

A FRESH START FOR ICANN

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EXECUTIVE SUMMARY

ICANN (the Internet Corporation for Assigned Names and Numbers) faces a serious challenge. Twelve years after its creation, it continues to earn low marks for institutional confidence because it is widely thought to lack sufficient accountability, transparency, and legitimacy. What confidence it does engender may be diminishing, now that the Joint Project Agreement has expired and with it the authority of the United States government to oversee ICANN's conformity with its institutional commitments.

Solving this problem without harming ICANN's capacity to act effectively turns out to be perplexing. ICANN depends on institutional confidence to carry out its mission of maintaining the global interoperability of the Internet, and that confidence may be slipping away because of insufficient accountability. At the same time, some of the most widely considered reform proposals will not work. Replacing supervision by the United States with supervision or control by an international organization, or by transforming ICANN itself into an international organization, would exacerbate ICANN's already prominent weaknesses by increasing the risk of bureaucratic sclerosis, capture, and corruption. The unworkability of these proposals appears to mire ICANN in an intolerable position. It must acquire the accountability it needs to survive, but some changes might make matters worse.

This white paper proposes a different approach. It aims to replace the previous oversight by the United States under the Joint Project Agreement with a fundamental reorganization of ICANN itself. Its structure should be reformed to ensure accountability, and its most basic structure and commitments should be reduced to a written charter. If ratified by a representative convention of ICANN constituents, such a charter could give ICANN the fresh start that the Affirmation of Commitments did not (and perhaps could not) accomplish. In this way, ICANN's accountability, transparency, and legitimacy can be strengthened without sacrificing the original vision on which it was founded: a private organization can be trusted to manage the technical coordination of the Internet as a global "network of networks." Understanding why such thoroughgoing reform deserves serious consideration requires an extended argument that describes ICANN today, the principal criticisms of it, how ICANN's structure defeats any effort to improve its accountability, and the structural changes to ICANN that should be included in the ratified charter.

Key provisions of the charter should include:

- Limit ICANN's authority to the narrow mission of carrying out the technical management and coordination of the Internet DNS and prohibit directors and officers from exceeding that authority. This is intended to hold ICANN's authority within the narrow technical purposes for which it was created and to prevent mission creep, where ICANN tries to resolve matters over which it has no authority.
- Put ICANN's principal obligations from the Affirmation of Commitments into the Charter, to give those obligations greater permanency. Require ICANN to maintain the security and stability of the Internet DNS without qualification or trade-off.
- Enumerate and check the powers of the board of directors. Board decisions should be subject to reversal, not merely reconsideration. Board members should be bound by the charter and the (revised) bylaws and removable if unfaithful to them.

- Remove the president as an *ex officio* member of the board of directors. Make him independent of the board, instead, with power to veto decisions that are manifestly inconsistent with the charter and bylaws.
- Create corporate members of record, place directors under fiduciary duties to those members, and authorize the members as a body to remove any director found to be out of compliance with the charter and bylaws. They would be authorized to bring a derivative action against the corporation or to submit a petition for review to the California Attorney General to enforce the charter and bylaws. Members also would be authorized to amend the charter by a 2/3 vote.
- Restrain ICANN's budget growth to 10% per year and its net uncommitted assets to the total annual budget of four years before. Require excess revenues to be redistributed for infrastructure and security improvements, WHOIS and contract compliance, and remote meeting facilities and a travel allowance for participation in ICANN's meetings and proceedings by ICANN constituents from developing countries.
- Establish a Board of Review with authority to reverse decisions of the board of directors.
- Make bylaws subject to amendment by a 2/3 vote of the board of directors and the charter subject to amendment by a 2/3 vote of all members of record.

INTRODUCTION

ICANN was created in 1998, guided by the principles and vision of the *DNS White Paper*.¹ It underwent restructuring in 2002, when ICANN's president sought to bolster its financial support and its Board of Directors' authority to act more definitively.² Events have demonstrated that ICANN must be fundamentally reformed again.

Its mission to manage and coordinate the Internet domain name system grows more indispensable, as the Internet grows more ubiquitous³ and valuable.⁴ Yet a growing chorus of critics has expressed disquiet, not with a particular policy or decision, but with the ICANN's institutional direction. This crisis of confidence marked ICANN's transition away from supervision by the United States under the Joint Project Agreement.⁵ Leading members of the Internet community asked the U.S. to renew the JPA, or at least to extend it long enough to devise a workable substitute. This criticism was not quelled by the adoption of the Affirmation of Commitments. Confidence in ICANN may have diminished even further, now that the JPA has expired and with it the authority of the United States government to oversee ICANN's conformity with its institutional commitments.

The moment holds both danger and opportunity. The danger is that distrust of ICANN could prompt major institutions to withdraw their support from it and to pursue other alternatives for the technical management of the Internet DNS. The opportunity lies in giving ICANN a fresh start, to rethink its institutional character from the ground up, and to explore where persistent criticisms can be resolved with enduring changes.

Reimagining ICANN, one is struck by the perplexity of its challenges. It must become more accountable, or the international support it needs to succeed will continue to slip away and its authority to manage the technical management and coordination of the Internet DNS could be threatened. Without accountability, there can be neither transparency nor legitimacy because the same organizational habits or practices that inhibit accountability tend to inhibit transparency and legitimacy too. Replacing supervision by the United States with supervision or control by an international organization, or by transforming ICANN into an international organization, could exacerbate ICANN's already prominent weaknesses by adding to them bureaucratic sclerosis, capture, and corruption.

A compelling answer to this problem is to reform ICANN's structure fundamentally. Its powers, especially the powers of its Board of Directors, should be limited and checked. The Board's decisions should be subject to reversal, not just reconsideration. ICANN should be

¹Nat'l Telecom. & Information Agency, Statement of Policy, *Management of Internet Names and Addresses*, 63 Fed. Reg. 31741 (June 10, 1998) ("*DNS White Paper*").

² M. Stuart Lynn, The President's Report: ICANN—The Case for Reform, Feb. 28, 2002, <http://www.icann.org/en/general/lynn-reform-proposal-24feb02.htm>.

³ See Int'l Telecom. Union, *Key Global Telecom Indicators for the World Telecommunication Service Sector*, available at http://www.itu.int/ITU-D/ict/statistics/at_glance/KeyTelecom99.html (reporting that in 2008 there were 1.54 billion Internet users around the world).

⁴ See, e.g., U.S. Census Bureau, E-Stats, May 28, 2009, at 3, available at <http://www.census.gov/econ/estats/2007/2007reportfinal.pdf> (noting that U.S. retail sales online amounted to nearly \$127 billion in 2007, the last year for which that figure was recorded).

⁵ Joint Project Agreement Between the U.S. Dep't of Commerce and the Internet Corporation for Assigned Names and Numbers (Sept. 29, 2006), <http://www.icann.org/en/general/JPA-29sep06.pdf> ("JPA").

authorized to carry out the technical functions for which it was created but prohibited from indulging in mission creep by assuming authority over policy matters best decided by governments and other accountable entities. Financial controls should be placed on the Board's capacity to raise and spend revenues. Internal reform can then replace external supervision by the United States under the JPA as a means of ensuring accountability. With greater accountability will presumably come improved transparency, as power is dispersed. ICANN's legitimacy would be enhanced by requiring ICANN's newly reformed structure to be reduced to a written charter and presented to a representative convention for ratification. In this way, ICANN's accountability, transparency, and legitimacy can be strengthened without sacrificing the original vision on which it was founded: a private organization can be trusted to maintain the global interoperability of the Internet.

Understanding why such thoroughgoing reform deserves serious consideration requires an extended argument that falls into four parts. First, this white paper describes ICANN, its current structure, powers, and relationship with the United States. Second, it describes recurring criticisms of ICANN as an institution, criticisms that figured prominently during the transition from the JPA to the Affirmation and that have been bolstered by subsequent events. Third, it explains why ICANN's current structure will permanently defeat any attempt to resolve the most basic criticisms of it. Fourth, it recommends the adoption of a written charter for ICANN by a ratifying convention composed of a diverse body of members taken from the key constituencies of the Internet community and explains how it will end ICANN's crisis of confidence by resolving the most basic criticisms of it.

ICANN is too important an organization to be left floundering. Its successes in managing and coordinating the Internet DNS are a central reason why the Internet has become a potent force for good, enabling international communications and commerce in ways that were unknown only a few years ago. Its failure to earn the confidence of the community it serves undermines those successes. Reform will come, one way or another, because ICANN's mission is too critical to be left in any but the most trustworthy hands for long. By taking up reform now, when it can be considered intelligently, all who rely on the Internet can avoid the consequences of delaying reform until it is compelled by circumstance.

I. ICANN TODAY

ICANN is a unique marriage of form and function.⁶ It combines the legal form of a private corporation with the functions of an international telecommunications authority. Its corporate structure is complex. Describing its component parts in detail, the modes of selection and removal for each, and their interrelationships, is necessary to understand precisely how ICANN is organized and how structural reform would improve it.

⁶ See Centre for Global Studies, *Enhancing Legitimacy in the Internet Corporation for Assigning Names and Numbers: Accountable and Transparent Governance Structures*, Sep. 18, 2002, at 1 (“*Enhancing Legitimacy*”) (“ICANN is a unique organization. There is no parallel for this public-private corporation, with its regulatory functions that have material consequences across a broad spectrum of interests...”), available at https://www.policvarchive.org/bitstream/handle/10207/15547/icann_enhancelegitemacy.pdf?sequence=1.

A. ICANN's Current Form and Structure

As a matter of strict legal form, ICANN is a corporation, “organized under the California Nonprofit Public Benefit Corporation law for charitable and public purposes.”⁷ Its headquarters are in Marina Del Rey, California, and its organization under California law subjects it to California law and U.S. federal law.⁸ ICANN has formally committed to maintain this legal status and a U.S. headquarters.⁹

ICANN is governed by a Board of Directors,¹⁰ which holds complete authority to conduct ICANN's affairs.¹¹ The Board is composed of 15 voting members, one of whom is the President *ex officio*, and 6 non-voting liaisons.¹² Selection of voting members is distributed among supporting organizations and advisory committees that purport to represent different constituent groups within the Internet community. A majority of 8 voting members of the Board are selected by the Nominating Committee,¹³ whose 17 voting members are selected in turn by the At-Large Advisory Committee (“ALAC”), the Generic Names Supporting Organization (“GNSO”), the Council of the Country Code Names Supporting Organization (“ccNSO”), a representative of “academic and similar organizations,” the Internet Engineering Task Force (“IETF”), and the ICANN Technical Liaison Group.¹⁴ Two voting members of the Board of Directors are selected by the Address Supporting Organization (“ASO”), two by the ccNSO, and two by the GNSO.¹⁵ One non-voting liaison each is selected by the Government Advisory Committee (“GAC”), the Root Server System Advisory Committee (“RRSAC”), the Security and Stability Advisory Committee (SAC), the Technical Liaison Group, ALAC, and IETF.¹⁶

Directors hold office during staggered terms of three years each;¹⁷ non-voting liaisons are appointed for terms that begin when ICANN's annual meeting concludes, and each body

⁷ Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, § 3 (rev. Nov. 21, 1998) (“Articles of Incorporation”).

⁸ *Accord ICANN, Accountability & Transparency: Frameworks and Principles*, at 17 (Jan. 2008) (“*Frameworks and Principles*”) (acknowledging that ICANN is “subject to both the state laws of California, and United States federal laws”).

⁹ Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers, Sep. 30, 2009, at 2 (“Affirmation”) (committing ICANN to “remain a not for profit corporation, headquartered in the United States of America”).

¹⁰ Bylaws for Internet Corporation for Assigned Names and Numbers, art. 2, § 1 (as amended 30 Sep. 2009) (“Bylaws”) (“the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board”).

¹¹ *Frameworks and Principles*, at 5 (“Under California corporate law, ICANN's Board of Directors is charged with overall responsibility for the management of the business and affairs of the corporation.”).

¹² Bylaws, art. 6, § 1 (composition of the Board); art. 6, § 2.1.e (membership of President *ex officio* as a voting member of the Board).

¹³ *Id.* at art. 6, § 2.1(a).

¹⁴ *Id.* at art. 7, § 2.

¹⁵ *Id.* at art. 6, § 2.1(b)-(d).

¹⁶ *Id.* at art. 6, § 9.1(a)-(f).

¹⁷ *Id.* at art. 6, § 2.1(b)-(d).

that appoints them gives notice of its liaison one month before the annual meeting begins.¹⁸ A director may be removed by a $\frac{3}{4}$ vote of the Board, following notice to that director and the supporting organization that selected him (if any).¹⁹ A non-voting liaison may be removed by a $\frac{3}{4}$ vote of the Board too, unless the liaison was selected by the GAC.²⁰ In that event, the Board may determine by a $\frac{3}{4}$ vote to request that the GAC replace its liaison.²¹

Its bylaws state that ICANN has four officers, including the president, secretary, and chief financial officer.²² The president is the chief executive officer and is elected by the Board of Directors in an annual election on the recommendation of the Chairman of the Board.²³ Other officers are elected by the Board on the recommendation of the president.²⁴ The president, secretary, and CFO remain in office until they resign, become disqualified to serve, are removed, or are replaced by a successor.²⁵ “Any Officer may be removed, either with or without cause, by a two-thirds (2/3) majority vote of all the members of the Board.”²⁶

The president, as ICANN’s CEO, is “in charge of all of its activities and business.”²⁷ Other officers and staff report to him, and he serves as an *ex officio* member of the Board of Directors with “all the same rights and privileges of any Board member.”²⁸ In addition, the president may “call special meetings of the Board” and “discharge all other duties as may be required by these Bylaws and from time to time may be assigned by the Board.”²⁹

ICANN bylaws provide for an ombudsman with the authority to “facilitate the fair, impartial, and timely resolution of problems and complaints that affected members of the ICANN community (excluding employees and vendors/suppliers of ICANN) may have with specific actions or failures to act by the Board or ICANN staff which have not otherwise become the subject of either the Reconsideration or Independent Review Policies.”³⁰ The ombudsman is appointed by the Board of Directors for an initial two-year term, which may be renewed.³¹ He may be dismissed only by a $\frac{3}{4}$ vote of all directors.³²

¹⁸ *Id.* at art. 6, § 9.2.

¹⁹ *Id.* at art. 6, § 11.1.

²⁰ *Id.* at art. 6, § 11.2.

²¹ *Id.* at art. 6, § 11.2.

²² *Id.* at art. 13, § 1.

²³ *Id.* at art. 13, §§ 1-2.

²⁴ *Id.* at art. 13, § 2.

²⁵ *Id.* at art. 13, § 2.

²⁶ *Id.* at art. 13, § 3.

²⁷ *Id.* at art. 13, § 4.

²⁸ *Id.* at art. 13, § 4.

²⁹ *Id.* at art. 13, § 4.

³⁰ *Id.* at art. 5, § 3.1.

³¹ *Id.* at art. 5, § 1.2.

³² *Id.* at art. 5, § 1.3.

Decisions of the Board may be reviewed through reconsideration or by an Independent Review Panel.

