

ICANN, Legitimacy, and the Public Voice: Making Global Participation and Representation Work

Report of the NGO and Academic ICANN Study

August 2001

Executive Summary

Introduction

As the Internet becomes increasingly important to people around the globe, a critical question has been raised: How can the voice of a growing community of stakeholders be appropriately included in new mechanisms for the coordination or “governance” of key Internet technical functions? This question is posed today in one such coordination body, the Internet Corporation for Assigned Names and Numbers (ICANN), which is tasked with managing aspects of the Internet’s naming system and other critical technical functions.

In 2000, ICANN completed an unprecedented global election for five “At-Large” Directors of its governing Board. ICANN is now in the midst of a major debate over the future of broad participation in its activities. That debate will be closely watched by policy makers around the world and could have profound implications for both the legitimacy of ICANN and the future of public participation in a new breed of non-governmental, global coordination bodies.

This report seeks to address key questions: Why is there a need for a public voice within ICANN? What role does and should ICANN’s At-Large Directors and Membership play in providing that voice? What lessons can be learned from the At-Large election with regard to the At-Large Membership and the structure of the ICANN Board? And what practical steps can ICANN take to establish an appropriate and effective public voice within its structure, and hence improve its legitimacy?

This report presents the findings of the NGO and Academic ICANN Study (NAIS)¹, a collaboration of ten research teams from around the world. The findings reported here began with an elaborate series of studies conducted within each of ICANN’s five designated geographical regions. The methodology of these regional assessments varied based on local conditions, but included personal interviews with experts and leaders, intensive review of supporting documents and media coverage, surveys of key stakeholders, and the analysis of experienced researchers. Cross-regional comparisons were made, coupled with a conceptual investigation of ICANN’s governance structure. Our final analysis and recommendations are the product of intense consultation, deliberation and collaboration since the formation of NAIS in early 2001.

The NAIS Interim Report (June 2001) presented initial observations and explored the need for a public voice in ICANN’s activities. This Report refines those findings, and proposes a structure for ICANN that we believe will provide a longer-term answer to the question of ICANN’s legitimacy. Our approach is rooted in the creation of an inclusive Membership, with a structure to facilitate informed *participation* in ICANN’s activities, and with elections to allow for *representation* of broader interests on ICANN’s Board. In addition, we present suggestions for structural reform, constitutional constraints, and increased accountability.

¹ More information about NAIS and the complete Interim Report is available at <http://www.naisproject.org> or by emailing info@naisproject.org. A list of NAIS team members is included below.

1. The Public Voice, Legitimacy, and ICANN

1.1 The mission, character, and history of ICANN requires global public participation and representation for its long-term legitimacy and stability.

This fundamental finding is based on the following key observations:

- *ICANN's current and potential range of purposes are not only "technical" but also have broad policy implications.*

Efforts have been made to confine the scope of ICANN's activity to technical coordination of certain naming and numbering and protocol functions. But many of ICANN's "technical" decisions—such as the creation of new top-level domains—are inextricably linked to "policy" decisions—such as intellectual property protection, competition policy, or the allocation of Internet resources. ICANN faces great pressure to address these policy issues and, by necessity, to make decisions on grounds other than technical merit.

Much here involves the future of ICANN. Its *potential* authority is largely unbounded. Policy authority over the root server system and other central Internet functions make it possible for ICANN to exert much broader control over Internet activity. To date, many of the ICANN Directors and staff have expressed little interest in doing so and have publicly disavowed such a broad scope of power. But ICANN is likely to face increasing pressure from those seeking ways to control a range of behavior online. The broader this pressure, the more sweeping the potential impact, and the greater the need for public participation and representation.

