The 2002 reforms moved decisively away from direct accountability toward an advisory-participatory structure that had to be mediated and managed by ICANN's staff.

The Nominating Committee is now the primary mechanism for placing people on the board, having replaced elections. It appoints all board members except for the six elected by the Supporting Organizations. It also appoints voting members to the Councils of the Supporting Organizations and one third of the ALAC. The Nominating Committee consists of five members appointed by ALAC, nine members appointed by various constituencies or organs of the Supporting Organizations, two appointed by the sitting board of directors, and two from technical organizations. It vets board candidates in secret and selects most of its members on the basis of these private deliberations.

ALAC is a committee of fifteen people, three for each world region recognized by

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

The At Large Advisory Committee (ALAC) is the only organ of the At Large community that has any real and direct influence in the ICANN process. It gains this influence through its authority to appoint liaisons to the board, the GNSO Council, and other ICANN committees, and through its power to appoint five members to the important Nominating Committee. Recently, ICANN announced that it would allow ALAC to appoint a voting member to the board.<sup>6</sup>

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

The contrast between the approach before and after the reform is stark: a form of direct accountability that enfranchised billions of individual users (and thus, potentially tens of millions of direct voters) was replaced by a committee of fifteen people and a

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6. Prior to this ALAC was represented on the board by a nonvoting liaison.

Nominating Committee of about two dozen insiders. ALAC appoints people to the Nominating Committee, and the Nominating Committee appoints people to ALAC; self-reinforcing circularity is one of the most prominent features of ICANN's participatory structures.<sup>7</sup> If we compare voting to the At Large community as a means of organizing public collective action, we see radical differences. True, both permit civil society to participate in ICANN—and both cost significant sums of money. But in the At Large community, numerous gatekeepers and levels of indirection are superimposed on the process. The average member of the public, whose stake in domain name policy is small, is unlikely to have a strong enough incentive to devote the time it takes to become regularly involved in the complex, multitiered At Large community and attend numerous meetings or working group sessions. More importantly, the At Large approach makes civil society participation and input dependent upon support and management by the ICANN professional staff. Indeed, the At Large system can be viewed as a kind of patronage system through which people who are loyal to the corporation can be recruited, rewarded, and elevated while those who are not can be discouraged. There is no autonomy in the structure. For this reason, the At Large has been compared to a “company union” (Auerbach 2009, 34). A company union internalizes the bargaining relationship between the corporation and its employees and subjects it to corporate management. It replaces what is supposed to be an independent collective bargaining relationship with a participatory-negotiation structure defined and owned by the employer.

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

Thus, in the formation of the At Large community we see a clear move away from direct accountability to a staff-managed participatory structure that makes people part of and dependent upon the corporation. With ALAC's regional structure and its right

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7. For several years following the 2002 reforms, the fifteen members of the “interim ALAC” were appointed by the board or the Nominating Committee because there were no RALOs in existence yet.

to place representatives on important committees, we see some vague resemblance to the representational logic of which Palfrey wrote, but it is clear that political representation has been totally subordinated to the imperatives of the corporation, which develops an indirect structure that carefully assimilates participants into managed structures.

### **Flight from the Governmental Model: The GNSO Improvements**

In 2007, ICANN's Board Governance Committee proposed another round of reforms that promised to create a more representative and consensus-based policy-making process in its Generic Names Supporting Organization (GNSO).<sup>8</sup> These reforms were proposed in response to a surprisingly independent and accurate report assessing the GNSO produced by consultants from the London School of Economics. (LSE Public Policy Group and Enterprise LSE, 2006)

The story of the reforms' implementation reveals the simultaneous interaction of the three organizational models. The consensual, bottom-up standards organization and representative governmental agency models are both regularly invoked in the public dialogue on these reforms. But the private corporation model, while not explicitly discussed during the reforms, has emerged as dominant and drives the nature and direction of the changes.

#### **The GNSO Prior to the Reforms**

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

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

delegations, and the Internet technical community.