A request for reconsideration may be brought to correct the acts or omissions of staff members or a decision of the Board that did not have material information before it.³³ Such a request must be directed to the Board Governance Committee, which may “(a) evaluate requests for review or reconsideration; (b) determine whether a stay of the contested action pending resolution of the request is appropriate; (c) conduct whatever factual investigation is deemed appropriate; (d) request additional written submissions from the affected party, or from other parties; and (e) make a recommendation to the Board of Directors on the merits of the request.”³⁴ However, the Board is not bound by the committee’s recommendation.³⁵

Review by an Independent Review Panel (IRP) is available for a “person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws.”³⁶ Such a Panel is provided by an international arbitration authority, appointed by ICANN.³⁷ The Panel is authorized to “(a) request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties; (b) declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and (c) recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.”³⁸ As with the process of reconsideration, the Board is not bound by an IRP declaration.³⁹

ICANN uses a bottom-up policy-making process, in keeping with the principles of the *DNS White Paper*.⁴⁰ To that end, it relies on supporting organizations (GNSO, ASO, ccNSO) and advisory committees (GAC, RSSAC, SAC, ALAC), classified by the presumed subject matter expertise or interest of its members that are assigned advisory and policy-making responsibilities accordingly.⁴¹ None of these organizations displaces the Board’s primacy as the sole decision-making authority for ICANN. Supporting organizations are not delegated

³³ *Id.* at art. 4, § 2.2.

³⁴ *Id.* at art. 4, § 2.3(a)-(d) (punctuation altered).

³⁵ *Id.* at art. 4, § 2.18 (“The Board shall not be bound to follow the recommendations of the Board Governance Committee.”).

³⁶ *Id.* at art. 4, § 3.2.

³⁷ *Id.* at art. 4, § 3.3.

³⁸ *Id.* at art. 4, § 8(a)-(c) (punctuation altered).

³⁹ *Id.* at art. 4, § 15 (“Where feasible, the Board shall consider the IRP declaration at the Board’s next meeting.”). The nonbinding nature of an IRP declaration was recently affirmed in the first IRP determination issued under ICANN’s bylaws. *See In re ICM Registry, LLC v. Internet Corporation for Assigned Names and Numbers*, Int’l Centre for Dispute Resolution, ICDR Case No. 50 117 T 00224 08, at 61 (Feb. 19, 2010) (“*ICM Registry*”) (“[T]he intention of the drafters of the IRP process was to put in place a process that produced declarations that would not be binding and that left ultimate decision-making authority in the hands of the Board.”).

⁴⁰ *See DNS White Paper*, at 31749 (“The private [coordinating] process should, as far as possible, reflect the bottom-up governance that has characterized development of the Internet to date.”).

⁴¹ *See generally* Bylaws, arts. 8-11.

authority to act for ICANN and its bylaws expressly prohibit any advisory committee from doing so.⁴² Indeed, the Board of Directors' assertion of authority vis-à-vis the national governments whose representatives populate GAC is extraordinary. Even concerning matters of public policy, the Board reserves the authority to "take an action that is not consistent with the Governmental Advisory Committee advice," and if no "mutually acceptable solution" can be found, the Board need only "state in its final decision the reasons why the Governmental Advisory Committee advice was not followed."⁴³

That the Board holds unchallengeable authority is likewise established by ICANN's decision not to have statutory members, as provided for under California law.⁴⁴ "ICANN is accountable to the global community, however the nature of ICANN's unique mission does not permit 'members' of the organization that could exert undue influence and control over ICANN's activities. Thus by not having any statutory members, ICANN is accountable to the public at-large rather than to any specific member or group of members."⁴⁵ While ICANN cites the board's "fiduciary duties," such as the duties of "care, inquiry, loyalty and prudent investment," these are said to run "to the public at-large rather than to any specific member or group of members."⁴⁶

ICANN's revenues principally come from registries and registrars. Afilias, Neustar, Verisign, and other registries manage root zone space and gTLD space like .com, .info, and .biz. Registrars like GoDaddy and Network Solutions sell domain addresses to individual buyers.⁴⁷ ICANN charges (1) transaction fees from registrants of domain names through accredited registrars and gTLD registries that are "charged based upon a set rate per domain name registration, renewal, or transfer" and (2) fixed fees paid by registrars and registries "based on amounts set in their contracts for services rendered and/or rights given."⁴⁸ ICANN's economic power has increased dramatically in the past five years. Audited financial reports show that between 2005 and 2009 ICANN's total support and revenues rose from \$17.80 million to \$60.24 million.⁴⁹ During that same period its wealth in the form of unrestricted net assets skyrocketed from \$8.23 million to \$53.27 million.⁵⁰ Although this year's financial report is not yet released, ICANN estimates that its revenues

⁴² *Id.* at art. 11, § 1 ("Advisory Committees shall have no legal authority to act for ICANN, but shall report their findings and recommendations to the Board.").

⁴³ *Id.* at art. 11, §§ 2.1(j), (k).

⁴⁴ *See id.* at art. xvii ("ICANN shall not have members, as defined in the California Nonprofit Public Benefit Corporation Law ... notwithstanding the use of the term 'Member' in these Bylaws, in any ICANN document, or in any action of the ICANN Board or staff."); Cal. Corp. Code § 5310(a).

⁴⁵ *Frameworks and Principles*, at 5.

⁴⁶ *Id.*

⁴⁷ Internet Corporation for Assigned Names and Numbers, *Independent Auditor's Report and Financial Statements, June 30, 2009 and 2008*, at 5 (Oct. 15, 2009) ("FY 2009 Financial Report"), available at <http://www.icann.org/en/financials/financial-report-fye-30jun09-en.pdf> ("ICANN's primary sources of revenue are from domain name registration activities and DNS service providers").

⁴⁸ *Id.*

⁴⁹ *Compare ICANN, Independent Auditors' Report and Financial Statements, June 30, 2006 and 2005*, at 3 (Aug. 25, 2006) ("FY 2006 Financial Report"), available at <http://www.icann.org/en/financials/financial-report-fye-30jun06.pdf> with FY 2009 Financial Report, at 3.

⁵⁰ *Id.*

for the fiscal year ending June 30, 2010 will be \$63.3 million and that it will increase its net assets by \$7.6 million.⁵¹ These figures mean that since 2005 ICANN's annual revenues have increased by 356% and its net assets have grown by a whopping 740%.

To review, ICANN is governed by a Board of Directors and led by a president. The Board's decisions are reviewable through a request for reconsideration or a referral to an Independent Review Panel, neither of whose recommendations are binding. ICANN's policy-making is largely initiated by supporting organizations and advisory committees, which can make recommendations to the Board but cannot bind it. ICANN has no statutory members to whom the Board is answerable. And ICANN's financial health, as measured by the size of its annual budget and the amount of money it now holds in savings and investments, has increased dramatically in the past five years.

B. Exclusive Control of the DNS's Essential Technical Functions

ICANN carries out functions that are highly technical, including managing and coordinating the Internet DNS, defined as “domain names; Internet protocol addresses and autonomous system numbers; protocol port and parameter numbers.”⁵² More precisely, ICANN asserts the powers of “(i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol (‘IP’) address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system (‘DNS’), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv).”⁵³

Collectively known as the IANA (Internet Address Naming Authority) functions, ICANN performs these tasks pursuant to a purchase agreement with the U.S. government's National Telecommunication and Information Agency (“NTIA”).⁵⁴ Performance of the IANA functions is necessary to maintain “universal connectivity on the Internet.”⁵⁵ Also by necessity, a single entity must exercise monopoly control of these functions to prevent the Internet from splintering into an archipelago of isolated network islands, thereby destroying the global interoperability that is the Internet's *raison d'être*.⁵⁶ ICANN holds the unique power “to coordinate, at the overall level, the global Internet's systems of unique

⁵¹ ICANN, *The FY11 Operating Plan and Budget*, at 9 (May 17, 2010 draft), available at <http://www.icann.org/en/financials/proposed-opplan-budget-v1-fy11-17may10-en.pdf>.

⁵² Affirmation, at 1. n.1.

⁵³ Articles of Incorporation, § 3. ICANN's bylaws state its functions somewhat differently, asserting that ICANN “(1) Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are (a) Domain names (forming a system referred to as ‘DNS’); (b) Internet protocol (‘IP’) addresses and autonomous system (‘AS’) numbers; and (c) Protocol port and parameter numbers. (2) Coordinates the operation and evolution of the DNS root name server system. (3) Coordinates policy development reasonably and appropriately related to these technical functions.” Bylaws, art. 1, § 1 (punctuation altered).

⁵⁴ Procurement Contract between U.S. Dep't of Commerce and ICANN, Aug. 11, 2006, at § C.2.2.1.1-4 (“IANA Contract”) (describing the IANA functions to be performed by ICANN).

⁵⁵ Articles of Incorporation, § 3.

⁵⁶ Affirmation, at 1 (“global technical coordination of the Internet's underlying infrastructure—the DNS—is required to ensure interoperability”); *accord DNS White Paper*, at 31749.

identifiers.”⁵⁷ This exclusive authority over the management and coordination of the Internet DNS gives ICANN control over who may access the Internet and possess space there.⁵⁸

C. Relationship between ICANN and the United States

ICANN was formed by “[p]rivate sector interests”⁵⁹ to carry out the DNS Project, the “process of transitioning to private sector leadership these [IANA] coordination and management functions.”⁶⁰ Until last fall, the JPA was one of “two distinct legal arrangements”⁶¹ that defined the relationship between ICANN and the U.S. government. One was the JPA, the other was (and is) the IANA Contract. Where the IANA Contract authorizes ICANN to perform the IANA functions, the JPA was the last iteration of a series of agreements between ICANN and the U.S., beginning with a Memorandum of Understanding executed in 1998.⁶² These agreements obligated ICANN to abide by certain institutional principles with the goal of “transition[ing] the coordination of DNS responsibilities, previously performed by the U.S. Government or on behalf of the U.S. Government, to the private sector so as to enable industry leadership and bottom-up policy making.”⁶³ In other words, the JPA contained the institutional principles by which ICANN agreed to conduct its business, so that it would become sufficiently mature for the U.S. to transition the IANA functions to it.

⁵⁷ Bylaws, art. 1, § 1.

⁵⁸ A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 Duke L.J. 17, 46-47 (2000) (“*Wrong Turn*”) (“Control of the root potentially confers substantial economic and political power. The root determines which TLDs are visible to the vast majority of Internet users. The most naked exercise of this power involves deciding what data is contained in the single data file that comprises the root. Given current Internet architecture and customs, the data in that file determines which gTLDs the vast majority of Internet users can access.”); accord Kees De Vey Mestdagh & Rudolf W. Rijgersberg, *Rethinking Accountability in Cyberspace: A New Perspective on ICANN*, 21 Int’l Rev. of Law, Computers & Tech. 21, 22 (2007) (“*Rethinking Accountability*”) (“The root zone file is the master file from which the DNS gets its data. In effect, controlling the root means controlling Internet because deletions and additions to this file affect the top of the Internet’s universe.”). Technically, access to the root zone depends on cooperation between ICANN and the U.S. government, and access to the Internet could be denied by denying access to the root zone. See IANA Contract, at § C.4.1 (“This purchase order, in itself, does not authorize modifications, additions, or deletions to the root zone file or associated information”). Such a denial is not the only means by which ICANN may deny access to the Internet, however. It might also refuse to authorize acquisition of a particular domain address or TLD.

⁵⁹ NTIA, Notice of Inquiry, *Assessment of the Transition of the Technical Coordination and Management of the Internet’s Domain Name and Addressing System*, 74 Fed. Reg. 18688, 18689 (Apr. 24, 2009) (“NOI”).

⁶⁰ *Id.*

⁶¹ Letter from Meredith A. Baker, Acting Assistant Secretary for Communications and Information, U.S. Dep’t of Commerce, to Peter Dengate-Thrush, Chairman of the Board of Directors, ICANN, July 30, 2008, at 1, http://www.ntia.doc.gov/comments/2008/ICANN_080730.pdf (“Baker Letter”). Interestingly, this letter is missing from the chronological listing of correspondence on ICANN’s website. See <http://www.icann.org/correspondence/>.

⁶² Memorandum of Understanding Between the U.S. Department of Commerce and the Internet Corporation for Assigned Names and Numbers (Nov. 25, 1998), available at <http://www.ntia.doc.gov/ntiahome/domainname/icann-memorandum.htm>.

⁶³ NOI, at 18689.

Executed on September 29, 2006, the JPA stated that it “will terminate on September 30, 2009.”⁶⁴ By its terms ICANN agreed to publish an annual report “that sets out ICANN’s progress against” its bylaws, Responsibilities, and strategic and operating plans.⁶⁵ It also agreed to “take action on the Responsibilities set out in the Affirmation of Responsibilities,” to which ICANN’s Board of Directors had agreed by resolution and which were contained in Annex A to the JPA.⁶⁶ Those Responsibilities included (1) “to ensure the stable and secure operation of the Internet’s unique identifier systems; (2) “to encourage improved transparency, accessibility, efficiency, and timeliness in the consideration and adoption of policies related to the technical coordination of the Internet DNS, and funding for ICANN operations”; (3) “to develop, test, maintain, and improve on accountability mechanisms ... including continuing to improve openness and accessibility for enhanced participation in ICANN’s bottom-up participatory policy development process.”⁶⁷

The U.S. Department of Commerce accepted correlative responsibilities. These included giving ICANN “expertise and advice on methods and administrative procedures to encourage greater transparency, accountability, and openness in the consideration and adoption of policies related to the technical coordination of the Internet DNS.”⁶⁸ In addition, the Department agreed “to monitor the performance of the activities conducted pursuant to this Agreement” and, specifically, to “conduct a midterm review of progress achieved on each activity and Responsibility that will include consultation with interested stakeholders.”⁶⁹

NTIA conducted its midterm review of ICANN’s performance under the JPA through a public comment period and a public meeting, held between November 2007 and February 2008. The comments it received led NTIA to conclude that “ICANN has made significant progress in several key areas, but most participants agree that important work remains to increase institutional confidence through implementing effective processes that will enable: long term stability; accountability; responsiveness; continued private sector leadership, stakeholder participation; increased contract compliance; and enhanced competition.”⁷⁰

⁶⁴ JPA, at 2.

⁶⁵ *Id.* at 1.

⁶⁶ *Id.* at 2. The title of the ICANN board’s superficially self-chosen obligations—the Affirmation of Responsibilities—may be where the curious title of the Affirmation of Commitments originated.

⁶⁷ *Id.*, Annex A, at 1.

⁶⁸ *Id.* at 1.

⁶⁹ *Id.* at 1, 2.

⁷⁰ NTIA, Statement on the Mid-Term Review of the Joint Project Agreement (JPA) Between NTIA and ICANN, April 2, 2008, at 1, available at http://www.ntia.doc.gov/ntiahome/domainname/ICANN_JPA_080402.pdf; accord Testimony of Fiona M. Alexander, Assoc. Administrator, Office of Int’l Affairs, NTIA, Before the House Subcomm. on Commc’ns, Tech. and the Internet, Comm. on Energy and Commerce, U.S. House of Reps., Hearing on Issues Concerning ICANN, June 4, 2009, at 3, available at http://www.ntia.doc.gov/ntiahome/domainname/ICANN_JPA_080402.pdf (“This review process revealed that, while some progress had been made, there remained key areas where further work was required to increase institutional confidence in ICANN. Specifically, these areas included: long-term stability; accountability; responsiveness; continued private sector leadership; stakeholder participation; increased contract compliance; and, enhanced competition.”).