- *ICANN is a new type of organization designed to provide coordination on a global scale.* The global nature of the Internet demands new, non-national forms of organization. For many a primary purpose of ICANN is to globalize Internet coordination in a new way. Public participation is seen as a key element and a safeguard against domination by governmental or commercial interests on a national level, and as a source of input as for global interests as ICANN's functions transition away from US control.
- *While ICANN is formally organized as a private, not-for-profit corporation, its functions are largely public and global.* In its recent Internet Coordination Policy (ICP-3), ICANN itself emphasized its "public trust" functions: "It is essential that the centrally coordinated functions be performed in the public interest, not out of proprietary or otherwise self-interested motives. For this reason, ICANN was founded as a not-for-profit public benefit organization, accountable to the Internet community." ICANN is thus best viewed as a hybrid organization, having important elements in its character and mission of both a private and a public entity.
- *Global public participation has historically played a role in ICANN.* The notion that the broad community of Internet users should be represented in ICANN's own governance has been a founding—though often poorly defined—principle of ICANN. ICANN was created, in part, to provide representation to the global Internet community in Internet coordination activities and to reflect an Internet tradition of bottom-up coordination. This broad view of public participation in ICANN is part of the basic bargain of institutional legitimacy that many relied on when supporting ICANN's development.
- *Globally broad stakeholder participation and representation will be an increasingly important element of ICANN's legitimacy.* Participation and representation are widely accepted good governance values. They are based upon the idea that those who are affected by policies should participate or be represented in the policy-making process. In the context of the Internet, this requires a truly global implementation.

1.2 To the extent possible, the entire affected Internet community—from companies in the business of providing DNS services, to domain name holders impacted by ICANN's rules, to individual Internet users and consumers whose activities online

could be shaped by ICANN's rules—should be considered stakeholders in ICANN's activities.

The notion of an impacted “public” in ICANN is broad. Definitions of the “public” affected by ICANN vary widely, in part due to regional differences in conceptualizing the idea of “public” independent of other civil institutions. At the very least there is a continuum of interests in ICANN's activities that, at its broadest, include all users and potential users of the Internet.

1.3 ICANN's existing supporting organization structures, or representation by governments, do not alone provide appropriate public participation.

ICANN's internal structures are not likely to provide adequate public participation. The three existing supporting organizations—the Address Supporting Organization (ASO), the Protocol Supporting Organization (PSO) and the Domain Names Supporting Organization (DNSO)—were originally conceived as the locus of expert technical and business input, and they vary in the degree to which the public can participate. Many feel that despite efforts to make ICANN a “bottom-up, consensus organization” with decentralized policy development, the Board and staff wield the most important influence and make decisions in a largely “top-down” fashion.

Government is not the appropriate avenue for public participation. While governments play a role in ICANN through the Government Advisory Committee, there are many reasons that their role is best a limited one. ICANN was conceived as a non-governmental body. Governments are viewed with skepticism as insufficient or a poor fit for Internet management where rapid change, technical expertise, and responsiveness to new social developments are needed. Traditional multilateral governmental organizations have been found lacking in this regard. ICANN in many ways represents an attempt to find alternative methods for non-government coordination.

1.4 “At-Large” Participatory Structures and Representation on the Board are therefore essential channels for broader stakeholder involvement and ICANN's legitimacy.

Based on this conceptual model, ensuring inclusive public participation and substantial Board representation should be overriding priorities for ICANN. The At-Large Membership (ALM) remains the great—and as yet unrealized—opportunity for such needed public involvement. Broadly conceived, the At-Large membership could serve a diverse set of goals including—

- global participation—a means for communication and outreach to the public;
- representation—a voice for members directly within the decision-making Board; and
- accountability and transparency—a watchdog over ICANN activities.

Developing an ALM is a necessary precondition to successful At-Large Director selection. Institutionalizing the other roles of the ALM in providing participation and accountability will have additional important benefits for establishing the global public legitimacy of ICANN.

2. The At-Large Election: Lessons from the Regional Reports

From its inception, ICANN recognized that some form of representation for broad public interests was needed. The creation of nine At-Large Directors—nearly half the 19-member Board—to be selected “At-Large” was a placeholder for that broader representation. But it was only a placeholder, as the exact method for selecting directors was not established at ICANN's founding and has been a subject of great debate.

The October 2000 ICANN election for five At-Large Directors, one from each region, was unprecedented. Potential voters in the election broadly included anyone in the world with an e-mail address and postal address who completed the web registration. Over 153,000 people worldwide registered, and over 30,000 ultimately voted. Up to seven candidates were on the ballot in each region, selected by nomination or a

petition-like member nomination process. Voting occurred online, through preferential balloting, and five new directors were elected to the Board.