The GNSO has two main powers.<sup>9</sup> It appoints two members to the board, and its Council initiates the policy development process that governs generic domain names. From 2003 to 2009, the GNSO had six constituencies, which are categories of representation defined in the ICANN bylaws. Two of these constituencies were domain name supply industry interests: Registrars and Registries. They are called “contracting parties” because their very existence as businesses depends on having contracts with ICANN and these contracts are the mechanism used by ICANN to govern them. Three other constituencies were large business entities: the Business Constituency, the Intellectual Property Constituency, and the Internet Service Provider Constituency, which consists of large telecommunication companies. Finally, there was a Noncommercial Users Constituency (NCUC), which included public interest advocacy groups, universities, and education and research networks. NCUC has often resisted the demands of the commercial interest groups. Each of these constituencies elected representatives to the GNSO Council. Since 2003, registrars and registries have had two votes for every seat they have on the Council. In addition to the 18 council members elected by constituencies, three more were appointed by ICANN’s Nominating Committee.

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

In theory, the voting distribution of the pre-2009 GNSO Council created a rough balance between user and supplier interests, with twelve votes assigned to registries and registrars, twelve to the users, and three Nominating Committee appointees thrown in for an independent perspective. Right from the beginning of the SO, however, there was a glaring imbalance in its structure. Trademark holders, commercial users, and telecom firms form overlapping categories. They all include large commercial entities whose primary interest in domain name system policy is trademark protection.

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9. ICANN Bylaws, Article X. Version of August 17, 2009. <http://www.icann.org/en/general/bylaws.htm#X>.

**Table 3.** The GNSO Council Voting Distribution Before Reform

| Constituency               | Council seats | Votes | Grouping                   |
|----------------------------|---------------|-------|----------------------------|
| Registries                 | 3             | 6     | Domain name supply         |
| Registrars                 | 3             | 6     |                            |
| Intellectual property      | 3             | 9     | Trademark defenders        |
| Commercial users           | 3             |       |                            |
| Internet service providers | 3             |       |                            |
| Noncommercial users        | 3             | 3     | Public interest, nonprofit |
| Nominating Committee       | 3             | 3     | Mixed, independent         |
| Total                      | 21            | 27    |                            |

These three constituencies were, for all practical purposes, one big constituency; they held joint meetings at ICANN and voted together as a bloc over 90 percent of the time. Thus, the GNSO gave trademark-oriented commercial interests three times as many votes as noncommercial user interests. Indeed, before the 2002 reforms, which gave the contracting parties double-weighted voting, these trademark-oriented interests even had more votes than the contracting parties combined.

The current round of ICANN reforms started in September 2006, when the London School of Economics (LSE) Public Policy Group released a report assessing the GNSO (LSE Public Policy Group and Enterprise LSE 2006). The report was commissioned by ICANN itself, in line with its commitment to continually assess and improve its performance. While praising the GNSO's ability to "make possible the policy development processes which provide the foundations for ICANN's legitimacy as an open and global policy-making body for the Internet," (2006, 5) the report laid bare numerous flaws. One of them, revealingly, was that the ICANN board paid little attention to the GNSO and had few institutionalized channels for communicating with it.

The LSE report directed its most pointed recommendations at the GNSO's constituency structure. "The current pattern of Constituencies is relatively complex and no longer seems well-adapted to the needs of all stakeholders in the rapidly changing Internet community," the report said. (2006, 6) In particular, it noted that participation in the user constituencies was narrow and tended to be dominated by a small core of people: "The Constituencies show a mixed pattern of participation, with relatively high levels of involvement in two Constituencies covering Registries and Registrars, but relatively narrow participation in four others, covering business users, intellectual property, internet service providers and non-commercial users." (2006, 5-6) Note well: the report leveled the charge of nonparticipation equally at commercial and noncommercial users; however, as will be discussed below, the ICANN board selectively

directed that charge at noncommercial users only. "There are some worrying signs," the report said, "of dominance of some constituencies by a small core of people and of low participation rates in policy development work by Constituency members." The LSE report documented and legitimized longstanding complaints that there was no major distinction between the three business constituencies and that maintaining all three as separate constituencies simply multiplied the votes of the same interests.