In April 2009, NTIA issued a Notice of Inquiry or NOI seeking “comments regarding the progress of the transition of the technical coordination of and management of the Internet DNS to the private sector, as well as the model of private sector leadership and bottom-up policy development which ICANN represents.”⁷¹ That notice posed several questions for public comment, amounting to a fundamental reconsideration of ICANN and its mission.

The NOI asked whether the principles of the *DNS White Paper*—stability, competition, private, bottom-up coordination, and representation⁷²—were “still the appropriate principles” and whether “these core principles have been effectively integrated into ICANN’s existing processes and structures.”⁷³ It asked whether the goal of privatizing the coordination of DNS responsibilities was “still the most appropriate model to increase competition and facilitate international participation in the coordination and management of the DNS,” while maintaining “the security and stability of the DNS” and whether “the processes and structures currently in place at ICANN [are] sufficient to enable industry leadership and bottom-up policy making.”⁷⁴ NTIA likewise asked what steps ICANN had taken to address the mid-term review’s conclusion that it needed to “increase institutional confidence related to long-term stability, accountability, responsiveness, continued private sector leadership, stakeholder participation, increased contract compliance, and enhanced competition.”⁷⁵ The government then asked the largest questions of all, whether “sufficient progress has been achieved” to complete the transition of the technical coordination and management of the Internet DNS to ICANN and whether there are “sufficient safeguards in place to ensure the continued security and stability of the Internet DNS, private sector leadership, and that all stakeholder interests are adequately taken into account” and whether, in closing, such safeguards are “mature and robust enough to ensure protection of stakeholder interests and the model itself in the future.”⁷⁶

These questions prompted several ICANN constituents to request that the U.S. extend the JPA until ICANN had demonstrated a stronger record of accountability. Despite such calls, the U.S. government allowed the JPA to expire and entered the Affirmation of Commitments with ICANN instead, which endorsed the *DNS White Paper’s* model of delegating management and coordination of the Internet DNS to a private corporation.⁷⁷

As of October 1, 2009, ICANN’s relationship with the United States is formed by the IANA Contract and the Affirmation. The Affirmation differs from the JPA, mainly in that it does not authorize the U.S. government to monitor ICANN’s progress toward meeting its institutional benchmarks or to conduct periodic reviews,⁷⁸ and it has no expiration date.⁷⁹

⁷¹ NOI at 18689.

⁷² See *DNS White Paper*, at 31749.

⁷³ NOI at 18689 (punctuation altered).

⁷⁴ *Id.* (punctuation altered).

⁷⁵ *Id.* at 18690 (punctuation altered).

⁷⁶ *Id.* (punctuation altered).

⁷⁷ Affirmation, at 1 (stating the U.S. government’s “commitment to a multi-stakeholder, private sector led, bottom-up policy development model for DNS technical coordination that acts for the benefit of global Internet users.”).

⁷⁸ *Id.* at 2 (“ICANN is a private organization and nothing in this Affirmation should be construed as control by any one entity.”).

In place of external supervision, the Affirmation states that ICANN will commit two kinds of voluntary reviews. A form of internal review commits ICANN to “perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS.”⁸⁰ Such ongoing internal reviews are separate from the periodic reviews conducted by “volunteer community members,” which are aimed at measuring ICANN’s transparency and accountability and whether it acts in the public interest; its implementation of the security plan and whether that plan is sufficiently effective and robust to meet current and future challenges and threats; and whether expanding the availability of new gTLDs (if implemented) will have promoted competition, consumer trust and consumer choice, and the effectiveness of the application and evaluation process for new gTLDs.⁸¹

ICANN is a complex organization with the unique responsibility to manage and coordinate the technical requirements necessary to preserve the Internet as a single interoperable network across the globe. Its relationship with the United States has recently passed a milestone, as the soft oversight of the JPA has given way to a greater independence of the Affirmation.

II. PERSISTENT CRITICISMS: ACCOUNTABILITY, TRANSPARENCY, AND LEGITIMACY

ICANN has attracted heated controversy since its creation.⁸² Much of that controversy has concentrated on the complaints that ICANN is deficient in its accountability, transparency, and legitimacy.⁸³ While analytically distinct, critics have rightly perceived that these principles are interconnected.⁸⁴ Such interconnections explain why comments and criticisms about ICANN’s institutional structure and performance often drift among these principles and why many more comments specifically mention lack of accountability, while fewer offer more than a passing mention of transparency and legitimacy. It is well understood that all three principles serve the single end of engendering institutional trust.

These themes of accountability, transparency, and legitimacy have appeared in reports commissioned by ICANN itself.

⁷⁹ *Id.* at 5 (“The agreement is intended to be long-standing, but may be amended at any time by mutual consent of the parties.”).

⁸⁰ *Id.* at 1.

⁸¹ *See id.* at 3-4.

⁸² *See generally* U.S. General Acc’g Office, Office of the General Counsel, *Department of Commerce: Relationship with the Internet Corporation for Assigned Names and Numbers*, B-284206 (July 7, 2000), available at <http://www.gao.gov/archive/2000/og00033r.pdf>.

⁸³ *See* National Research Council, *Signposts in Cyberspace: The Domain Name System and Internet Navigation* 198 (2005) (“*Signposts*”), available at <http://www.nap.edu/catalog/11258.html> (“The concerns about management processes have included the lack of transparency, effectiveness, accountability, and recourse in ICANN’s electoral and decision processes.”).

⁸⁴ *See* Zoë Baird, *Governing the Internet*, 81 *Foreign Affairs*, No.6, at 20 (Nov./Dec. 2002) (“[I]ncreasing the perceived legitimacy of international governance institutions and regimes demands greater accountability and transparency”); *Signposts*, at 203 (“Many ICANN observers view accountability as an ‘essential component of legitimacy for ICANN.’”) (quoting Center for Democracy and Technology, “Comments of the Center for Democracy and Technology to the Committee on ICANN Evolution and Reform,” May 3, 2002, available at <http://www.cdt.org/dns/icann/020503ceir.shtml>).

One World Trust issued a lengthy report in 2007 acknowledging that “accountability and transparency are central to ICANN” but concluding that “while ICANN have the policies and procedures in place to foster transparency and accountability they are not always consistently followed.”⁸⁵ For example, the report found that ICANN provides an unusual amount of information on its website, but it needed to “improve their practice in explaining more clearly how stakeholder input is used when making decisions.”⁸⁶ Indeed, the report cautioned that “[i]f basic good practice principles such as explaining to stakeholders how their inputs made an impact on the final decision are not met, levels of engagement will fall.”⁸⁷ Despite these recommendations, ICANN has yet to implement them.⁸⁸

The same holds true of the recommendations proposed by the President’s Strategy Committee. Its report in February 2009 proposed 24 “detailed recommendations.”⁸⁹ Among them were measures to “enhance its public consultation process”⁹⁰ and manage its revenue growth “in line with ICANN’s not-for-profit status and its core mission and mandate.”⁹¹ Again, sensible recommendations—even when developed over an extensive three-year process at ICANN’s own request—have not been put into practice.⁹²

Concerns with ICANN’s deficient accountability, transparency, and legitimacy figured prominently among the published comments submitted to NTIA in response to the NOI issued in anticipation of the JPA’s expiration only last year. These recent comments offer an especially useful measure of ICANN’s institutional confidence as seen by some of its key constituents. What makes the NOI comments particularly useful as a barometer of public opinion about ICANN is that they are recent, on the record, and effectively framed as a

⁸⁵ One World Trust, *Independent Review of ICANN’s Accountability and Transparency – Structures and Practices*, at 7, 35 (Mar. 2007), available at <http://www.icann.org/en/transparency/owt-report-final-2007.pdf>.

⁸⁶ *Id.* at 5.

⁸⁷ *Id.*

⁸⁸ NeuStar, *NeuStar Response to NTIA’s Notice of Inquiry on ICANN and the Joint Project Agreement*, at 1, 4 (June 8, 2009) (“NeuStar Comments”), available at <http://www.ntia.doc.gov/comments/2009/dnstransition/042.pdf> (“ICANN must provide greater transparency and accountability surrounding recommendations made by staff and decisions made by its Board of Directors.... It is critical that ICANN not only identify and summarize comments that are received in its policy-making process, but ICANN should also identify comments that were not adopted and articulate [the] rationale for pursuing a different policy result.”).

⁸⁹ ICANN, *Draft Implementation Plan for Improving Institutional Confidence*, at 3 (Feb. 26, 2009), available at <http://www.icann.org/en/jpa/iic/draft-iic-implementation-26feb09-en.pdf>.

⁹⁰ *Id.* at 24 (“ICANN shall enhance its public consultation process, including strengthening the steps of providing detailed analysis of all comments received, acknowledging, synthesizing, and implementing them in decision-making as appropriate, and explaining the decision.”). This recommendation echoes the One World Trust report.

⁹¹ *Id.* at 31 (“In view of the rapid widening of ICANN’s revenue base due to the expansion of the Internet, and notwithstanding the possible effects of the present economic recession, consideration should be given to the management of ICANN’s future revenue growth in line with ICANN’s not-for-profit status and its core mission and mandate.”).

⁹² *See* NeuStar Comments, at 3 (“ICANN has increasingly expanded its activities and mission to justify its growing budgets rather than reduce its revenues to meet its narrow role as envisioned in the DNS White Paper and Memorandum of Understanding.”).

referendum on ICANN as an institution. The NOI asked whether the Internet community regarded the ICANN model as the right approach to DNS management, or whether community members had other models to recommend.⁹³ On these basic questions ICANN constituents were divided unevenly. Some argued that ICANN had matured sufficiently to manage and coordinate the Internet DNS, free from oversight.⁹⁴ Many more constituents requested, however gingerly, that the JPA or some form of substitute be extended beyond September 2009.⁹⁵ Their requests signaled that for much of the Internet community ICANN was yet unready to accept unsupervised stewardship for the Internet DNS.

Both NOI comments and related arguments made by other ICANN observers are summarized below. They demonstrate that a diverse range of ICANN constituents considers ICANN especially weak in accountability, transparency, and legitimacy.

Governments and government-affiliated organizations characterized ICANN's accountability as, at best, open to question. The European Union stated in a policy paper released during the NOI comment period that “[o]ne element of an evolution of the current governance system could be the completion of an *internal* ICANN reform leading to full accountability and transparency.”⁹⁶ Canada wrote that it “views transparency and accountability as important guiding principles” and that “several fundamental accountability questions remain to be addressed.”⁹⁷ The Spanish Internet Governance Forum identified “Board accountability mechanisms” as one of “three particular issues

⁹³ NOI, at 18689 (asking whether transitioning the coordination of the DNS to ICANN is “still the most appropriate model to increase competition and facilitate international participation in the coordination and management of the DNS, bearing in mind the need to maintain the security and stability of the DNS”) (punctuation altered).

⁹⁴ Internet Society, *Comments Submitted to the United States Department of Commerce, National Telecommunications and Information Administration*, at 1 (“The Internet Society recommends that the Joint Project Agreement be concluded, and that we declare a successful end to the DNS Project.”), available at <http://www.isoc.org/pubpolpillar/docs/ISOC-NOI-comments.pdf>; The Number Resource Organization, *NRO's Comments Submitted to the United States Department of Commerce, national Telecommunications and Information Administration's (NTIA) Notice of Inquiry (NOI)*, at 1 (June 5, 2009) (“the NRO supports the expiration of the JPA and believes that the objectives of the DNS Project have been sufficiently met for this purpose.”), available at <http://www.ntia.doc.gov/comments/2009/dnstransition/092.pdf>

⁹⁵ See, e.g., NeuStar Comments, at 2 (“NeuStar believes that it is in the best interests of the Internet community that the relationship between the Department of Commerce and ICANN should continue to exist until such time that the concerns raised in our response are fully addressed and resolved.”); Letter from Alan C. Drewsen, Int'l Trademark Association to Lawrence E. Strickling, NTIA, July 24, 2009, at 2 (“INTA Comments”), available at <http://www.ntia.doc.gov/comments/2009/dnstransition/097.pdf> (“INTA believes that the NTIA should take the necessary steps to ensure that the JPA with ICANN is extended beyond the September 30, 2009, expiration date in order to allow ample time for a new accountability mechanism to be explored and implemented and for any increase in new gTLDs to be undertaken in a measured and responsible manner.”); Coalition Against Domain Name Abuse, Inc., *Comments on the Termination of the JPA between NTIA and ICANN*, at 2 (“CADNA Comments”), available at <http://www.ntia.doc.gov/comments/2009/dnstransition/069.pdf> (“CADNA contends that termination of the JPA with NTIA should be delayed until ICANN demonstrates its ability to operate in accordance with these principles [of the *DNS White Paper*].”).

⁹⁶ Commission of the European Communities, Communication From the Commission to the European Parliament and the Council, *Internet Governance: The Next Steps*, at 8 (June 18, 2009) (“*Next Steps*”).

⁹⁷ Comments by the Government of Canada on the Assessment of the Transition of the Technical Coordination and Management of the Internet's Domain Name and Addressing System, June 8, 2009, at 1, 2 (“Canada Comments”), available at <http://www.ntia.doc.gov/comments/2009/dnstransition/076.pdf> (emphasis added).

[that] hold the key to institutional confidence of ICANN” and found “that these issues are not yet settled.”⁹⁸

Registrars and registries were even more critical of ICANN’s lack of accountability. GoDaddy expressed the view that “[w]e believe work remains to be done in all of the areas identified by the midterm review including assuring long-term stability, protection from capture, continued private sector leadership, and stakeholder participation. But the foundation upon which all these areas rely is accountability.”⁹⁹ SIDN, the registry for the ccTLD .NL in the Netherlands, acknowledged that “[a]ccountability and legitimacy of ICANN has over the years been a key topic for many” and it called for the JPA to be eventually “replaced by a governance model that ascertains on one hand that accountability is guaranteed, capture is prevented and the possibility of objection, appeal and in the extreme; intervention is assured.”¹⁰⁰ NeuStar noted that ICANN’s “decision-making process lacks adequate accountability and transparency safeguards” and warned that “absent (i) additional accountability mechanisms, (ii) appropriate oversight mechanisms, and (iii) a greater commitment to contract enforcement, ICANN remains at risk of failing to maintain the core principles of stability, competition, private-sector coordination and representation.”¹⁰¹

Trade associations, public interest groups, and individual businesses likewise singled out ICANN’s lack of accountability for particular criticism. The International Trademark Association (INTA) bluntly referred to “ICANN’s lack of accountability to the public.”¹⁰² Similarly, the International Chamber of Commerce wrote that “enhanced accountability to the Internet community is essential to the next phase of ICANN’s evolution.”¹⁰³ The Technology Policy Institute wrote that “a lack of accountability is the major issue surrounding ICANN.”¹⁰⁴ It explained that “[t]his absence of accountability is worrisome because ICANN’s actions can have important consequences for the structure of the Internet and the important economic, communication, and social activity that now occurs on and through the Internet.”¹⁰⁵ The Internet Governance Project stated, “external accountability is still the main problem with ICANN” and that because of this problem, “ICANN’s processes and structures still do not adequately deliver private, bottom-up policy making

⁹⁸ Spanish IGF Comments submitted to the United States Department of Commerce, NTIA, Notice of Inquiry, “Assessment of The Transition of the Technical Coordination and Management of the Internet’s Domain Name and Addressing System,” at 1, available at <http://www.ntia.doc.gov/comments/2009/dnstransition/071.pdf> (emphasis added).