The election has become a point of contention among those who question the need for public participation in ICANN at all and those for whom the At-Large participation was a basic premise of ICANN's existence. In many ways the 2000 election was perceived to be successful in selecting directors by a broad membership. However, the election also presents challenges for the future.

2.1 Common Elements

The 2000 election, though experienced regionally, was developed and implemented globally. All regional elections had core issues in common:

- *A rapidly implemented election based on multiple goals*—In early 2000 ICANN faced the need to design an election that was broadly inclusive, inexpensive to conduct, enhanced participation and legitimacy, minimized capture and fraud, and would be completed in less than a year. These goals were in tension with each other. It is certainly a major achievement that the election was designed and conducted within the timeframe allotted.
- *Technical and administrative problems*—Members and potential members experienced numerous problems with the online registration and voting system. Registration servers were unable to handle demand and some potential members could not register. Some failed to receive a PIN number after registering. Others had trouble actually voting. These problems damaged the election's credibility but many of them—such as building scalable systems to handle higher peak loads—appear possible to remedy in a future election with more time, resources, and experience.
- *Inherent limitations of online voting*—Online voting is probably the only practical way to conduct a low cost, globally inclusive election. Yet at this time there appear to be inherent problems with such voting. Voters worldwide have little experience with such systems. Experts report a tradeoff between cost and security. Without a well-developed global authentication system, there is little chance of technically preventing people from registering more than once. The combination of online registration and postal mail confirmation, while inconvenient, seemed a reasonable tradeoff for additional security.

2.2 Regional Distinctions and Cross-Regional Comparisons

Region-by-region analyses are provided in the NAIS Final Report and summarized separately. They provide a rich picture of both the benefits and challenges—particular to each region—of a new global election for ICANN. Major cross-regional observations of note include:

- *Outreach gap*—Communication and education are key enablers of fair elections. In most countries, and particularly in Africa and Latin America, there was little public education about the At-Large elections. In a few countries, such as Japan and Germany, intensive outreach took place. This wide differential raises concerns about the possibility of national capture of a regional election (exacerbated by potential national voting tendencies), or regional domination of elections held on a global basis. Increased and improved voter education by ICANN, taking the complexity of language into account, may mitigate this problem.
- *Voter education*—Across regions, complaints were heard about the almost complete absence of systematic outreach or voter education. Voter turnout remained extremely low relative to eligible voters, and it is unclear how informed most voters were about the issues.
- *Diversity*—In nearly every region, concern was raised about diversity in dimensions besides geography. While many acknowledge the importance of regional representation, there was also a felt need for a new global coordination body such as ICANN to foster representation along lines other than geography.

- *Participation role*—Across regions, At-Large members sought a role beyond merely voting for Directors. Participation can involve more than casting a ballot; it can include deliberation and open exchange of ideas, allowing the public to inform and to be informed. So far, ICANN has provided no platform for integration and deliberation by the ALM.
- *General 'satisfaction and skepticism'*—Across the regions numerous election problems and challenges were encountered. But, given the rules and circumstances, the At-Large Elections were widely seen as legitimate and a successful step towards public participation within ICANN.

3. Conclusions and Recommendations

ICANN serves a vital global public trust. It must therefore achieve a level of legitimacy appropriate to that trust, by structuring itself to take account of the public's interest in its activities. As described above, its existing structures have not done so to date.

Our observations and analysis of the 2000 elections indicate that the At-Large Directors and the At-Large Membership (ALM), mandated at the founding of ICANN, have so far been inadequately defined and institutionalized in ICANN's framework of operations. The 2000 elections highlight many of the challenges with global membership and elections. We believe that they also indicate possibilities for meaningful involvement and representation.

We believe that incorporation of the public interest into ICANN can be achieved through the creation of an inclusive membership, resting on two overarching principles: *The public membership should be given structure, and the public membership should be given representation.*

- ICANN should create and support a *broad, open At-Large Membership* with low barriers to entry and a tendency towards inclusiveness.
- That Membership should be provided with a *functional, robust structure* capable of facilitating self-organization, coordination, aggregation, and articulation of the Membership's diverse views. A Secretariat and a Membership Council for the At-Large Membership could serve this purpose.
- The Membership should be *represented in ICANN's central decision-making structure*, the Board of Directors. Balance and of appropriate representation require that the Membership *directly elect at least the same number of seats* on the ICANN Board as the various Supporting Organizations in total (nine currently).