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

ICANN's Board Governance Committee formed a working group (BGC-WG) to consider the recommendations and make specific proposals for reform. Formed on 30 March 2007, the BGC-WG was dominated by what one might call ICANN idealists—people who favor a bottom-up, consensus-oriented approach to policy making modeled on the institutions of the Internet technical community. It released its final recommendations in February 2008, and they were adopted by the board (ICANN Board Governance Committee 2008).

The BGC-WG proposed two main changes to the GNSO: (1) to adopt an IETF-style working group model as the basis for policy making and (2) to regroup GNSO constituencies into four broader stakeholder groups and restructure the GNSO Council and its voting along these lines. Superficially, it appears as if the first reform moved ICANN in the direction of the open, bottom-up standards organization model, and that the second moved it in the direction of a fairer representational structure in line with the governmental agency model. In fact, during the highly politicized process through which both changes were implemented, one can see how the centralization of power in the hands of the board subordinated both bottom-up and representational structures.

### **Working Groups**

In contrast to a more realistic view of policy formulation based on political science or political economy, the ICANN idealists equated policy making with what they



believe about deliberation over technical standards. They see policy making not as self-interested bargaining among organized interest groups over the distribution of costs and benefits created by binding regulations but as a process of deliberation and discussion among unaffiliated individuals seeking the best solution, the merits of which will be instantly recognized by disinterested participants and will, therefore, achieve consensus.<sup>10</sup> In line with this belief, they advocated that ICANN should model its policy processes on IETF and other Internet technical institutions that rely on working groups open to participation by anyone and use rough consensus among participants as the basis for agreement on technical standards.

In line with its idealist view, the BGC-WG wanted to move the council away from being a legislative body focused on voting toward a more strategic body that manages and oversees the policy development process. (ICANN Board Governance Committee 2008, 28). Voting, the BGC-WG claimed in its report, encourages division rather than cooperation. Open working groups managed by the council, they believed, would produce a more collaborative and inclusive approach. Under this new regime, the BGC-WG opined, the council's most important functions would be to guide the establishment of working groups and to monitor their progress. In the initial proposal of the BGC-WG, the council with its representational structure would not even vote to approve the working group's policies; it would simply prepare a statement that would accompany the policy proposal on the way to a board decision.

While this proposal would indeed have diminished the GNSO Council's legislative status, it would also, and as a direct result of that, concentrate more important forms of decision-making power in the staff and the board. The working group model relies heavily on management of the working groups by highly skilled chairs. This would undermine the role of the quasirepresentative legislative body (the GNSO and its council) and empower professional staff. The board would simply be given a document from a working group that had achieved some level of agreement and a cover letter from the GNSO Council. It could then do whatever it wanted with the report. Here we see two of the governance models Palfrey identified (standards body and government entity) directly subordinated to the private corporation model. The actual effect of the naive, technical-idealist approach to policy formation would be to give the board almost unlimited discretion over which working group policies it chose to adopt and which it did not, and a stronger role for staff in managing the process and selecting WG chairs. This assumes, of course, that working groups could ever succeed

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10. Political scientists and economists experienced with regulation might not accept these assumptions, but they are accurate descriptions of the premises of many people involved in ICANN.