⁹⁹ GoDaddy Group, Inc., *Assessment of the Transition of the Technical Coordination and Management of the Internet’s Domain Name and Addressing System*, June 8, 2009, at 1 (“GoDaddy Comments”) (emphasis added).

¹⁰⁰ Letter from Roelof Meijer, SIDN, to Fiona M. Alexander, NTIA, June 5, 2009, at 1, 2, available at <http://www.ntia.doc.gov/comments/2009/dnstransition/014.pdf> (emphasis added).

¹⁰¹ NeuStar Comments, at 1.

¹⁰² INTA Comments, at 2 (emphasis added).

¹⁰³ Int’l Chamber of Commerce, *ICC Response to Department of Commerce, National Telecommunications and Information Administration (NTIA) [Docket No. 090420688-9689-01] Assessment of the Transition of the Technical Coordination and Management of the Internet’s Domain name and Addressing System*, at 2 (June 8, 2009) (“ICC Comments”).

¹⁰⁴ Thomas M. Lenard & Lawrence J. White, Technology Policy Institute, *ICANN At a Crossroads: A Proposal for Better Governance and Performance* 3 (Rev. June 2009) (“Crossroads”) (emphasis added).

¹⁰⁵ *Id.* at 13.

and coordination.”¹⁰⁶ TechAmerica argued that a “key element that addresses many of the questions posed in the NOI is the continued need for greater, sustained accountability of ICANN to its stakeholder community.”¹⁰⁷ CADNA (The Coalition Against Domain Name Abuse) chimed in by saying that “ICANN needs a greater degree of accountability. At present, ICANN is not accountable to any supervising body or to its stakeholders. Once the JPA is terminated, ICANN will not even have the light oversight of NTIA to govern its actions. A complete lack of accountability is dangerous for any organization but especially for an organization that regulates a global resource.”¹⁰⁸ AT&T called for “meaningful accountability” and chastised ICANN in a passage that deserves repeating in full:

[T]he multi-stakeholder community lacks confidence in ICANN’s processes and in the fairness of many of its decisions. ICANN’s existing ‘accountability’ mechanisms are inadequate, and were recognized as such from the start. They either depend entirely on the support, resources, expertise and sympathy of the staff and the Board, or require an enormous financial commitment to pursue. They do not rest on a fundamental standard and formal set of obligations against which ICANN’s actions can be measured, and as ICANN considers them merely advisory, they do not offer meaningful recourse to either contracted parties or non-contracted party stakeholders.¹⁰⁹

As an example of ICANN’s deficient accountability, commentators pointed to the fact that neither the Reconsideration Process nor the Independent Review Process suffices to provide meaningful review of ICANN’s disputed actions. AT&T captured the tenor of these criticisms when it candidly expressed that “the community has now written off the Reconsideration Process, which is undertaken behind closed doors, depends on the willingness of Board members to review the actions of staff and fellow Board members, and is supported entirely by the staff most likely to have been involved in the initial decision.”¹¹⁰ The IRP fared no better under its analysis. “If ICANN is correct about the scope, impact, and terms under which the IRP operates, it will rarely make sense for a uniquely injured complainant to devote the considerable resources required to initiate international arbitration designed to produce advice that ICANN is free to ignore.”¹¹¹ The European Union likewise called for ICANN to establish “effective mechanisms for independent scrutiny and review of its Board decisions and independent appeal

¹⁰⁶ Internet Governance Project, Comments of the Internet Governance Project on the DNS Transition, at 2, 3 (“IGP Comments”), available at <http://www.ntia.doc.gov/comments/2009/dnstransition/023.pdf> (emphasis added).

¹⁰⁷ Letter from Phillip J. Bond, President, TechAmerica, to Fiona M. Alexander, June 8, 2009, at 3 (“TechAmerica Comments”), available at <http://www.ntia.doc.gov/comments/2009/dnstransition/084.pdf> (emphasis added).

¹⁰⁸ CADNA Comments, at 2.

¹⁰⁹ Comments of AT&T, Inc., *Assessment of the Transition of the Technical Coordination and Management of the Internet’s Domain Name and Addressing System*, at 12 (“AT&T Comments”), available at www.ntia.doc.gov/comments/2009/dnstransition/061.pdf.

¹¹⁰ *Id.* at 12-13.

¹¹¹ *Id.* at 13.

mechanisms to safeguard the rights of individuals and organisations affected by the decisions of such a private sector body.”¹¹²

ICANN has attracted specific criticism for its lack of transparency, too. In a thorough study of ICANN nearly a decade ago, the Markle Report defined transparency as the idea that “the structure, mechanisms, decisions, and policies of an organization should allow constituents (members, participants, citizens) to see openly into the activities of the organization, rather than cloaking these processes in secrecy.”¹¹³ The Report then pushed transparency a step further, connecting it with accountability. “Transparency is at the heart of accountability—allowing constituents to understand the policy regime and hold boards and officials accountable for their decisions.”¹¹⁴

Comments submitted in response to the NOI left no doubt that ICANN’s transparency remains questionable. The U.S. Telecom Association pointedly observed that “[t]he ICANN stakeholder community’s frustration with ICANN’s opaque decision-making process is a matter of extensive record,” adding that “more needs to be done to make ICANN more transparent.”¹¹⁵ CADNA charged that “[t]here is little to no transparency during the development and proposal of policies.”¹¹⁶

ICANN’s perceived illegitimacy also remains an impediment to its institutional credibility.¹¹⁷ “The claim that ICANN lacks democratic legitimacy has persisted, making ICANN a rather controversial entity in Internet governance.”¹¹⁸ Such claims are partly explained by ICANN’s shadowy origins in the U.S. government’s decision to delegate the IANA functions to a private corporation.¹¹⁹ But much their force is owed to ICANN’s persistent culture of unaccountability and its spin-off effects on constituents. “Unlike institutions of democratic national governments, ICANN has no legal avenue to provide for checks and balances. Critics have characterized ICANN’s actions as ‘taxation without representation’ and as not subject to the rules of law, there being no apparent mechanism, other than recourse to the courts, for limiting the exercise of its powers.”¹²⁰ As some have said, “ICANN’s existing processes have also been heavily criticized for their lack of transparency, for the failure to document the logic of decisions, for the absence of a process

¹¹² Council of the European Union, *International Management of the Internet Domain Name System*, Doc. 11960/09, Annex, at 4 (July 14, 2009) (“EU Comments”).

¹¹³ *Enhancing Legitimacy*, at 18.

¹¹⁴ *Id.*

¹¹⁵ Letter from Jonathan Banks & Kevin G. Rupy, USTelecom to Fiona M. Alexander, NTIA, June 8, 2009, at 4 (“USTelecom Comments”), available at <http://www.ntia.doc.gov/comments/2009/dnstransition/064.pdf>.

¹¹⁶ CADNA Comments, at 2.

¹¹⁷ See Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 Duke L.J. 187, 257 (2000) (“*Problem of Legitimacy*”) (“ICANN cannot accomplish its goals without the cooperation of other Internet actors, and that cooperation will not be forthcoming unless the Internet community sees its claim to supervise the domain name system as legitimate.”).

¹¹⁸ Rolf H. Weber & Mirinia Grosz, *Legitimate Governing of the Internet*, 2 Int’l J. Private Law 300, 302 (2009) (*Legitimate Governing*).

¹¹⁹ *Problem of Legitimacy*, at 212-16 (describing charges of legitimacy stemming from the designation of ICANN to supervise the Internet DNS).

¹²⁰ *Enhancing Legitimacy*, at 1.

of appeal, and for the heavy reliance on non-accountable staff and consultants.”¹²¹ Still others have specifically pointed to ICANN’s apparent unresponsiveness as the basis for its perceived illegitimacy. “Legitimacy is based upon a feeling of connection, of responsiveness; it must be based upon the constituents’ or members’ perception that they are not only listened to, but *heard* by the decision-makers.”¹²² Unfortunately, such connection or sense of responsiveness is the exception rather than the rule for ICANN’s constituents.¹²³

Developments since the advent of the Affirmation of Commitments bolster these criticisms of ICANN’s institutional confidence.

In February 2010 the first IRP decision was handed down in the .xxx case, hearing the claim by ICM Registry, LLC that ICANN had not followed its own rules when it refused to approve ICM’s application for .xxx as a TLD.¹²⁴ For purposes of this discussion the desirability of using such a TLD to zone pornography online is immaterial. The question at hand is whether ICANN answers to anyone else. Strikingly, a majority of the three-judge international arbitral panel concluded that its award was advisory and not binding.¹²⁵ From this experience it is evident that the IRP provides advice to ICANN’s Board of Directors but does not bind it—not even when it has violated ICANN’s own rules.

ICANN continues to push forward with its plans to open up virtually unlimited numbers of new gTLDs¹²⁶ without the support of the United States¹²⁷ and despite the objections raised by INTA on behalf of trademark holders around the world.¹²⁸ What’s more, serious questions have been posed about the costs ICANN will be charging applicants for new gTLDs and about the consequences of letting ICANN’s revenues balloon by nearly \$100 million, as they may do given the number of expected applicants and the resulting application fees.¹²⁹ The concerns expressed about the rollout of new gTLDs are intertwined

¹²¹ *Signposts*, at 203.

¹²² *Enhancing Legitimacy*, at 12.

¹²³ See USTelecom Comments, at 6 (complaining that “many stakeholders feel like nothing more than passive observers to the ICANN process”).

¹²⁴ *In re ICM Registry, LLC v. Internet Corporation for Assigned Names and Numbers*, Int’l Centre for Dispute Resolution, ICDR Case No. 50 117 T 00224 08, Feb. 19, 2010 (“*ICM Registry*”).

¹²⁵ *Id.* at 63 (interpreting ICANN bylaws to mean that the IRP consists of “a process that produced declarations that would not be binding and that left ultimate decision-making authority in the hands of the Board” and concluding, for that reason, that “the Panel’s Declaration is not binding, but rather advisory in effect.”).

¹²⁶ ICANN, *ICANN Board Stays on Course for Launch of New gTLD Program*, March 15, 2010 (announcing that ICANN’s Board of Directors has voted to continue pursuing implementation of the new gTLD program, rather than requiring interested applicants to submit an Expression of Interest pre-application), available at <http://www.icann.org/en/announcements/announcement-15mar10-en.htm>.

¹²⁷ Affirmation, at 1-2 (“Nothing in this document is an expression of support by [the U.S. Department of Commerce] of any specific plan or proposal for the implementation of new generic top level domain names (gTLDs) or is an expression by DOC of a view that the potential consumer benefits of new gTLDs outweigh the potential costs.”).

¹²⁸ INTA Comments, at 2 (“the most serious concern of trademark owners is ICANN’s failure to develop an acceptable methodology for introducing new generic Top-Level Domain names (gTLDs) to the Internet and, despite the lack of that methodology, its intention to introduce an unlimited number of new gTLDs to the Internet root server beginning in 2010.”).

¹²⁹ *Compare*, ICANN, *Draft Applicant Guidebook, Version 3*, at 1-30 (Oct. 2, 2009) (“The gTLD evaluation fee is required from all applicants. This fee is in the amount of USD 185,000.”); ICANN, *Draft: Delegation Rate*

with doubts about ICANN's accountability and its motivations behind opening up vast new online space without determining objectively whether benefits to consumers outweigh the costs. Expanding the number of gTLDs so substantially also may pose a threat to the security and stability of the Internet DNS.¹³⁰

An independent report commissioned by ICANN states that only 23% of all domain names reviewed provided fully accurate information, out of an internationally representative sample among the top five gTLDs.¹³¹ This report indirectly calls into question the wisdom of opening up a virtually unlimited number of new gTLDs, given ICANN's demonstrated inability to police the most basic requirements of domain name ownership.¹³²

Experienced ICANN observers may be forgiven for responding to these complaints with a shrug and a muttered "plus ça change." But these criticisms of ICANN's deficient accountability, transparency, and legitimacy betoken a gap between ICANN's undoubted importance and its performance.

III. STRUCTURED TO DEFEAT REFORM

This survey of ICANN's structure and the persistent criticisms of it reveals an unexpected but instructive disconnect between them. Its critics largely ignore ICANN's legal status as a private corporation and speak of it at times as if it were a government agency run amok. Because their criticism reflects the views of a broad range of intelligent and well-informed observers, one is compelled to probe beneath the surface to ask what is actually happening.

One explanation is that ICANN's unique marriage of private form and public function impedes clear thinking about it. Usually it would be nonsense to talk about the "democratic legitimacy" of a private corporation. No sensible person talks that way about Google or Exxon. Yet one can reasonably question the democratic legitimacy of ICANN and criticize its unresolved deficiencies in accountability and transparency in the same aggrieved tones as one would criticize an errant government agency.

Thinking of ICANN as a government-like organization flows naturally from its unique control over the technical management and coordination of the Internet DNS. That control gives it exclusive authority over an international communications asset that grows in

Scenarios for New gTLDs, at 9 (March 5, 2010) (corrected version) (concluding that "demand in the initial round [of gTLD applications] will be in the 400-500 range.") with R. Shawn Gunnarson, *When It Comes to gTLDs, Follow the Money (Part 1)*, July 30, 2009 (concluding that ICANN will collect approximately \$92.5 million in evaluation fees for the first round of applications for new gTLDs), available at http://www.circleid.com/posts/20090730_when_it_comes_to_gtlds_follow_the_money_part_1/; R. Shawn Gunnarson, *When It Comes to gTLDs, Follow the Money (Part 2)*, Aug. 4, 2009, available at (explaining how the introduction of new gTLDs could increase ICANN's financial power dramatically), http://www.circleid.com/posts/20090804_when_it_comes_to_gtlds_follow_the_money_part_2/.

¹³⁰ CADNA Comments, at 1 ("Cybersquatting, phishing, and other domain name abuses are rampant in the current space. Despite this, ICANN is proceeding with the introduction of new gTLDs without developing adequate safeguards to ensure the stability of the Internet for users.")

¹³¹ See NORC at The University of Chicago, *Draft Report for the Study of the Accuracy of WHOIS Registrant Contact Information*, at 2 (Jan. 17, 2010).

¹³² See CADNA Comments, at 1 ("Historically, ICANN has also had difficulty ensuring the accuracy of Whois data across various registries, a problem that will only be exacerbated once new gTLDs flood the domain name space.")

human significance and economic value with every passing year,¹³³ and that control is unmistakably coercive.¹³⁴ ICANN does not merely set standards; it effectively controls who has access to and space on the Internet DNS. That it holds such power over an immensely important asset explains why its critics expect it to behave more like a government agency, accountable and transparent to the community over whom its power extends.

This analysis leads one to ask whether ICANN, as now organized, can resolve the persistent criticisms of it for lacking accountability, transparency, and legitimacy. To address that question, these terms first need to be clarified.

A. Defining Terms

1. Accountability

The meaning of accountability as applied to ICANN is highly contested. ICANN's own definition is broad, encompassing public sphere accountability, legal and corporate accountability, and accountability to the participating community.¹³⁵ ICANN's conception of accountability appears to include every effort it makes to act as an honest broker, from disclosing information voluntarily to encouraging public participation in its policy-making processes.