We also put forward additional proposals for structural reforms and accountability mechanisms that should be enacted in parallel with ICANN's membership structures.

3.1 ICANN Should Constitute A Broad Membership Open to All Who Complete a Relatively Simple Registration Process.

ICANN will gain requisite legitimacy from the creation of a membership that allows for substantial participation and representation by interested members of the public. Since ICANN's activities have the potential to impact all Internet users and in fact the public in general, we favor an inclusive approach to membership. We believe that membership should be open to all who express interest by completing a relatively simple registration process online combined with postal return confirmation.

Online registration and postal return appears to strike a reasonable balance between practicality, security appropriate for a narrow membership organization, and inclusiveness on a global basis. Postal return, while imperfect, provides a measure of authentication and security. While the costs of postal return are non-trivial, these are likely one-time costs for many members. Many of the problems encountered in the postal return in the 2000 election could also be avoided with greater time for registration and better planning.

Problems with alternatives: NAIS considered many other criteria for membership. We found major alternatives far less attractive in achieving inclusiveness and participation in a practical fashion.

For example, limiting membership to holders of domain names was one alternative considered but which ultimately fails basic tests of fairness and practicality. Interested ICANN stakeholders include many Internet users who are not necessarily domain name holders, and holders are a highly imperfect match for those directly interested in ICANN. Domain name holders as a group are dominated by parties already well-represented in the SO structure. VeriSign has estimated that over 80% of current gTLD registrants are commercially-oriented organizations—creating a membership pool that under-cludes individuals and is heavily skewed towards commercial groups and organizations. Substantial practical questions remain in determining whether those who own more than one domain name get more than one vote. And capture is still possible through the registration of many names.

Similarly, NAIS rejected the use of a fee for membership. Imposing a fee raises serious equity issues, even with substantial sliding scales for poorer regions. While likely to weed out less committed members, a fee still allows the possibility for over-representation of wealthy interests or countries. NAIS is cognizant of the need to pay for membership activities, but we believe that such costs can be borne by ICANN for at least the next several years, and question the extent to which an equitable fee would raise sufficient funds without jeopardizing inclusiveness and legitimacy at this time.

3.2 In order to facilitate participation in ICANN's activities, the At-Large Membership should have internal structures that promote policy deliberation, coalition building and information sharing among Members.

Legitimacy for ICANN depends on both the opportunity for and reality of meaningful participation. An At-Large Membership that lacks enabling structures is likely to lie dormant, gradually losing its coherence—described by many as a major disappointment following the 2000 elections. We therefore propose a four-part At-Large Membership (ALM) structure to facilitate participation and representation of a productive and informed membership.

- **Secretariat**, a non-partisan, staff-level position, to facilitate the flow of information and engagement of an informed Membership.
- **Membership Council**, selected by the Membership, to oversee the ALM, guide the Secretariat, and generally empower At-Large Members
- **ALM Working Committees and Groups**, formed on an *ad hoc* basis, to discover and deliberate policy positions through an extensive outreach/consultation process.
- **Local and Regional Associations**, encouraged to self-organize (or catalyzed by the Council) in order to provide global forums for discussion catering to particular language, culture, or ideological groups.

This structure is designed with the goal of limiting, to the extent possible, the negative effect that excessive intermediary structures can have on Members' ability to directly interact with ICANN's policy development structures. For that reason, the NAIS team does not propose any kind of "Policy Council" (like the Names Council for the DNSO) purporting to represent all Member interests. While there may be a need for such a structure in the future, it should be implemented only after consideration by the Membership.

3.3 The public voice in ICANN should be represented at the Board level through a number of At-Large Directors equal to the number of Directors chosen by the Supporting Organization.

In order to provide the public voice with meaningful representation, At-Large Directors should balance the policy authority of the Directors chosen by Supporting Organizations. Therefore, the number of At-Large Directors should equal the number of SO Directors, even if the size of the Board should change from its current nineteen members. This balance has also been part of the Board structure since ICANN's formation and many participants have cited it as part of ICANN's basic structural balance.