in reaching consensus on divisive issues.<sup>11</sup>

### **GNSO Representation**

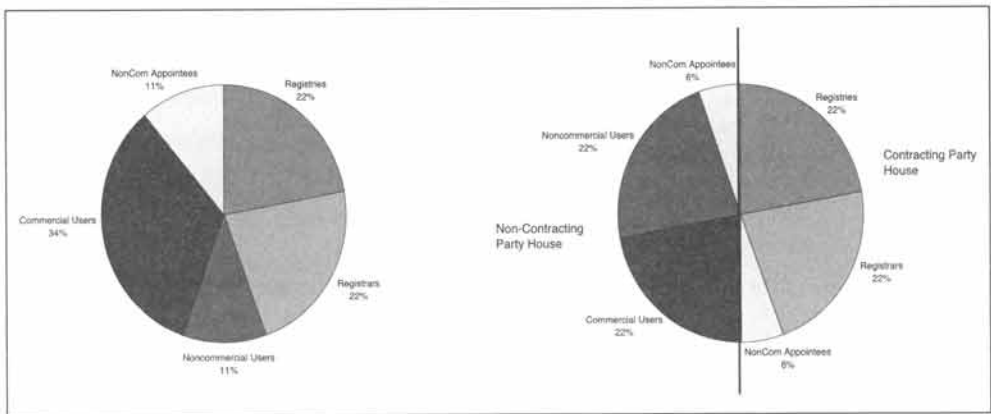
The Board Governance Committee seemed to approve of the LSE report's recommendation that the GNSO should be composed of broader groupings of stakeholders. The board viewed the lack of participation in the GNSO as a threat to its legitimacy. It eventually proposed that four broad groups be formed that would serve as the foundation for most GNSO functions: Registrars, Registries, Noncommercial Users, and Commercial Users. These would be called Stakeholder Groups. The final BGC-WG recommendations proposed to rebalance the GNSO Council into four stakeholder groups each with an equal share in Council representations (figure 1).

As the GNSO reforms were implemented, intense political competition developed among the groups involved. The commercial interest groups lobbied strenuously against the reduction of their voting power on the council. They did this by vocally attacking the net gains afforded to the Noncommercial Stakeholder Group (NCSG), claiming that NCUC, which would form the basis of the NCSG, was small and unrepresentative.<sup>12</sup> The ambitions of ALAC added another wrinkle to the complex politics. The chair of ALAC and a few others saw the expansion of the NCSG council seats as an opportunity to expand ALAC's influence within the ICANN structure. They thought of themselves as the representatives of civil society in ICANN and viewed

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11. ICANN tried the open working group model in dealing with Whois policy, which deals with access to information about domain name registrants. It found that while the open working group allowed some new actors to participate and did produce a report documenting where the parties agreed and disagreed, it was not able to overcome the entrenched differences between privacy advocates and open-access advocates (*Final Outcomes Report 2007*).
  12. The charge had no factual basis. In mid-2009, the GNSO's Business Constituency website listed 44 members (about the same size as the NCUC in mid-2008), and the Trademark Constituency's website listed 18 member organizations. The third commercial user constituency, the Internet Service Provider Constituency, did not even publish a membership list and, reflecting its dormant nature, had no messages posted on its email list in the first seven months of 2009. As for diversity, 58 percent of the Business Constituency's membership was based in the United States, and nearly all others were in Europe. The London School of Economics report showed that NCUC had the highest number of different people serving on the GNSO Council of any of the six constituencies in the time period 2001-2006. During that time NCUC had fifteen different people serve on the GNSO Council. In contrast, the ISPs and Business constituencies had the same three people representing them on the Council for nearly all of the GNSO's existence. The NCUC did, however, accept the need for broader participation and initiated a membership expansion campaign. By mid-2009 its membership had tripled.

NCUC as an obstacle to that special designation. Three ALAC members supported the formation of a new consumer constituency that would be composed almost entirely of At Large Structures. Likewise, a group of religious conservatives also proposed a new constituency. Organized under CP80, a Mormon group that strives to utilize ICANN and other Internet governance agencies to regulate pornography, they petitioned to form a cyber-safety constituency in the new NCSG. Given the proposed structure of the NCSG favored by the staff and board, any new constituency of this sort would split the six votes of noncommercial users evenly among the constituencies, creating a zero-sum game among the groups.