These efforts, while frequently laudable in themselves, do not qualify as the kind of accountability that ICANN must have to resolve the deep and persistent criticisms of it. Real accountability consists of what ICANN must do, not what it can be persuaded to do.¹³⁶ It has to do with the distribution of power. Real accountability would require ICANN to disclose all of its actions to an independent body with the power to measure those actions against objective benchmarks and to deliver consequences and not just advice.¹³⁷ Without

¹³³ See *Comcast Corp. v. FCC*, No. 08-1291, slip op. at 36 (D.C. Cir. Apr. 6, 2010) (quoting FCC's Br. 19) (characterizing the Internet as "arguably the most important innovation in communications in a generation").

¹³⁴ See Hans Klein, *ICANN Reform: Establishing the Rule of Law*, at 1, IP3: Internet & Public Policy Project (prepared for the World Summit on the Information Society (WSIS), Tunis, Nov. 16-18, 2005) ("*Rule of Law*"), available at www.internetgovernance.org/pdf/ICANN-Reform-Establishing-the-Rule-of-Law.pdf ("Any reform proposal for ICANN must begin by recognizing what ICANN is: a regulatory agency. ICANN exercises such regulatory powers as accrediting registrars, setting base prices for domain names, evaluating the social utility of new TLDs, protecting trademarks, and punishing wrong-doers."); GoDaddy Comments, at 1-2 ("ICANN does not rely on voluntary donations; it is able to mandate fees to contracted parties (Registrars and Registries) which in turn are eventually passed on to consumers. ICANN, by means of policy making procedures, is able to establish regulations for a major medium of international communications, information, and commerce. These regulations become binding on contracted parties who in turn enforce them with consumers, and these regulations also mandate the processes through which stakeholders participate in ICANN.").

¹³⁵ *Frameworks and Principles*, at 7, 16, 20 (describing these forms of accountability).

¹³⁶ See NeuStar Comments, at 3 ("Truly independent accountability measures must be **binding**." (emphasis added); *Next Steps*, at 6 ("Accountability means an organization like ICANN being **answerable** for its decisions") (emphasis added); Rolf H. Weber, *Accountability in Internet Governance*, 13 Int'l J. Comm'n's L. & Pol'y 152, 155 (Winter 2009) ("Weber, *Accountability*") ("[A]ccountability consists in the **obligation** of a person (the accountable) to another (the accountee), according to which the former must give account of, explain and justify his actions or decisions against criteria of the same kind, as well as take responsibility for any fault or damage.") (emphasis added).

¹³⁷ See, e.g., Weber, *Accountability*, at 167 ("Accountability should contain at least three elements: (1) standards to which governing bodies are held; (2) information easily made available to the body or bodies responsible for holding governing bodies accountable; (3) accountability bodies hold power to impose sanctions on governing bodies for failure to meet standards.").

such a mandatory form of accountability ICANN will remain free to ignore its constituents and the general public.¹³⁸

Accountability, as I mean it, would bind ICANN to (1) act in harmony with fixed standards of conduct; (2) disclose all information relevant to determining whether it has met those standards or fallen short; and (3) receive correction or sanctions by a person or persons empowered to hold ICANN to its commitments by legal force, if necessary.

2. Transparency

The meaning of transparency is less controversial. Borrowing the definition from the Markle Report captures what many commentators appear to mean. “[T]he structure, mechanisms, decisions, and policies of an organization should allow constituents (members, participants, citizens) to see openly into the activities of the organization, rather than cloaking these processes in secrecy.”¹³⁹ So defined, transparency refers at least to ICANN’s policies and practices covering the disclosure of Board of Director decisions; of policy proposals and their grounds; of policy decisions and the factual bases underlying them; of and of financial transactions.

3. Legitimacy

Legitimacy is a more layered concept to apply to ICANN. It is not surprising that critics and observers have defined legitimacy to denote a range of concepts, including (1) accountability;¹⁴⁰ (2) a connection with political institutions;¹⁴¹ (3) the representative composition of ICANN’s Board of Directors;¹⁴² (4) the consent of the governed;¹⁴³ (5) establishing a fair process for ICANN to act by;¹⁴⁴ and (6) fidelity to ICANN’s mission.¹⁴⁵

¹³⁸ *Enhancing Legitimacy*, at 2.

¹³⁹ *Id.* at 18.

¹⁴⁰ See, e.g., USTelecom Comments, at 9 (“In conjunction with APA-style mechanisms, improvements to ICANN’s accountability measures will provide further legitimacy to ICANN and its policy making process and help to ensure that ICANN remains accountable to *all* members of the Internet community.”).

¹⁴¹ *Rule of Law*, at 3 (defining legitimacy as a direct connection with “established political institutions”).

¹⁴² See *Signposts*, at 202 (“No composition of the ICANN board, no matter how arrived at, is likely by itself to confer the perception of legitimacy on ICANN among all its possible constituency groups.”); *Legitimate Governing*, at 311 (“Representation only has a legitimizing effect, if the outcomes reflect the values of the represented stakeholders.”).

¹⁴³ See also *Signposts*, at 6 (“If ICANN becomes steward of the DNS, legitimacy based on the ‘consent of the governed’ would be the principal basis for its continued authority and its ability to resist inappropriate pressure from governments and other powerful interests.”).

¹⁴⁴ See *Legitimate Governing*, at 311 (defining legitimacy in terms of “procedures that establish equal bargaining powers and fair proceedings, as well as enhanced transparency and review mechanisms which enable the allocation of accountability”); *Signposts*, at 204 (arguing that ICANN’s legitimacy would be better improved by “making conventional majority-vote decisions through processes that are accepted as being open to input from all those having a legitimate interest, transparent and observable in all their stages, and fair to all participants.”).

¹⁴⁵ Tamar Frankel, Report to the Markle Foundation, *Accountability and Oversight of the Internet Corporation for Assigned Names and Numbers (ICANN)*, at 1 (July 12, 2002) (“*Accountability and Oversight*”), available at <http://www.policyarchive.org/handle/10207/bitstreams/15548.pdf>.

Of these conceptions of legitimacy, only the last three are useful. Legitimacy for ICANN consists of consent of the governed, a fair process, and fidelity to mission. These virtues, more commonly attributed to governments than corporations, seem nonetheless fitting to describe an organization with ICANN's government-like control of the Internet DNS.

Consent as a component of legitimacy suggests the seemingly intractable problem of ICANN's origins. At its birth ICANN acquired powers to which the vast membership of the Internet community never expressly consented. Whether this beginning can be overcome is questionable.

Process and mission appear easier to reform. The kind of fair process most commonly referred to in this context involves "strong provisions for checks and balances, and avenues of recourse," as well as "[p]rovisions for evaluation and oversight, and/or mechanisms for appeal."¹⁴⁶ Controversy over the scope of ICANN's mission strikes at the heart of its legitimacy. "So long as ICANN's functions and powers are controversial, its problems of legitimacy will persist"¹⁴⁷ This problem of mission fidelity or mission creep, depending on one's perspective, continues to persist as a challenge to ICANN's perceived legitimacy.¹⁴⁸

ICANN's legitimacy depends, then, on whether it can obtain the consent of those it governs, establish fair procedures by which to act, and settle the long-simmering debate over its proper mission.

C. An Organization Designed to Defeat Reform

With this understanding of accountability, transparency, and legitimacy it becomes evident that ICANN's current structure will defeat any effort to resolve these persistent criticisms. The fault lies not in a single person or policy, but in ICANN's organizational structure. Its board of directors holds unreviewable power over what is, after all, a private corporation. Its origins cast doubt on the legitimacy of its authority.

At the heart of that structure is the board of directors, which holds unreviewable power to act for ICANN.¹⁴⁹ The board has complete control over ICANN's policies, finances, and even the president—over whom the board has the power to appoint and dismiss.¹⁵⁰ Not even the GAC, composed of governmental representatives, has authority to slow or reverse a mistaken course of action by the board.¹⁵¹ Neither a request for reconsideration nor an

¹⁴⁶ *Enhancing Legitimacy*, at 20.

¹⁴⁷ *Accountability and Oversight*, at 1.

¹⁴⁸ *Next Steps*, at 1 (referring to "the complexity and reach of its DNS functions, which have expanded so dramatically from technical functions to decisions involving important global policy implications since the structure was first established."); Letter from Kathryn C. Brown, Verizon, to Fiona M. Alexander, NTIA, Aug. 10, 2009, at 1 ("Verizon Comments"), available at <http://www.ntia.doc.gov/comments/2009/dnstransition/099.pdf> (referring to "the complexity and reach of [ICANN's] DNS functions, which have expanded so dramatically from technical functions to decisions involving important global policy implications since the structure was first established").

¹⁴⁹ See Bylaws at art. 2, § 1 ("the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board").

¹⁵⁰ See *id.* at art. 13, §§ 1-3.

¹⁵¹ See *id.* at art. 11, §§ 1 (stating that advisory committees "have no legal authority to act for ICANN") and 2.1(j), (k) (providing that the board need merely state its reasons for not following GAC recommendations).

IRP can reverse a board decision: they can only produce recommendations that the board is free to reject.¹⁵²

These powers mean that ICANN's efforts at accountability and transparency go only as far as its board allows. But accountability as defined above requires ICANN to answer to someone not because it wishes to, but because it must, and transparency does not permit ICANN to conceal information that is merely embarrassing or inconvenient. The board's powers defeat that kind of accountability and transparency because the board answers to no one. Consequently, ICANN answers to no one. That fact is jarring for an organization with exclusive authority over an international communications asset of surpassing importance. Unreviewable power is to accountability what fire is to an extinguisher: it is the harm for which the latter exists. As long as ICANN's board of directors retains unreviewable power to act in its name, no accountability worth its name is possible.¹⁵³

This analysis can be summed up by saying that ICANN's form does not follow its function. It exercises important international powers but vests unreviewable authority in a board of directors and continues to attract doubts about its basic legitimacy because of the undemocratic nature of its origins and the uncertain nature of its mission.

ICANN's structure will defeat any attempt to resolve its most enduring criticisms of accountability, transparency, and legitimacy. Beyond the problems caused by diminishing institutional confidence, such criticisms pose serious practical dangers. An unaccountable ICANN poses a threat to the safety and security of the Internet. Its inability to become genuinely accountable increases the risk that the most basic technical decisions that maintain the stability of the Internet DNS could be compromised. "If nothing is done, problems of accountability and transparency will continue and the state of the domain name space will deteriorate."¹⁵⁴ Allowing that to happen would be unacceptable. But what is to be done?

IV. A FRESH START FOR ICANN

Rethinking ICANN from the ground up requires an honest appraisal of a wide variety of potential solutions for its institutional challenges, including some that turn out to be unworkable. Two such solutions are transforming ICANN into a public organization and replacing the United States with another government body to ensure ICANN's accountability through external supervision. On closer examination, both of these proposals could make matters even worse.

¹⁵² See *id.* at art. 4, § 2.18 ("The Board shall not be bound to follow the recommendations of the Board Governance Committee."); art. 4, §§ 8(a)-(c) (authorizing the IRP to make declarations and recommendations but not binding decisions).

¹⁵³ See NeuStar Comments, at 3 (noting that ICANN "suffers from a structural weakness in that the ICANN Board is only truly accountable to itself. An entity accountable only to itself is in reality accountable to no one.").

¹⁵⁴ CADNA Comments, at 3.

A. Unworkable Solutions

1. Transforming ICANN Into a Public Organization

to transform it into a public organization, whether treaty-based or an independent international organization. The impetus behind this idea is understandable. ICANN exercises unique authority over a global telecommunications resource. Recasting it as a public organization of some sort appears to be an obvious means of enhancing its institutional confidence, by bringing its legal form into line with its global influence.

But this answer won't work. A broad consensus of commentators responded to the U.S. government's NOI by endorsing ICANN's continued responsibility for the Internet DNS as a private sector led organization. So did the United States in rejecting an intergovernmental or international model in the *DNS White Paper*¹⁵⁵ and in characterizing ICANN's direction in the Affirmation of Commitments.¹⁵⁶ Delegating the IANA functions to another organization besides ICANN or reorganizing ICANN as a treaty organization or international organization would seem pointless to consider because it would contradict this consensus. It also could detract even further from ICANN's shaky institutional confidence.

Transforming ICANN into a public organization risks the kinds of inefficiency and corruption unfortunately familiar among even reputable international organizations.¹⁵⁷ DNS management would then be mired in international politics. Relying on government-centered reformations of ICANN also would overlook the fact that the Internet has grown in value and importance because of non-public investments of time, money, and intellectual capital. Its power derives from the freedoms that it engenders.¹⁵⁸ Because the Internet is not controlled or owned by governments, their assumption of dominant authority now would be widely criticized. Censorship and similar concerns would be more prevalent, even if government policies did not fatally undermine the freedoms from which the Internet gets its potency. Bureaucratic sclerosis could replace the flexibility and speed that justified

¹⁵⁵ *DNS White Paper*, at 31744 (“While international organizations may provide specific expertise or act as advisors to the new corporation, the U.S. continues to believe, as do most commenters, that neither national governments acting as sovereigns or intergovernmental organizations acting as representatives of governments should participate in management of Internet names and addresses.”).

¹⁵⁶ Affirmation, at 1 (“[The U.S. Department of Commerce] affirms its commitment to a multi-stakeholder, private sector led, bottom-up policy development model for DNS technical coordination that acts for the benefit of global Internet users. A private coordinating process, the outcomes of which reflect the public interest, is best able to flexibly meet the changing needs of the Internet and of Internet users.”).

¹⁵⁷ See The World Bank, Dep't of Institutional Integrity, *Report of Investigation into Reproductive and Child Health I Project*, Credit N0180, Nov. 23, 2005, at 4 (finding that “systematic and institutionalized” bribery of government officials, including ministers, corrupted a World Bank loan program for the government of India to procure drugs for its country's poor); 1 Independent Inquiry Committee Into the United Nations Oil-for-Food Programme, *The Management of the United Nations Oil-for-Food Programme*, Sept. 7, 2005, at 3 (acknowledging that “serious instances of illicit, unethical, and corrupt behavior within the United Nations” characterized the Oil-for-Food program).

¹⁵⁸ *DNS White Paper*, at 31749 (“The Internet succeeds in great measure because it is a decentralized system that encourages innovation and maximizes individual freedom.”); Afilias, *NTIA Notice of Inquiry, Assessment of the Transition of the Technical Coordination and Management of the Internet's Domain Name System*, at 1 (June 8, 2009) (“The U.S. government's decision in the 1997 White Paper to privatize the DNS and to leave the day-to-day management in the hands of a not-for-profit, private sector led, bottom-up policy making body was an enlightened policy decision that provided the basis for the subsequent explosive growth of the Internet as a transformational global communications platform.”).

vesting authority for the overall coordination of the Internet DNS with a private corporation in the first place.¹⁵⁹

Other legal forms would be no less problematic. Making ICANN a public corporation would subject it to the vagaries of the market while risking capture by the highest bidder. Removing its not-for-profit status would invite the kind of self-dealing typical of virtually any monopoly.

Maintaining ICANN's status as a private nonprofit corporation makes it less likely to fall prey to self-interested agendas that would impede ICANN's mission of maintaining a global interoperable network. Its legal status should remain unchanged.