Because changes to the by-laws require a two-thirds majority, this balance on the board would permit only those changes that command at least some support from both the At Large and SO Directors. In our view, this would provide an appropriate level of “checks and balances” on the board, and would provide the At-Large with enough authority to block changes to the bylaws that might negatively impact the public voice. (While we recognize that Directors to date have seldom acted in monolithic voting blocks, we anticipate that future boards may find At-Large Directors sharing certain common perspectives inherent to their positions.) *We believe that reducing the At-Large Directors to less than one-third of the Board would seriously undermine the legitimacy of ICANN.*

3.4 At-Large Directors should be chosen through direct election by the At-Large Membership. Direct elections, while imperfect, are more likely to provide ICANN with global legitimacy than other proposed options.

Properly managed, direct elections can provide high levels of representation, diversity, and accountability. Because they eliminate an intermediate layer between members and the Board, they encourage a higher level of participation than other selection mechanisms. They also help to lessen the risk of capture when compared to indirect elections, since the electorate with real decision-making power is significantly larger in size.

The creation of an At-Large Membership structure and the direct election of At-Large Directors is a model with both benefits and problems. As was discussed in the context of the 2000 election, direct elections present challenges in voter registration and education, funding, security, and capture. These shortcomings, however, are outweighed by the system’s benefits—and by the problems with alternative models—especially when based on a conception of ICANN that recognizes the organization’s unique mission and character.

ICANN’s legitimacy is of a fundamentally different character, and should be measured with different standards, than that of traditional governments. ICANN makes important policy decisions, but it is not a government. It does not raise armies or jail people, though it does have the potential to make far-reaching policies about the Internet. The point of ICANN elections is to choose directors who are representative of the public’s perspective to act within the important, but presumably narrow, confines of ICANN’s mandate.

- *ICANN elections are legitimized by the process used.* We propose an inclusive membership for ICANN. Such openness provides the *opportunity* for participation to those who want it, and in so doing validates the public legitimacy of the process. It is this diminished barrier to public input and access that legitimizes the election as a selection process, not its ability to represent each and every stakeholder or interest group.
- *Vulnerability to fraud or capture, while real, should not be overstated.* The danger of election fraud—such as multiple registrations—is real, but not so great that it invalidates direct elections. The system of authentication by postal mail used last year provides a meaningful level of protection (additional protections are discussed below) appropriate for an organization of ICANN’s character and responsibilities.

The danger of capture—through overrepresentation of particular interests or domination by nations—is real but somewhat overstated. The 2000 elections provided little evidence of corporate domination of the elections, and improved elections rules and monitoring could mitigate this fear. Nationalism remains a concern as well, but we note that “capture” may arise as little more than a vigorously sponsored effort at voter registration and participation. The response, then, to fear of capture is not less elections, but more democracy and clearer rules. Alternatives to elections appear at least as susceptible to domination by particular interest groups or nations.

- *ICANN’s importance may increase, not diminish, with time.* As to the fear that public interest in ICANN will wane, leaving elections to the control of a fringe few ICANN zealots, this is a concern that can only be tested over time. We do not think this will happen because we believe that ICANN will become more, not less, relevant and visible to the public. The creation of a stable, informed membership—one that is perhaps smaller than the 2000 electorate—appears a reasonable outcome.

Alternative models of selection. A number of alternatives to the direct election model have been proposed by members of the ICANN community. These proposals seek to address some of the shortcomings of the direct election model, but all sacrifice critical elements of legitimacy, accountability, or security.

- *At-Large Directors selected by a "User Supporting Organization"* appears to have many different meanings to different people. To the extent it stands for the notion of reducing the number of At-Large Directors to three, it fails to provide an adequate level of representation or check on other interests. To the extent it stands for the adoption of the indirect and questionably representative elections of the other SO's, it would be a poor fit for a body meant to represent the broad public voice.
- *At-Large Directors appointed by governments.* For many reasons, as stated above, governments are not seen as the best public voice at ICANN. Governments already have input into ICANN through the GAC, and ICANN was created in many ways as an alternative to government or multilateral treaty organizations felt inappropriate for the fast-paced and often technical coordination activities.
- *At-Large Directors selected by intermediary "public interest" organizations.* It would be extremely difficult to identify the appropriate intermediary organizations to represent the public interest in selecting At-Large Directors. No single organization or set of organization appears adequate, especially on a global basis.
- *At-Large Directors selected by the ICANN Board.* While a common model for companies, for sitting Board members to select their successors would not provide the outside input and check on vested interests already represented on the Board that the At-Large Directors are intended to provide. This proposal is very unlikely to provide the comfort or legitimacy sought from an At-Large process.
- *Indirect elections.* These dramatically dampen the sense of public participation in the selection process, and therefore fail the fundamental test of providing the Internet public with a sense of participation and empowerment. Problems of fraud, authentication, and cost are not necessarily diminished, and the risk of capture within the narrower selecting group is heightened.