**Figure 1.** GNSO Council Distribution of Voting Power Before and After BGC-WG Reforms



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

In the end, a process of top-down decisions made by the board and staff undermined the promise of a new balance favoring noncommercial civil society. On July 30, 2009, the board declared, without referring to any objective standard, that the noncommercial interests organized under NCUC were "not sufficiently representative" to receive the

expanded number of seats on the council. In its bylaw amendments implementing the GNSO reforms, it allowed the NCUC to elect only three of the six seats assigned to the new Noncommercial Stakeholders Group and arrogated to itself the authority to appoint the additional three seats for the next two years at least. The board also refused to recognize CP80's cyber safety constituency (whose proposal was very unpopular among the technical community) and deferred action on the consumer constituency.

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

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

### **Flight from External Accountability: The Affirmation of Commitments**

The third ICANN reform discussed here is the Affirmation of Commitments (AoC), released September 30, 2009, at the expiration of the Joint Project Agreement (JPA) between the U.S. Commerce Department and ICANN. Under the JPA, the Commerce Department exercised ongoing supervision of ICANN on a unilateral basis. U.S. unilateralism was a sensitive geopolitical issue, and many in the Internet community welcomed its demise. The AoC is a permanent agreement to adhere to certain principles and policy objectives, and in that respect could eventually open the door to a more globalized form of accountability.

The main argument for letting the JPA expire was that oversight by one government was inconsistent with ICANN's global mandate. The special U.S. role had influenced policy in numerous ways, some direct and some more subtle. The argument against letting the JPA expire was based on the concept of external accountability. Even those who opposed U.S. unilateralism and thought the JPA was dysfunctional expressed doubts about the wisdom of eliminating this tether to the one public authority that could, in theory at least, control ICANN. The AoC represents the end of one form of external accountability. What does it put in its place?

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

The process for conducting these reviews had not been defined at the time of this writing. But statements by the Governmental Advisory Committee chair at the Seoul ICANN meeting in October 2009 indicated that once again, the public will be offered voice accountability instead of any new form of external or direct accountability. As Governmental Advisory Committee chair Janis Karklins stated, "In my view, the review [should not be confined to] the review teams, but [should be] a community review. And we need to construct the process in a way that [the] community is involved from the very beginning to the very end in the review process" (Affirmation of Commitments Consultation 2009). The characteristic approach of making transparency and participation the solution to all problems was evident in Karklins' next comment:

Now, in my view, the work of review teams should be transparent to the extreme. . . . I mean they should be live video streamed or video cast. That everybody who wants to be present in the room should be present in live in the room. So that there shouldn't be any hidden moments when team does something that the community is not informed. In my view, this is the way how to ensure that there is no competition for being on these teams, because everybody will be . . . present in the room in meeting. (Affirmation of Commitments Consultation 2009)

Once again, members of the public will be afforded every opportunity to express their opinions about ICANN's performance—but what are the criteria used to assess performance, and who will have decision-making power to rectify any deficiencies? As always, it is the board and the board alone. The review panel recommendations are nonbinding.

As before, circularity characterizes the process. The review panels mandated by the AoC are selected by two people at the top of the decision-making chain in ICANN, so the panels are selected by the very people who are responsible for what ICANN does; moreover, the people selected as reviewers are required to be representative of ICANN's existing policy-making organs. In other words, the people who are being reviewed select the reviewers, from among the ICANN subunits already responsible for making policies. And because of that, any review panel is likely to reproduce the politics of ICANN at any given moment. A circular self-evaluation process is proposed instead of any real external accountability. ICANN has more autonomy than it did before.