2. Replacing the United States as a Source of External Accountability

Another inviting but ultimately unsatisfactory solution to ICANN's deficient institutional confidence is to locate some replacement for the external accountability that the United States exercised through the MOU/JPA process. That process supplied several benefits that have been lost with the expiration of the JPA.¹⁶⁰ Perhaps the most troubling loss is the lack of external accountability. External accountability refers to some entity outside of ICANN, which holds the authority to supervise or review ICANN like the U.S. government's soft oversight of ICANN under the JPA. Internal accountability concerns the relations of ICANN's constituent parts to each other.

The European Union has called for a substitute form of external accountability to replace the oversight previously exercised by the U.S. Reasoning that "public attitudes have changed towards the concept of self-regulation in the wake of the financial crisis," the EU asserts that "[t]here is now a higher and understandable expectation that governments will be more proactive than they may have been in the past in defending the public interest" and that "[c]ontinuing to pursue an exclusively 'back-seat' approach to the development of international Internet governance practices is therefore not an option."¹⁶¹ A more prominent role for governments in Internet governance means, for the EU, that "[g]overnments need to interact with multi-stakeholder processes, with stakeholders accepting that *governments alone are ultimately responsible for definition and implementation of public policies.*"¹⁶² From this responsibility the EU emphatically states the "need to ensure that ICANN is accountable externally to the global Internet community, which in the first instance ... means being *accountable externally to the*

¹⁵⁹ *Id.* at 31749 (private sector control of the Internet DNS management and coordination functions would carry the advantages of being "more flexible than government" and capable of "mov[ing] rapidly enough to meet the changing needs of the Internet and of Internet users.").

¹⁶⁰ See *Signposts*, at 218 ("A transfer of stewardship from the [Department of Commerce] will leave ICANN (and another organization if stewardship is kept separate) without the benefits and controls that the DOC has provided. It independently reviewed ICANN's recommended decisions, regularly oversaw ICANN's performance subject to the sanction of nonrenewal of its MoU, and implicitly protected it from attempts by other governments and organizations to gain control of or strongly influence ICANN's decisions. If the DOC does transfer its stewardship either to ICANN or to another private body, how will these benefits and controls be provided?").

¹⁶¹ *Next Steps*, at 4.

¹⁶² *Id.* at 6 (emphasis added).

governments of the various countries of the world.”¹⁶³ For the EU, accountability must be external to be effective. Not necessarily so.

Government participation in ICANN’s policymaking is necessary and useful to a point. Such participation ensures that ICANN properly respects national prerogatives with respect to ccTLD space and public policy decisions that affect national laws or national interests. It also ensures sufficient political support for ICANN’s continued exercise of its unique powers over the Internet DNS. But giving governments supervisory authority over ICANN likely would create more problems than it solves. Increasing governmental control over ICANN, even if intended to act as a counterweight to hold ICANN to its commitments and to reduce or eliminate its self-dealing conduct, presents intolerable risks to the Internet’s ecosystem.

Governments have limited tools, most of them resembling cleavers rather than scalpels. Resorting to those tools might seriously impede the continuing success of the Internet, which is at least partly due to its libertarian ecology. The Internet does not direct or regulate; it facilitates. And what it facilitates is virtually instant communication—communication of companies and customers, buyers and sellers, students and teachers, friends and family. Government regulation of the technical protocols by which the Internet operates could act as a brake on innovation, investment, and, ultimately, on the cascading benefits of individual choice.¹⁶⁴ ICANN should continue relying on governments for their expertise and perspectives in the policymaking process. But authorizing a governmental body to supervise ICANN would politicize the policymaking even further and potentially disrupt the fragile ecosystem by which the Internet has thrived. Improving ICANN’s accountability could come at the price of disrupting its success at managing and coordinating the Internet.

Something different should be tried.

B. The Way Forward

1. Reforming ICANN Internally Can Replace External Accountability

ICANN should remain a private nonprofit corporation, and the U.S. government should not be replaced as a means of external accountability. This analysis eliminates superficially attractive but ultimately unworkable solutions to the problem of reforming ICANN. It should remain a private nonprofit corporation and the U.S. government should not be replaced with another entity as a means of external accountability.

The answer to ICANN’s weaknesses is to strengthen ICANN from within. Understanding why this is so depends on two critical insights.

Internal reformation of ICANN’s basic structure can adequately replace the loss of external oversight by the United States. The independent check on ICANN’s actions required for

¹⁶³ *Id.* at 7 (emphasis added).

¹⁶⁴ See Affirmation, at 1 (“A private coordinating process, the outcomes of which reflect the public interest, is best able to flexibly meet the changing needs of the Internet and of Internet users.”); Verizon Comments, at 3 (“Ways should be found to address the policy concerns of other governments by evolving the ICANN mechanism, but not by abandoning the private-sector model or shifting toward slow-moving bureaucracy and stifling regulation.”).

accountability need not be external. Reforming ICANN's structure can resolve the longstanding criticisms of it. Accountability, transparency, and legitimacy are attributes that ICANN must acquire; they are not necessarily attributes that an external body must guarantee. Reforming ICANN to remove the organizational impediments to achieving these qualities probably will be more effective than any form of external accountability could be. External accountability seeks to improve ICANN from the outside in; internal reformation will seek to improve ICANN from the inside out. Only the latter will change the institutional character of ICANN, which is after all what its critics want.

Some of the architectural principles most suitable for reforming ICANN's structure come from constitutional law. Fixing basic standards of conduct and enumerating and checking powers, the better to control them, are familiar principles to students of constitutional law.¹⁶⁵ Those principles should be applied to ICANN.¹⁶⁶ Organizing its structure as if it were exercising governmental powers—which it in effect does—would enable ICANN to assert those powers as a private corporation while acquiring sufficient institutional confidence to satisfy its harshest critics.

One could object that treating a private corporation like a government for purposes of its structure and powers flies in the face of how private corporations are ordinarily viewed. California Nonprofit Public Benefit Corporation Law,¹⁶⁷ by which ICANN is governed, gives a corporation like ICANN “all the powers of a natural person” and the power to “[c]arry on a business at a profit and apply any profit that results from the business activity to any activity in which it may lawfully engage.”¹⁶⁸

But ICANN is unlike other corporations. Its power over the Internet DNS is international in scope and necessarily exclusive. Placing meaningful limitations on that power is needed to establish the structure and processes necessary to produce an accountable, transparent, and legitimate organization. Such limitations should encompass ICANN's board of directors, its policymaking organization, and its budgetary authorities. These constraints might be considered intolerable if ICANN were an ordinary private corporation. Sacrificing some of its corporate autonomy is indispensable to achieving the institutional confidence. Unless reformed, ICANN will continue to attract demands for government regulation or control. Accepting the trade-off of autonomy for long-term viability may be the best means

¹⁶⁵ See also The Federalist No. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961) (“The powers delegated by the proposed Constitution to the Federal Government, are few and defined.”); The Federalist No. 51, at 349 (“Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.... In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself.”).

¹⁶⁶ See Weber, *Accountability*, at 167 (“[T]he establishment of standards in terms of specific values that lay the foundation of accountability could provide for a viable way forward. Similarly to a Magna Charta or a constitutional approach, such standards could help implement a legitimizing structure and a guideline for Internet governance in general. Furthermore, they would be suitable to entail significant self-constraints for the policy-making institutions, and, hence, move towards substantiating the realistic implementation of accountability.”). My research uncovered Professor Weber's recommended application of constitutional principles to Internet governance after I had independently devised the charter-plus-ratification approach proposed here.

¹⁶⁷ Cal. Corp. Code §§ 5110-6910.

¹⁶⁸ *Id.* at §§ 5140 & 5140(l).

for ICANN to remain a private nonprofit corporation with the responsibility to manage and coordinate the Internet DNS.

Reforming ICANN's organizational architecture based in part on constitutional principles of enumeration and division of power promises to enhance both its accountability and its legitimacy.¹⁶⁹

2. Written Charter, Formal Ratification

a. Written Charter

An especially attractive approach to reforming ICANN was proposed by AT&T and VeriSign during the NOI process. They recommended drafting and adopting “permanent governance documents” to bind ICANN to fundamental commitments.¹⁷⁰ Apart from placing ICANN on a more solid institutional foundation, binding ICANN in this way may “institutionalize [its] independence, protect it from takeover by financial interests, and preclude it from being effectively captured by other government and quasi-government organizations.”¹⁷¹ Following this approach would “require some form of binding document, founded in the ICANN bylaws, to effectively describe ICANN's Mission and its detailed obligations to community stakeholders, and to institutionalize the core principle of private-sector leadership.”¹⁷² Binding ICANN to a document with these features would provide the best means for achieving the structural reorganization aimed at acquiring the institutional traits of accountability, transparency, and legitimacy that it needs.

Giving ICANN a new charter would satisfy this approach. That charter should describe its mission, powers, organizational structure, and obligations to the Internet community—in short, its most fundamental commitments. Because of their importance, the commitments ICANN stated in the Affirmation should be given permanent form in the charter.

b. Formal Ratification

Drafting even the clearest statement of ICANN's mission, organization, and commitments may not accomplish much until that document is adopted. Adoption through formal ratification carries several benefits, primarily investing ICANN with a fresh sense of democratic legitimacy.

Ratification would follow a familiar path of representative deliberation. It would be presented for debate and ratification by a representative body of ICANN constituents

¹⁶⁹ *Legitimate Governing*, at 311 (“the elaboration of architectural principles can have a legitimizing effect by providing for certain criteria for the assessment of Internet governing decisions.”).

¹⁷⁰ See AT&T Comments, at 10 (calling for the describing a charter that articulates “the fundamental elements of the bargain between ICANN and its stakeholders that cannot be changed without the consent of the ICANN community”); Letter from Raynor Dahlquist, Verisign, Inc., to Suzanne R. Sene, NTIA, June 8, 2009, at 1 (“VeriSign Comments”), available at <http://www.ntia.doc.gov/comments/2009/dnstransition/046.pdf> (“The JPA mid-term review revealed that many are worried about capture of ICANN in the absence of a substitute oversight body as well as in the absence of a set of permanent governance documents. The global community has not yet reached an agreement on a long term private sector arrangement that in the absence of the JPA yields the appropriate oversight and appeals process within the ICANN community.”).

¹⁷¹ SIIA Comments, at 6.

¹⁷² *Id.*

chosen from the current supporting organizations and advisory councils. Each supporting organization and advisory committee would elect five members to serve in a ratifying convention authorized to amend, ratify, or reject the charter. That convention would meet to debate and vote on the charter. A vote of 2/3 of all ratifying committees required for ratification. Once ratified, the charter should then be presented to the board of directors for its vote. A board resolution ratifying the charter would then require a review of the articles of incorporation and bylaws to determine what further amendments would be necessary to make them consistent with the charter.

Adopting ICANN's new charter through ratification offers ICANN a fresh chance at the kind of legitimacy that its beginnings were denied. For the first time, a genuinely representative group of constituents would consider what would be ICANN's most basic governance document and vote as a body whether to adopt it. Democratic legitimacy would finally attach to ICANN's exercise of power over the Internet DNS. In addition, obtaining the Internet community's consent to ICANN's continuing exercise of its unique powers would lend it authority and enable it to maintain its independence from governments and powerful commercial interests alike.¹⁷³

Only ratification holds these advantages. Lobbying the board of directors to adopt the charter, without ratification, would be open to the same accusations of backroom dealing and questionable compromises that tainted ICANN's origins. No matter what the charter says, ICANN's legitimacy would be little enhanced, and might be hurt, by such a process. An open ratifying convention would be as representative as reasonably feasible and would go a long way toward resolving persistent doubts about ICANN's legitimacy by giving its core governance document an undeniably democratic provenance.

C. A New Charter for ICANN

1. Narrow Mission, Limited Authority

ICANN's new charter should contain a clear statement of ICANN's mission and authority. Becoming more accountable, transparent, and legitimate requires its return to the purposes for which it was created, as explained in the *DNS White Paper*, and to exercise the more modest range of technical functions needed to carry out those purposes successfully.

ICANN began with a mission defined in terms of the IANA functions. In proposing to delegate the IANA functions to a new corporation, the U.S. government disclaimed any attempt to "set out a system of Internet 'governance.'"¹⁷⁴ To the contrary, it positively declined "to expand the functional responsibilities of the new corporation beyond those exercised by IANA currently."¹⁷⁵

At the heart of that mission was a long-term effort by the United States to privatize management of the DNS. Labeled the DNS Project, this effort consisted of the "process of

¹⁷³ See *Signposts*, at 218-19 ("Without additional protection [after the expiration of the JPA], legitimacy based on the 'consent of the governed' would be the only basis for ICANN's continued authority and its ability to resist inappropriate pressure from governments and other powerful interests.")

¹⁷⁴ *Id.* at 31743.

¹⁷⁵ *Id.* at 31749.

transitioning to private sector leadership these coordination and management functions.”¹⁷⁶ In pursuing that aim, ICANN’s original guiding principles were “stability, competition, private bottom-up coordination, and representation.”¹⁷⁷ The *DNS White Paper* added that “the principle of representation should ensure that DNS management proceeds in the interest of the Internet community as a whole.”¹⁷⁸

ICANN’s authority as originally conceived was narrowly technical. Carrying out the IANA functions necessitated “the authority to manage and perform **a specific set of functions** related to coordination of the domain name system.”¹⁷⁹ That authority included the power to “(1) Set policy for and direct allocation of IP number blocks to regional Internet number registries; (2) Oversee operation of the authoritative Internet root server system; (3) Oversee policy for determining the circumstances under which new TLDs are added to the root system; and (4) Coordinate the assignment of other Internet technical parameters as needed to maintain universal connectivity on the Internet.”¹⁸⁰ Eschewing the very notion of “a monolithic structure for Internet governance,” the *DNS White Paper* sought only to inaugurate “a stable process to address the **narrow** issues of management and administration of Internet names and numbers on an ongoing basis.”¹⁸¹

Later descriptions of ICANN’s mission by the U.S. have been equally constrained. The U.S. Principles on the Internet Domain Name and Addressing System described ICANN as “the technical manager of the DNS and related technical operations” and stated that “[t]he United States will continue to provide oversight so that ICANN maintains its focus and meets **its core technical mission**.”¹⁸² The JPA itself characterized ICANN’s work as “the coordinator for the technical functions related to the management of the Internet DNS.”¹⁸³ Likewise, the Affirmation of Commitments described ICANN as having the “**limited, but important technical mission** of coordinating the DNS.”¹⁸⁴ Statements like these demonstrate that the U.S. government—the body whose policy decisions led to ICANN’s creation and whose contract with ICANN continues to give it authority over the IANA functions today—has consistently viewed ICANN’s mission as “technical” and “limited.”

Yet ICANN unquestionably intrudes into areas beyond its technical mandate. The Internet Governance Project has described several activities beyond the narrow compass of technical management and coordination of the Internet DNS:

ICANN makes global public policy in a number of fields. It makes competition policy by controlling business entry into the domain name registry market and by determining the market structure of that \$2 billion

¹⁷⁶ NOI, at 18689.

¹⁷⁷ *DNS White Paper*, at 31743.

¹⁷⁸ *Id.* at 31743.