3.5 Details of the At-Large Election: Lessons from 2000 and Recommendations For the Future Election of At-Large Directors.

3.5a ICANN should adopt inclusive authentication mechanisms based on postal returns, while also pursuing alternative models. The At-Large Election's long-term viability will depend on the system's security, accuracy, and resistance to fraud. These questions all lead eventually back to the problem of authenticating users in an election with such a broad electorate. The task before ICANN is to provide reasonable protection that each person voting is a real person, and that no person can vote more than once.

Postal return system. Used in 2000, the postal return system was successful in some ways but problematic in others. Despite its problems, we believe electronic registration with postal return strikes the best balance among security, inclusiveness, and cost. With more lead-time and greater experience, we expect lower failure rates and greater opportunities for errors to be remedied. Reforms such as longer registration periods, better addressing of PIN letters, and opportunities to re-send lost or misplaced PINs should be adopted. A long-term membership means that many members will use the system only initially. Clearer election rules, combined with improved auditing (perhaps on a statistical basis periodically), would provide greater levels of security. Publication of membership rolls—an option to be pursued by the ALM—could further reduce fraud and boost confidence. Finally, serious member education is needed to diminish confusion.

Authentication technology is advancing rapidly, though we believe at this time none of the major alternatives provide an acceptable tradeoff in deployment or accessibility. ICANN should experiment with these systems in the next few At-Large elections, perhaps offering them as an alternative to the postal return system.

3.5b At-Large Directors should be elected both geographically (by region) and on a global basis. Measures should be taken to reduce the risk of national dominance. The election of directors on a regional basis, from

among voters within the region, was cited as a critical benefit of the At-Large system that guarantees a baseline of regional balance. We recommend ICANN continue to elect one Director from each region (recognizing that the number of regions may change over time.)

Many with whom we spoke also felt strongly that geography should not be the only basis for representation. The election of some directors on a global basis could have the very desirable effect of promoting organization, debate, and communities of interest across regional lines. ICANN should therefore elect the remaining At-Large Directors on a “global” basis, through a separate ballot cast at the same time for regional and global elections. In order to diminish risks of regional domination, we also recommend that no region be allowed to secure more than 25% (one under the current board makeup) of these “global” seats.

3.5c ICANN should refine its election policies, creating more independent Election and Nominations committees and improving educational efforts surrounding preferential voting. As it did in 2000, we recommend that ICANN continue to delegate responsibility for the development of election rules and the identification of some candidates for election to Election and Nominating Committees.

- **Election Committee.** The notion of an expert committee tasked with proposing election rules is attractive, but ICANN must make every effort to ensure the Committee’s independence from the Board, as well as its transparency. Rules should be promulgated early, with at least a basic enforcement mechanism set in place. Also, ICANN should make a strong commitment to regular review of the elections and rules, to include some kind of auditing (through sampling) of the Membership rolls.
- **Nominating Committee.** The 2000 Nominating Committee was criticized for its ties to the Board and perceived biases in its nominations. We believe a Nominations Committee provides a useful way to identify strong candidates for the Board, but it must have heightened independence and sensitivity to the interests of Members. Alternatives to nomination, through a petition process with a low threshold, should continue to exist. Further, both the Committee’s membership and its nominations should reflect diversity of gender, ethnicity, experience, and ideology.
- **Preferential Voting.** Despite legitimate concerns about voter confusion, the preferential voting system seems to offer a fair way to elect Directors without relying on costly and complex runoff elections. We recommend the continued use of the preferential voting system, contingent on a commitment by ICANN (and, in the future, the ALM) to undertake a significant multi-lingual outreach effort to inform voters about the voting system’s operation.

