

**THE PUBLIC VOICE,  
LEGITIMACY, AND ICANN**  
JUNE 2001



**THE INTERIM REPORT OF THE  
THE NGO AND ACADEMIC ICANN STUDY (NAIS)**

# The Public Voice, Legitimacy, and ICANN

## Interim Report of the NGO and Academic ICANN Study

June 2001

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. Members include:

- **Izumi Aizu**, Asia Network Research and **Adam Peake**, Center for Global Communications (GLOCOM), International University of Japan.
- **Jerry Berman, Alan Davidson, Rob Courtney**, Center for Democracy & Technology, USA
- **Christian Ahlert**, Center for Interactive Media, University of Giessen, Germany
- **Scott Harshbarger, Don Simon, Andy Draheim, Scott Albert Johnson**, Common Cause, USA
- **Alan Levin**, Future Perfect, South Africa
- **Ra l Echeberr a** , Instituto Nacional de Investigati n Agropecuaria, Uruguay
- **Clement Dzidonu**, International Institute for Information Technology (INIIT), Ghana
- **Stefaan Verhulst**, Programme in Comparative Media Law and Policy, Oxford University, United Kingdom
- **Myungkoo Kang**, Department of Communication, Seoul National University, South Korea
- **Jeanette Hofmann**, [Wissenschaftszentrum](#) Berlin/NEXUS, Germany

*This study was conducted through a generous grant from the Markle Foundation (New York, USA), and through an additional travel grant by DENIC (Frankfurt, Germany).*

-----

This Interim Report is preliminary in nature. A final report, including a more complete analysis and recommendations for action by ICANN, will be presented in September. The Interim report is intended to promote discussion and inform the ongoing debate within the ICANN community. The NAIS team members recognize the potential limitations imposed by the compressed timeframe of this study. We invite and welcome feedback, comments, and discussion.

## Table of Contents

<b>Introduction .....</b>	<b>3</b>
<b>1. The Public Voice, Legitimacy and ICANN .....</b>	<b>7</b>
1.1. <i>A Value-based and Conceptual Approach .....</i>	<i>7</i>
1.2. <i>ICANN s History and its Commitment to Public Representation.....</i>	<i>15</i>
1.3. <i>Public Participation and the At-Large Membership.....</i>	<i>20</i>
<b>2. Lessons and Challenges: The 2000 At-Large Election.....</b>	<b>25</b>
2.1. <i>Cross-Regional Lessons: Board and staff election administration.....</i>	<i>25</i>
2.2. <i>Regional Reports .....</i>	<i>41</i>
2.2.1. <i>Africa .....</i>	<i>41</i>
2.2.2. <i>Asia and Pacific Region.....</i>	<i>53</i>
2.2.3 <i>Europe .....</i>	<i>64</i>
2.2.4 <i>Latin America .....</i>	<i>74</i>
2.2.5 <i>North America .....</i>	<i>84</i>
<i>The North American ballot.....</i>	<i>91</i>
2.3. <i>Concluding Comparative Themes.....</i>	<i>97</i>
<b>3. Options for At-Large Governance.....</b>	<b>99</b>
<b>4. Conclusions.....</b>	<b>106</b>

### Appendix I: Internet Usage Statistics

### Appendix II: At-Large Membership and Other Statistics

### Appendix III: Participants/Interviewees

### Appendix IV: Surveys/Questionnaires

A complete version of this report is available online at

<http://www.naisproject.org>

## Introduction

As the Internet becomes more widespread, pervasive and mature, policymakers worldwide are recognizing the need for new modes of governance and coordination to address the global challenges that the Internet poses. Some nation-states are deferring to nontraditional, global coordinating or policymaking organizations, either for guidance in harmonizing national lawmaking or for the actual creation of binding policy. These entities are making decisions that once would have been made by nation-states through traditional legislation and administrative rulemaking.

This shift in the locus of societal decision-making represents an important development for governance and social coordination as we know it. Such a trend may fulfill its promise to enable efficient, stable and international policymaking to support a rapidly growing industry, but will not do so legitimately without adequate mechanisms for protecting the public interest.