¹⁷⁹ *Id.* at 31749 (emphasis added).

¹⁸⁰ *Id.* at 31749.

¹⁸¹ *Id.*

¹⁸² *U.S. Principles* (emphasis added).

¹⁸³ JPA, preamble (emphasis added).

¹⁸⁴ Affirmation, at 2 (emphasis added).

industry. It engages in rate regulation, setting the base price for the majority of the world's wholesalers and retailers of generic domain names. It makes intellectual property policy by defining and enforcing global 'laws' regarding rights in domain names. Indirectly, ICANN affects freedom of expression, because its rules on trademark protection in domains set limits to public use of words, and its rules regarding registrant data are intended to make anonymous expression on the Internet impossible. Many would say that ICANN also engages in taxation: it imposes per-domain fees on domain name registries, and the fees have grown sharply over time. Finally, ICANN's powers are open-ended: the entities it regulates must commit to implementing any further policies that the organization should promulgate. ICANN's regulatory and supervisory activities constitute global public policy of a type usually exercised only by governmental (or inter-governmental entities.)¹⁸⁵

ICANN's mission creep may result, at least in part, from how many have come to think about Internet governance. Issues affecting ICANN and its performance too often get conflated with the term Internet governance, but Internet governance comprises a broad array of issues, including legal and policy matters covering, among other things, law enforcement, free speech, intellectual property, and the digital divide. ICANN is not responsible for Internet governance, writ large.¹⁸⁶ No single organization performs that mission, nor should it.¹⁸⁷ ICANN serves narrow technical purposes and should not try to resolve matters over which it has no authority.

ICANN's indulgence in mission creep, for whatever reason, poses several problems: (1) increases political pressure on ICANN, which may explain the EU's call for greater political supervision or intervention in ICANN's policymaking activities; (2) diminishes ICANN's legitimacy by interjecting it in matters perhaps beyond its competence and certainly beyond the reasons for its creation; (3) tends to push ICANN toward empire building; (4) detracts from potential usefulness of Internet Governance Forum and other potentially effective policy-making bodies.

¹⁸⁵ Internet Governance Project, *What to Do About ICANN: A Proposal for Structural Reform*, Apr. 5, 2005, at 2 ("Structural Reform"), available at <http://www.internetgovernance.org/pdf/igp-icannreform.pdf>.

¹⁸⁶ See Report of the Working Group on Internet Governance, June 2005, at 4, available at <http://www.wgig.org/docs/WGIGREPORT.pdf> ("It should be made clear, however, that Internet governance includes more than Internet names and addresses, issues dealt with by [ICANN].").

¹⁸⁷ *DNS White Paper*, at 31749 ("The policy that follows does not propose a monolithic structure for Internet governance. We doubt that the Internet should be governed by one plan or one body or even by a series of plans and bodies. Rather, we seek a stable process to address the narrow issues of management and administration of Internet names and numbers on an ongoing basis."); 2005 U.S. Principles on the Internet's Domain Name and Addressing System ("U.S. Principles"), available at http://www.ntia.doc.gov/ntiahome/domainname/USDNSprinciples_06302005.htm ("Given the breadth of topics potentially encompassed under the rubric of Internet governance there is no one venue to appropriately address the subject in its entirety. While the United States recognizes that the current Internet system is working, we encourage an ongoing dialogue with all stakeholders around the world in the various for a as a way to facilitate discussion and to advance our shared interest in the ongoing robustness and dynamism of the Internet. In these fora, the United States will continue to support market-based approaches and private sector leadership in Internet development broadly.").

Requiring ICANN to return to its original technical mission would avoid these problems. It would also enhance ICANN's accountability¹⁸⁸ and legitimacy¹⁸⁹ and reduce political pressure to include governments in policy matters outside ICANN's technical mandate.¹⁹⁰ Minimizing ICANN's unnecessary policy forays also, and not incidentally, would reduce ICANN's revenue needs. This would benefit registries, registrars, domain owners, and other consumers—all of whom pay when ICANN strays too far from its core mission.

ICANN cannot entirely avoid making policy, even if it completely returned to the “limited technical mission”¹⁹¹ for which it was created. The *DNS White Paper* anticipated that ICANN would have authority to set policy for the allocation of IP number blocks to regional Internet number registries and for the addition of new TLDs.¹⁹² The problem is how to prevent ICANN from using its authority to drive “the public policy aspects of the technical coordination of the Internet DNS,”¹⁹³ or what might be called ancillary policymaking authority, to expand its own powers beyond its limited mandate.

Preventing ICANN from engaging in mission creep depends not only on a clear statement of its authority but on locating the line between technical coordination and policy, a line that is hardly self-evident. One definition holds that “a matter is ‘technical coordination’ of the Internet only if ‘[a] wrong decision has an immediate and direct impact on the ability of the Internet to deliver its fundamental service, i.e., the end-to-end transport of IP packets. Otherwise it is a policy matter.’”¹⁹⁴ That definition seems adequate to mark the boundary separating technical coordination from policy. It should be incorporated into ICANN's charter.

With these preliminaries out of the way, ICANN's authority should be stated in something like the following terms:

ICANN shall have the authority only to provide (i) technical coordination for the allocation and assignment of domain names (collectively forming a domain name system or DNS); Internet protocol (“IP”) addresses and autonomous system (“AS”) numbers; and protocol port and parameter numbers; (ii) technical coordination and oversight for the DNS root name server system; (iii) policies for adding any new top-level domains to the DNS root system, consistent with the other provisions of this Charter; (iv) engage

¹⁸⁸ *Structural Reform*, at 4 (“Perhaps the simplest step towards achieving accountability would be to impose clear limits on ICANN's powers and to enforce those limits with governmental oversight.... These limits could be codified in a contract, a Memorandum of Understanding, a multilateral framework agreement, or some other legally-binding international agreement.”).

¹⁸⁹ *Signposts*, at 199 (“ICANN is more likely to achieve perceived legitimacy with a narrower scope rather than a broader one.”).

¹⁹⁰ GoDaddy Comments, at 4 (“Deviation from its mission and coordination role will only serve to further increase the interest of governments in exercising control and oversight of ICANN. An appropriate accountability mechanism would prevent such deviation.”); *accord Next Steps*, at 7.

¹⁹¹ Affirmation, at 3.

¹⁹² See *DNS White Paper*, at 31749.

¹⁹³ Affirmation, at 2.

¹⁹⁴ *Wrong Turn*, at 172 (quoting e-mail from Karl Auerbach to ICANN wc-c Mailing List (Dec. 29, 1999), Domain Name Server Organization, <http://www.dnso.org/wgroups/wg-c/ARC01/msg00456.html>).

in any other lawful activity reasonably necessary to carry out ICANN's responsibilities under the Contract between ICANN and the National Telecommunications and Information Administration for the Performance of the IANA Functions. "Technical coordination" shall refer only to a decision required for the Internet to complete successfully the end-to-end transport of IP packets.

Precautions will be needed to hold ICANN within the confines of this authority. That authority should be stated in the new charter. Board members should be expressly prohibited from exercising any power not enumerated in the charter. Members of Record (whom I will describe below) should be authorized to remove a board member for exceeding the authority stated in the charter. And the growth of ICANN's budget and its use of net uncommitted revenues should be limited so that ICANN lacks the financial wherewithal to indulge in operations outside of its authority.

2. Binding ICANN to Key Commitments

a. Core Values

ICANN's bylaws contain a statement of core values.¹⁹⁵ While several of them are pertinent insofar as they are acted on, none of them is truly binding. Not only does the board retain unchecked authority to decide how to implement them, the bylaws themselves leave ICANN free to pick and choose among them.¹⁹⁶

No set of values that leaves a decision-maker free to choose among them can be said to be "core." ICANN needs values that bind it to conduct its operations in harmony with standards that will attract agreement among the widest range of ICANN constituents. Consistently adhering to a few basic values may be more useful in pursuing that goal than several "core" values "deliberately expressed in very general terms."¹⁹⁷

Some of the current core values should be placed in the charter, however. Understanding that any choice among them will be debated, the values that seem most fundamental to ICANN's institutional identity include the following:

- Preserve and enhance the operational stability, reliability, security, and global interoperability of the Internet.
- Limit ICANN's activities to those matters within ICANN's mission and enumerated authority.
- Implement documented policies consistently and objectively, with integrity and fairness.

¹⁹⁵ Bylaws, art. I, § 2.

¹⁹⁶ *See id.* ("Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.").

¹⁹⁷ *Id.*

- Employ open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.

b. Affirmation of Commitments

ICANN's new charter also should include the agreements it made with the United States in the Affirmation of Commitments. Binding ICANN to those "key commitments"¹⁹⁸ through the adoption of a charter is intended to establish them as fixed and settled standards at ICANN's institutional foundation.¹⁹⁹ Those standards are described below in terms that sometimes borrow from the Affirmation verbatim but that reorganize and reframe them.

ICANN should be bound to remaining a nonprofit corporation, headquartered in the United States. Placing this agreement in the charter will answer the need for "[a] binding commitment prohibiting conversion by ICANN to for-profit status"²⁰⁰ It may have satellite offices around the world to meet the demonstrated needs of the global community, and it will continue operating as a multi-stakeholder, private-sector-led organization that invites public participation in its decisions.

Its mission statement should state ICANN's responsibilities of coordinating the Internet DNS at the overall level and striving for a single, interoperable Internet. Above every other priority, ICANN's mission is to preserve the security, stability, and resiliency of the DNS.²⁰¹ In addition it should promote competition, consumer trust, and consumer choice in the DNS marketplace, and it should facilitate international participation in DNS technical coordination. But security first.

All of ICANN's decisions should be made in the public interest and be fully accountable and transparent. As a responsible steward of its powers over the Internet DNS, ICANN will adhere to transparent and accountable budgeting processes, fact-based policy development, cross-community deliberations, and responsive consultation procedures. Those procedures would require ICANN to furnish detailed explanations of the basis for decisions, including how comments have influenced the development of DNS policy. A thorough and reasoned explanation of each decision will be published that includes its rationale and the sources of data and information on which ICANN relied before taking it.

ICANN should measure its progress by the standards set forth in the charter, its articles of incorporation, and its bylaws; reports of those findings should be published. Accordingly, it should publish each year an annual report that sets out ICANN's progress against ICANN's bylaws, responsibilities, and strategic and operating plans. No less than once each year ICANN should conduct and publish analyses of the positive and negative effects of its

¹⁹⁸ Affirmation, at 1 (emphasis added).

¹⁹⁹ Incorporating the ICANN-directed portions of the Affirmation into the charter serves much the same purpose as the Affirmation, which aimed "to institutionalize and memorialize the technical coordination of the Internet's domain name and addressing system." *Id.*

²⁰⁰ VeriSign Comments, at 8.

²⁰¹ *DNS White Paper*, at 31750 ("[T]he commercial importance of the Internet necessitates that the operation of the DNS system, and the operation of the authoritative root server system should be secure, stable, and robust."); Verizon Comments, at 1 ("The primary objective is to preserve the security and stability of the Internet, given its enormous importance as a means of global communications and commerce.").

decisions on the public, including the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS and any financial impact on the public. ICANN should organize the reviews of its operations by voluntary community members as prescribed in the Affirmation of Commitments. Those reviews should address ICANN's performance with respect to accountability, transparency, and public input; the operational stability, reliability, resiliency, and global interoperability of the DNS; promoting competition, consumer trust, and consumer choice; and the effectiveness of ICANN's enforcement of WHOIS policy.

ICANN's decision to introduce new gTLDs (which after Nairobi seems a foregone conclusion) should be implemented only after it has publicly considered the costs and benefits to the public, including the costs of its application procedure. It should also pause to study the effects of new gTLDs on competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection. Implementation of ICANN's new gTLD program should await the result of such a study. After new gTLDs have been in operation for a year, ICANN should organize a review conducted by volunteer community members, as prescribed by the Affirmation, that will determine whether the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice. That review also should examine the effectiveness of the application and evaluation process and the safeguards put in place to mitigate any harms posed by the introduction or expansion. Follow-up reviews should be conducted as prescribed by the Affirmation.

3. An Accountable Board of Directors

A written charter ratified by a representative body of ICANN constituents will state ICANN's authority in plainer and more limited terms. It will reduce some of its current core values and the agreements made in the Affirmation of Commitments and bind ICANN to keep them. These few changes will markedly improve ICANN's accountability, transparency, and legitimacy. Even so, they do not resolve the chief obstacle standing in the way of these necessary qualities.

That obstacle is a board of directors whose powers are unrestrained. Elections, standing alone, have proven to be an ineffective check on those powers.²⁰² Something more than elections are needed.

Until direct limits are placed on the board's powers, ICANN will fall short in acquiring every one of the qualities needed to resolve the persistent criticisms of it. Transparency and legitimacy depend on accountability. Accountability—at least the kind that binds ICANN to (1) act in harmony with fixed standards of conduct; (2) disclose all information relevant to determining whether it has met those standards or fallen short; and (3) receive correction or sanctions by a person or persons empowered to hold ICANN to its commitments by legal force, if necessary—must be established to ensure that its operations are transparent and that ICANN acts consistently with its mission. As things now stand, ICANN operates as transparently and hews as closely to its written purposes as the board permits and no more. It is only as accountable as the board allows it to be, a situation that its constituents are finding increasingly intolerable.

²⁰² *Signposts*, at 7 (“No composition of its board is likely by itself to confer the perception of legitimacy on ICANN among all its possible constituency groups.”).

Resolving the persistent criticisms of ICANN requires a penetrating reconfiguration of the board of directors and its powers. Those powers should be enumerated and checked. This is where the application of constitutional principles to ICANN's structure would have the greatest impact.

There should be 21 directors, elected by the supporting organizations and advisory councils. The board's powers should be enumerated. Its powers should be stated, not implied. Directors should be expressly prohibited from exercising powers unless enumerated or a suitable means for exercising an enumerated power.

Its powers should be internally checked. Board decisions should be subject to reversal, not merely reconsideration. Board members should be bound by the charter and the (revised) bylaws and removed if unfaithful to them. Mechanisms for holding board members within their enumerated powers could include veto, removal, and judicial review provisions. The president should hold a veto over board decisions. Board decisions should be subject to reversal by the Board of Review under circumstances described below. Directors who violate their fiduciary responsibilities or the charter may be removed by a 2/3 vote of all members of record. Removal may be challenged before the Board of Review. A derivative lawsuit to enforce the charter and bylaws could be commenced with a 2/3 vote of all members of record. An investigation by the California Attorney General may be commenced in the same way.

Directors should owe members of record recognized fiduciary duties, including the duties of "care, inquiry, loyalty and prudent investment."²⁰³ The duty of loyalty will be expressly defined in terms of fidelity to the charter.

The practice of occupying more than one leadership position within ICANN should end. No person should be eligible to serve as a member of the board of directors until they have resigned any position within ICANN, including its committees.

Restraining the board's power in these ways should not hamper ICANN's capacity to carry out its mission. Decisions may take longer to reach and implement. Some of those decisions will be challenged through procedures that will take time. But any delays will be more than paid for by ICANN's enhanced institutional confidence.