3.5d ICANN should commit to funding the Membership from its operating budget for at least the next several years, while pursuing alternative methods. To ensure that the Membership’s development continues unimpaired, we recommend that ICANN commit itself to funding the membership’s full expenses out of the ICANN operating budget for a period of at least the next several years. While we recognize that this constitutes a serious budgetary obligation for ICANN, it is also an integral component of ICANN’s legitimacy.

A pillar of ICANN’s funding structure has been that those groups deriving financial or other benefits from ICANN’s operation should shoulder the responsibility for supporting ICANN’s activities. These groups indisputably benefit from a legitimate and stable ICANN. The At-Large Membership is an essential component of that legitimacy, and should be supported. We recognize that money paid by the registries and registrars to support these expenses would ultimately be passed on to the customers of those entities—namely, the community of users who purchase and hold domain names.

At-Large Membership and elections would not be cheap, but we believe that the costs of Membership and elections should be manageable. The 2000 election cost on the order of US\$350,000 and the largest variable costs—from the postal return system—should decrease sharply as Membership stabilizes if ICANN can institute a reasonable system for “one-time” authentication of members. Even a Membership costing US\$1 million (US\$500,000 in fixed costs, and US\$500,000 in variable costs—enough to register more than three times the 2000 membership), would cost less than US\$.04 per domain name registered in “.com” alone.

Self-sustainability is a laudable long-term goal for the Membership, and should also be explored in the future. Possible options include:

- *Membership fees.* As already discussed, mandatory membership fees run afoul of principles of equity and democracy. Also, the expenses of collection and international money transfers call into question the value of this approach. At the same time, it appears that greater experience may resolve some of these issues and the ALM should continue to monitor possibilities for equitable collection of fees.
- *Government contributions.* ICANN has to date avoided government support, but many NGOs and research organizations benefit from government subsidies worldwide. There is, of course, a risk that governments might seek to use any degree of financial dependence on the part of the At-Large Membership as leverage to pursue political ends.
- *Voluntary donations.* The Membership should pursue innovative suggestions that have been made about the collection of fees on a voluntary basis as part of the domain registration process. It may be possible for the Membership to collect some, though most likely not all, of its budget from voluntary contributions by members, especially if such a contribution were made very easy.

3.6 ICANN should pursue other mechanisms to ensure the public's voice in ICANN.

The ALM and At-Large Directors are only one method—though an essential one—for enhancing ICANN's legitimacy and stability. Other reforms should be pursued in parallel to the changes outlined for the ALM.

3.6a ICANN should develop structural constraints on Board authority. ICANN should directly confront the reasonable fear that it will venture into an even broader policy agenda than it now does. To do so, ICANN should find a way to constrain its jurisdiction in a binding fashion. The limitations currently in ICANN's bylaws do not effectively serve this purpose, both because ICANN has shown a distressing tendency to amend its bylaws casually, and because there is little public confidence in the restraints that already exist.

ICANN should therefore take steps to limit the Board's mission and powers to provide the organization with additional legitimacy:

- **Create "constitutional" limits in charter and bylaws.** ICANN should specifically enumerate the types of activities it may engage in, the scope of topics it may act on, and the principle that powers not specifically granted to the ICANN Board should devolve to the stakeholders in ICANN and the individual users of the Internet.
- **Declaration of user rights.** ICANN should adopt a charter guaranteeing individuals and organizations protection for certain basic liberties, their property, and their expectation to be treated fairly and with due process.
- **Limits on amendment power.** ICANN has already modified its bylaws nine times. ICANN should adopt a much-heightened amendment process—requiring ratification by a supermajority of SOs and the ALM— for those charter and bylaws provisions governing the scope of its authority and the rights of users.

3.6b ICANN should create additional accountability mechanisms. Accountability promotes responsiveness by enabling stakeholders to hold the organization responsible for its decisions. To renew accountability we suggest:

- **Board and Staff Codes of Conduct.** At present, there is no adopted standard for measuring the performance of Board and staff, or for providing a baseline of acceptable behavior. ICANN should develop a code of conduct for both elected and other ICANN Board members, and should clarify their mandate.
- **Fair Administrative Procedure and Reporting.** ICANN should adopt procedures for guaranteeing the transparency of its policy activities. Decisions and meetings should be fairly noticed. Input should be openly taken. Documents should be made widely available. Stakeholders should be provided with detailed reasoning behind decisions of the Board and staff. We note that ICANN has made some

substantial progress in this direction and particularly in the use of online resources, but much more can and should be done to promote the openness of ICANN processes.