### **CONCLUSION: UNDERSTANDING ICANN, INC.**

Although Palfrey was right about the presence of three distinct organizational models within ICANN, the story of the organization's evolution since 1999 is a story of how the private corporation governance model has assimilated and subordinated the other models. What makes ICANN the corporation troublesome is not its private nature, as is so often assumed, but the way it has monopoly control of a resource space critical to an entire global infrastructure while being completely disconnected from the normal accountability mechanisms that guide and constrain other corporations. Although it is a nonprofit organization, it has no members with specific interests that pay its dues and elect its officers to serve a well-defined mission—unlike, say, the regional Internet registries. Although it takes in a large and growing amount of revenue and stands at the center of a number of highly contentious commercial interests, it has no competitors, nor does it have corporate shareholders with the legal right and the economic incentives to see that it performs properly. Unlike a government, it has no citizens enfranchised to share in its power through election and representation. In the absence of these moorings, ICANN's mission is just to maintain and strengthen itself, by managing its relationship to the community of people who are forced to deal with it by virtue of its control of the domain name system. The self that it maintains and strengthens is its staff and a slowly expanding, self-selecting network of insiders who climb its organizational ladders to obtain influential positions. It optimizes its own

autonomy, stability, and revenue.

The concept of participation plays a central role in maintaining this process. Participation is ICANN's chief legitimizing principle. Each of the reforms discussed in this paper involves offering more participation—but at the price of less formal, less clear accountability. ICANN invites comment and participation ceaselessly. It offers it to civil society, governments, technologists, businesses—an exhausting array of opportunities for getting involved. But none of these forms of participation provides forms of engagement that have any clear, binding authority over what ICANN does. Indeed, ICANN's board-centered decision-making process allows its board and management to manipulate the channels of participation in a way that can undermine the autonomy of the participants.

While the concept and definition of civil society is problematic,<sup>13</sup> civil society influence and participation in international institutions is important because in global governance, there is no institutional structure to provide democratic governance through a global citizenry. The concept of civil society thus serves as a kind of proxy for the global public interest.<sup>14</sup> Without civil society, business and government are likely to make deals that serve narrow special interests. If ICANN's actions are to serve the public interest, it must provide civil society and individual users of the Internet a level of representation and influence that corresponds to the stakes they have in its policies and practices. And yet the practical and organizational challenges associated with reflecting the interests of large numbers of people with small stakes in an outcome are well known from collective action and institutional theory (Mueller, Page, and Kuerbis 2004; Olson 1966; Ostrom and Ostrom 1971; Stigler 1971; Skocpol 1999).

We need to think harder about the implications of a transnational, policy-making private corporation that permits and even encourages civil society involvement but acts to co-opt ambitious or acquiescent civil society actors and maintains significant top-down controls over their participation. While this institutional model is in many ways more open and probably also more responsive than the traditional intergovernmental international institution, we need to be aware of its dangers and flaws. Most importantly, we need to reassess the importance of public participation relative to harder forms of

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

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

public accountability (Delli Carpini, Cook, and Jacobs 2004). Participation may not be an adequate substitute for accountability mechanisms, and more participation may not be the answer to all of a global governance institution's problems.

Returning to Palfrey's (2004) article, its title and conclusion are, upon reflection, quite strange. The title announces "the end of the [ICANN] experiment." But the experiment that is ICANN has not ended, it continues. If anything, ICANN has grown in significance since Palfrey's paper was written. Palfrey concludes the article with the puzzling statement, "Those who care about democracy and technology should shift their attention away from ICANN, which is almost certainly now beyond repair, and toward the many greener fields in cyberspace." (Palfrey 2004, 473) Palfrey's article reflects the disappointment in the ICANN experiment that characterized many liberal, U.S.-based Internet advocacy groups following the "failed" 2000 elections; these groups have been absent from active participation in ICANN ever since. But what exactly does it mean to call upon them to "shift their attention away from ICANN" and turn to "greener fields"? Whether or not ICANN is truly "beyond repair," the admonition to shift attention away from it invokes the image of an ostrich with its head in the sand—the false and dangerous belief that things can't hurt you if you refuse to pay attention to them. ICANN is still an important institution in cyberspace, with control of critical resources. We must either take responsibility for repairing it, or mount efforts to shift its governance responsibilities elsewhere, or encourage the growth of technologies or institutions that can bypass it and undermine its authority. It is hard to conceive of a rationale by which those who care about free and fair Internet governance can simply ignore it.

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