4. A More Powerful President

The president should continue acting as the leader of ICANN, its public face and chief advocate. But he also needs to become an independent check on the board's power. To do that, he should stop sitting as a member of the board *ex officio* and become independent of the board. Appointment and removal of the president should change to reflect that independence. The board should continue appointing the president by a majority vote, but removal should be only for cause, defined as serious infidelity to the charter or the bylaws, and only by a majority of all members of record.

Presidential powers would include implementing board actions, proposing actions to the board, and vetoing any action of the board that he finds repugnant to the charter or bylaws. Reasons justifying the veto should be publicized, and the president should be required to include in a written veto statement any refinements of the vetoed action that would bring it

²⁰³ *Frameworks and Principles*, at 5.

into line with the charter and bylaws. To carry out his powers, the president should be given the same information conveyed to any director.

Restraints should be placed on the president, as well. He should serve for fixed two-year terms that are renewable on a majority vote of all members of record. His compensation should continue to be set by the board but cannot be reduced during his time in office. However, his total compensation also cannot be increased more than 10% per year.

5. Members of Record

Perhaps the most significant change recommended here is the creation of memberships of record. California law permits a nonprofit public benefit corporation like ICANN to have members.²⁰⁴ Like shareholders in a for-profit corporation, members of a nonprofit corporation hold the board of directors in check. ICANN has no members, by design.²⁰⁵ ICANN's explanation for eschewing members of record is telling:

ICANN is accountable to the global community, however the nature of ICANN's unique mission does not permit "members" of the organization that could exert undue influence and control over ICANN's activities. Thus by not having any statutory members, ICANN is accountable to the public at-large rather than to any specific member or group of members. This construct helps eliminate the specter of antitrust violations by allowing ICANN to operate in the best interests of the public at large rather than in the individual interests of certain members. This construct also allows ICANN to work collaboratively, rather than compete, with the various constituents of the Internet community.²⁰⁶

None of these reasons is convincing.

ICANN's conceit of accountability "to the global community" or "the public at-large" is accountability in name only. Without accountability to a particular person or persons, the board may act with impunity because no one holds the legal right to hold the board of directors to its duties and prohibitions under the bylaws.²⁰⁷

Its concern with "undue influence and control over ICANN's activities" contains a kernel of truth but gets the answer wrong. To be sure, even the United States agrees that "there is a group of participants that engage in ICANN's processes to a greater extent than Internet users generally" and that steps must be taken to ensure that "its decisions are in the public interest, and not just the interests of a particular set of stakeholders."²⁰⁸ But ICANN has already responded to this concern by committing "to perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial impact on

²⁰⁴ See Cal. Corp. Code § 5310(a).

²⁰⁵ Bylaws, art. XVII ("ICANN shall not have members, as defined in the California Nonprofit Public Benefit Corporation Law ("CNPBCL"), notwithstanding the use of the term "Member" in these Bylaws, in any ICANN document, or in any action of the ICANN Board or staff.").

²⁰⁶ *Frameworks and Principles*, at 20.

²⁰⁷ IGP Comments, at 5 ("What has been missing is a legal framework with clear lines of accountability to real stakeholder/members.").

²⁰⁸ Affirmation, at 1.

the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS.”²⁰⁹ Ironically, then, the right answer to its concern with “undue influence” is to place greater limits on ICANN’s decision-making processes, not to liberate the board of directors from accountability to particular members. So long as both members and the board are bound by law to act in the public interest, the addition of corporate memberships will enhance ICANN’s accountability without making it more vulnerable to capture by special interests.

Working collaboratively with constituents should be encouraged because it surely benefits ICANN. But it is a means, not an end. ICANN simply fails to explain how establishing members for ICANN will preclude or even impede collaboration. More importantly, it is not clear (nor does ICANN say) why collaboration should be fostered at the expense of accountability, transparency, or legitimacy.

Establishing members of record for ICANN is an indispensable step in ensuring its accountability.²¹⁰ ICANN’s integrity as an organization, making its operations consistent with its principles, requires internal checks like members authorized to hold directors to their duties. Accordingly, I propose that the charter provide for the establishment of 42 memberships, or twice as many as the number of directors. Unlike some previous proposals, such members would not be elected through Internet-wide elections. They would be appointed by a majority vote of the governing board of each ICANN committee. Like directors and officers, members of record would be required to resign from any other position within ICANN. The “representativeness” of an individual member will lie with the experiences and expertise that let him or her to be appointed by a particular committee. It will not lie with continued interaction between the member and that committee.

Members of record would have powers and duties that are few in number but powerful by design. They would be authorized to remove any director by a super-majority vote of 2/3 of all members. They would be authorized to remove the president for cause by the same vote. They would be authorized to amend the charter or vacate an amendment of the bylaws by the same vote. And they would be authorized to bring a derivative action against the corporation or submit a petition with the California attorney general, if by a 2/3 majority vote they concluded that an action by the board of directors so seriously exceeds its authority or in some other way conflicts with the charter or the bylaws that judicial review or a government investigation is necessary.²¹¹ By these last means the charter can use California’s “rigorous framework of legal accountabilities”²¹² to hold the board of directors

²⁰⁹ *Id.*

²¹⁰ IGP Comments, at 4-5 (“Once ICANN detached nearly all its participants from statutory member status after 1999, it basically cut itself off from the basic protections of the laws it was incorporated under. ICANN now claims to be accountable to anyone and everyone—and thus in reality, it is accountable to no one. If one believes that the membership provisions of California corporate law don’t scale to a global level, then either the membership issue must be cleared up, or another legal framework found.”).

²¹¹ See Cal. Corp. Code § 5222 (authorizing removal of any or all directors by approval of a majority of members); *id.* at § 5250 (authorizing members to submit complaint with the California Attorney General requesting him to ascertain the condition of a corporation’s affairs and determine to what extent it has failed to comply with the trusts it has assumed or departed from the purposes for which it was formed and to institute an appropriate proceeding).

²¹² *Frameworks and Principles*, at 16; see VeriSign Comments, at 8 (calling for “a defined legal framework and jurisdictional oversight”).

within the bounds set out in the charter and bylaws. The bylaws would need to be amended to reflect that a derivative action by the members or a petition for review by the attorney general satisfies the procedural provisions of California law.²¹³

6. Financial Constraints

ICANN's budget and revenues should be restrained too. Accountability would be enhanced if the board's power to raise and spend money depended on its narrow technical authority under the charter. Transparency would be enhanced if extended to financial reporting and budgetary authorities.

ICANN should have the authority to raise sufficient revenues to carry out its core mission effectively. Limiting the reach of its financial authority should not be mistaken as a call to return to its early days when it lacked proper funding for staff and other resources necessary to fulfill its duties under the IANA Contract.

Those days are long gone. Since 2005 ICANN's annual revenues have increased by 356% and its net assets by 740%.²¹⁴ Such dramatic increases in ICANN's financial power cannot be justified by the increased costs of performing the IANA functions, and in an era of global recession they are impossible to justify.

ICANN should not be free to charge what the market will bear when its managerial control of the Internet DNS makes it a monopoly. Unchecked financial power is a threat to ICANN's accountability and an affront to its core value of acting in the public interest.²¹⁵ ICANN should have authority to raise and spend revenues as necessary to satisfy its duties under the IANA Contract and to take reasonable steps to extend its policy-making deliberations around the globe. It should be free to acquire a limited reserve. Beyond those purposes its financial authority should be curbed.

The charter should provide that ICANN's is permitted to grow by no more than 10% per year. Its net uncommitted revenues should not exceed an amount equal to the annual budget of four years before. Amounts beyond this limit should be reallocated: 50% for safety and stability (infrastructure and security improvements); 25% for enhanced compliance measures (WHOIS and contract compliance); and 25% enhanced participation in ICANN's meetings and proceedings by developing countries (remote meeting facilities and a travel allowance). Surplus uncommitted revenues should not be used for increased staff salaries. The need for additional investment in these areas seems evident, but finally determining where to reallocate excess net uncommitted revenues and in what proportions naturally will be matters for further debate.

Cost-benefit analysis should be embedded in the charter. It should provide that no new ICANN initiative (including the introduction of new gTLDs) may receive funding by any source until an auditor selected by the president has reviewed the proposed project and

²¹³ See Cal. Corp. Code § 5710(b)(2) (requiring a claim in a derivative action to be made with particularity); *id.* at § 5710(c) (requiring a showing that a derivative action will benefit the corporation or its members).

²¹⁴ Compare FY 2006 Financial Report, at 3 with FY 2009 Financial Report, at 3.

²¹⁵ See NeuStar Comments, at 4 ("For years ICANN was under-funded, but that's no longer the case, and while technically a non-profit corporation, ICANN has increasingly expanded its activities and mission to justify its growing budgets rather than reduce its revenues to meet its narrow role as envisioned in the DNS White Paper and Memorandum of Understanding.").

issued a written report detailing (1) estimated costs of the project; (2) estimated benefits; (3) estimated timeline for completion.

Compensation for ICANN officers and staff should continue to be set by the board. Presidential compensation presents special problems. To maintain his independence, the president should receive compensation set by the board but immune from being reduced during his time in office. At the same time, it cannot be increased more than 10% per year.

Annual financial reports including a detailed accounting of ICANN's expenditures should be required. Reports by gross category are insufficient. Any expenditure above \$25,000 should be listed individually. International Financial Reporting Standards should be followed. The auditor should be appointed by the president.

These constraints on ICANN's financial authority will enhance its accountability, transparency, and legitimacy.

7. Board of Review

ICANN's processes of reconsideration and IRPs furnish avenues for convincing the board of directors to revise or reverse its own decisions. But they are at most an incomplete form of relief because they yield recommendations that the board remains free to accept or reject.²¹⁶ This is a critical point in ICANN's structure where the board's power must be checked for ICANN to become genuinely accountable. As NeuStar rightly pointed out, the problem with the status quo is that "the ultimate arbiter of any dispute is the very body which is alleged to have made the incorrect or inappropriate decision in the first place."²¹⁷

Reconsideration is a worthwhile process to keep if it merely provides the board with a second look at decisions that were made in haste or without all the facts.²¹⁸ This conclusion appears sound even though "the community has now written off the Reconsideration Process"²¹⁹ Some process enabling the board of directors to reexamine its own decisions is unavoidable; perhaps further discussion among ICANN constituents can identify refinements that would make the process of reconsideration more effective. The Independent Review Process is inadequate, however, because it cannot reverse even the most mistaken board decision. Additional relief is needed to ensure that the board's decisions remain congruent with the charter and the bylaws.

During the past year several organizations have called for the establishment of new mechanisms that will enable aggrieved parties to reverse decisions of the board, not merely review them. The European Union stated, "It is essential to ensure that ICANN has effective mechanisms for independent scrutiny and review of its Board decisions and

²¹⁶ Bylaws, art. 4, § 2.18 ("The Board shall not be bound to follow the recommendations of the Board Governance Committee."); *id.* at art. 4, § 15 ("Where feasible, the Board shall consider the IRP declaration at the Board's next meeting."); *ICM Registry*, at 61 ("[T]he intention of the drafters of the IRP process was to put in place a process that produced declarations that would not be binding and that left ultimate decision-making authority in the hands of the Board."); NeuStar Comments, at 3 (describing the processes of reconsideration and IRP as "only advisory in nature and not binding on the Board").

²¹⁷ *Id.*

²¹⁸ See Bylaws, art. 4, § 2.2.

²¹⁹ AT&T Comments, at 12-13.

independent appeal mechanisms to safeguard the rights of individuals and organisations affected by the decisions of such a private sector body. For instance, the establishment of an arbitration and dispute resolution mechanism based on international law in case of disputes could be considered. This includes reassurance that the outcomes of the appeal mechanisms are enforceable in a timely manner.”²²⁰ The government of Canada noted that “[s]takeholders that are adversely affected by decisions of the ICANN Board might wish to seek reconsideration of decisions, including through a process independent of reconsideration of the Board.”²²¹ The Software and Information Industry Association similarly recommended that ICANN establish an “effective independent review body ... whose mission is to strengthen ICANN accountability processes.”²²² TechAmerica also pointed out the need for “a mechanism that enables the ability to not only challenge but also overturn decisions of the Board. Such a mechanism should ensure that members of ICANN’s broad stakeholder community, including non-contracted parties, have the requisite standing in that regard.”²²³ And AT&T recommended that “ICANN should establish an independent adjudicatory panel and work with the stakeholder community to strengthen its existing accountability mechanisms in order to ensure that ICANN is accountable to members of the community it serves.”²²⁴

In keeping with these recommendations, a Board of Review should be established. It would be composed of five members. Each member would serve a term of five years each, a term that could be staggered beginning with the second round of appointments. The Board would have jurisdiction over any dispute over which a party could obtain IRP review today. Standing would extend beyond contracted parties but would require a showing of individual injury. Rules of court should be adapted from the rules of the International Court of Justice. Decisions should be issued in the form of written opinions explaining in what respect the disputed action did or did not comply with the charter and bylaws. Such decisions would final and binding on the parties, including on the board of directors, and must be executed within five calendar days of the decision unless otherwise directed by the Board. It would be authorized to reverse noncompliant decisions of the board of directors.

8. Amendments

Amending the charter or bylaws is a serious process that ought to require an unusual effort to marshal support among the broadest and most diverse range of representative constituencies. For that reason, I propose that the charter may be amended only by a 2/3 majority vote of the members of the record. I also propose that the bylaws may be amended only by a 2/3 majority vote of the board of directors with the concurring vote of the president.

D. Additional Work

Each of these ideas deserves further refinement and discussion. The charter should reflect the collective resolve of its constituents to bind ICANN to a basic framework document that

²²⁰ European Union Comments, at 4.

²²¹ Canada Comments, at 3.

²²² SIIA Comments, at 7.

²²³ TechAmerica Comments, at 3.

²²⁴ AT&T Comments, at 14.

prescribes an organizational structure that, in time, will earn the institutional confidence that it needs. Details of that framework need to be elaborated and set down in a charter document. Part of that charter debate could include areas not addressed here, such as procedural requirements and the future shape of the supporting organizations and advisory councils. Amendments to the bylaws should be considered as part of the charter adoption process, so that ICANN's most basic corporate documents would be internally consistent.

V. Conclusion

ICANN's perplexing challenge is to earn greater institutional confidence without imperiling the basic project of privatizing the management of the Internet DNS. This paper offers a proposal for giving ICANN a fresh start through a process of ratifying a written charter that would bind ICANN to its most basic commitments and prescribe a new corporate structure designed to keep it accountable, transparent, and legitimate.

To those ends, the charter should (1) limit ICANN's authority to the narrow mission of carrying out the technical management and coordination of the Internet DNS, to prevent mission creep; (2) put ICANN's principal obligations from the Affirmation of Commitments into the Charter, to give those obligations greater permanency; (3) enumerate and check the powers of the board of directors by making them subject to reversal and not just reconsideration; (4) make the president independent of the board and give him the power to veto decisions that are manifestly inconsistent with the charter and bylaws; (5) create corporate members and place directors under fiduciary duties to them; (6) limit ICANN's budget growth to 10% per year and its net uncommitted assets to the total annual budget of four years before; (7) establish a Board of Review with authority to reverse decisions of the board of directors; and (8) make bylaws subject to amendment by a 2/3 vote of the board of directors and the charter by a 2/3 vote of all members of record.

Whether a written charter with these attributes will be tried depends on a robust debate among ICANN's constituents. While there is still time, let the debate begin.