- **Active Independent Review Panel.** ICANN should prioritize the creation of an Independent Review Panel from globally respected figures who can serve as a true balance to the Board, and whose decisions should hold great weight within the ICANN community.

3.6c ICANN should pursue Supporting Organization reform.

While not discussed in this report in detail, the ICANN community has recently focused significant attention on the proper role of the Supporting Organizations. We note above many concerns about the effectiveness and openness of the SOs, especially the DNSO. Public participation and representation through the ALM does not end the need for sound bottom-up policy development processes in the functional areas represented by the ASO, PSO, and DNSO. We therefore support the notion of reevaluating the SO structure, processes, and board representation.

4. Proposed Action Plan & Timeline of Activities

Having established a theoretical framework for ICANN's legitimacy and proposed a set of structures to make that legitimacy real, we believe ICANN still needs to institutionalize the At-Large Membership, establish its relationship with the ICANN community, and set in motion an election. Reform must happen quickly; the terms of office for the five elected At-Large Directors on the Board will expire in November 2002, while four other At-Large seats are still filled by Initial Board Members appointed in 1999. Their replacements should be chosen and ready to serve by November 2002 at the latest. Considering the complexity and length of the election implementation, the Board will need to take decisive action at its Annual Meeting in November 2001.

This necessitates major bylaw changes, as well as a commitment by ICANN to adhere to a rigorous schedule of At-Large Membership-related activities over the next year. The full NAIS report proposes a detailed plan of bylaws changes, as well as a timeline for community action. For timely implementation, we feel it is essential for the Board to make substantial progress in this direction by November.

5. Conclusion

ICANN is an experimental, quasi-public, global organization with important responsibilities for a critical worldwide infrastructure that must be managed as a public trust to serve the public interest. As such, its real legitimacy will come only when ICANN establishes robust and effective structures for a public voice to participate and be represented within the institutions of ICANN's internal governance.

Thus it is essential for ICANN to establish an inclusive, open At-Large Membership, with a clear means to participate in the decision-making process and substantial direct representation on the board. Such steps acknowledge the broad potential impact of ICANN's activities, and would significantly legitimize ICANN's operation. They would go a long way towards the basic tenet of good governance that those affected by policies should have a role in deciding those policies. We understand that the difficulties in establishing a functional At-Large Membership are not trivial. However, we also believe these difficulties are outweighed by the benefits to ICANN of such essential legitimacy and stability.

As long as ICANN fails to strongly establish the public voice in its activities, it will increasingly risk that the Internet community will reject the legitimacy of its decisions. The terms of office for the five current At-Large Directors will expire in November 2002; ICANN should make it a high priority to develop and implement a system for their replacement by then.

We note that ***while SO reform is important it need not and should not delay progress towards establishing an At-Large Membership and At-Large elections next year.*** To that end, we have presented recommendations and systems that can be set in motion immediately. These approaches are structured in terms that are flexible in the face of changes that seem possible, whether sooner or later, in ICANN's SO's, regions, or board structure.

The Internet is about empowerment—about giving information, and giving voice, to individuals around the globe. What more appropriate opportunity than for ICANN itself to use the power of the Internet to harness the public voice needed to make its own work legitimate. By solving the riddle of its internal government, ICANN will take a great step toward more stable grounding to ensure the success of its own, larger experiment.

We welcome comment and feedback on this document. For more information and a copy of the full NAIS report, please visit our web site at <http://www.naisproject.org/>. Comments or questions can be addressed to comments@naisproject.org.

The NGO and Academic ICANN Study (NAIS) is a collaboration of experts from around the world, formed to explore public participation in ICANN and the selection of At-Large Directors on ICANN's governing board. NAIS mirrors ICANN's own study effort, and was created to provide an independent examination, global in scope and grounded in a belief in the importance of public representation. NAIS team members include:

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Copies of the complete NAIS report are available at
<http://www.naisproject.org/>