The Internet Corporation for Assigned Numbers and Names (ICANN) represents such an effort to create a new mode of coordination or governance outside the traditional framework of international organizations and national governments. Its key objectives include promoting core principles of administration for the Internet:

- Stability
- Competition
- Private, bottom-up coordination
- Representation<sup>1</sup>

As such, ICANN was designed to represent stakeholders directly, rather than through nation states. Moreover its decisions are to be guided by consensus. Yet, the legitimacy of ICANN's structure and policies have been questioned by various players in the Internet community. The central plank of this criticism is that ICANN's organizational structures and activities do not comply with the ethos of good and democratic governance. This need for new global governance structures on the one hand and the inclusion of the public voice on the other underpins the current debate of ICANN's At-Large Membership and forms the subject of this interim report. In particular it aims to offer some insights in how to address the current debate about democracy and legitimacy at ICANN.

The idea that Internet coordination should include some sort of membership body of Internet users has been apparent in Internet policy debates since at least 1992 (then in

---

<sup>1</sup> See U.S. Department of Commerce Statement of Policy (the White Paper), <http://www.icann.org/general/white-paper-05jun98.htm>.

reference to the Internet Society<sup>2</sup>). Since ICANN's formation, it has been plagued by a deep confusion concerning who exactly it is meant to represent. Its bylaws called for an At-Large Membership of Internet users from which just under half of the ICANN directors should be elected, yet its Initial Board of Directors did not appear to represent what some saw as user interests.<sup>3</sup>

The first At-Large Membership election was therefore widely seen as an important experiment to establish representation, accountability and transparency, by giving interested individuals a means to be informed about and connected to the policymaking structure for certain of the Internet's domain name, numbering systems, and protocol functions. Following the election last year, an independent Study Committee is now embarking on an At-Large Membership Study (<http://www.atlargestudy.org/>) to evaluate the 2000 election and to assess the role that a user membership body should play in ICANN and how to structure individual user participation and representation. It was emphasized that *such a study should be structured so as to allow and encourage the participation of organizations worldwide.*

This Interim Report is a response to the above call for participation and study of the At-Large Membership. It is the result of research conducted by the NGO and Academic ICANN Study (NAIS) group that addresses the need to ensure inclusion of most regional, sectoral and disciplinary viewpoints and approaches; and connects advocacy groups and experts of all regions that share certain public interest concerns and that can produce a valuable, independent and legitimate study. Its main objectives include:

- To review the At-Large Membership and ICANN's governance structure;
- To conduct regional assessments of the 2000 election;
- To conduct an inclusive, interdisciplinary and comparative analysis of key governance issues behind ICANN Governance (including accountability, transparency and legitimacy);
- To recommend participation and representation structures for individual users within ICANN; and
- To provide input into ICANN's deliberations on the future of its At-Large elections and the structure of its Board.

This interim report poses a variety of questions and probes answers with regard to: Why is there a need to include the public voice within ICANN? And how was it reflected

---

<sup>2</sup> For more information about the Internet Society (ISOC), see *A Brief History of the Internet* (<http://www.isoc.org/internet/history/brief.html>) and *History of the IETF/ISOC Relationship* (<http://www.isoc.org/internet/history/ietfhis.html>).

<sup>3</sup> Article II of ICANN's bylaws deals with At-Large Membership and elections, and has seen multiple changes, most recently at the Board's July 2000 meetings in Yokohama, Japan.

during and since the creation of ICANN? How is the At-Large Membership organized and structured worldwide? How did the At-Large election take place regionally? And what models of representation, elections and governance exist in the region and is there a relationship? How were the election results and possible complaints communicated, perceived and evaluated by the different stakeholders? What improvements with regard to participation and representation of different interests within ICANN were suggested? And perhaps more importantly: What lessons can be learned with regard to the procedures and processes of an At-Large membership and the structure of the ICANN Board? Are there other participation and representation mechanisms for individual Internet users that should be considered that enable legitimacy, effectiveness and efficiency within ICANN?

As such the report is structured along three parts. The first part considers the need to include the public voice within ICANN, first from a value-based approach and then by analyzing ICANN's founding documents, public statements made by its officers, and its agreements with the U.S. government which committed ICANN to meaningful representation of the Internet user community on its board of directors. The second part reviews comparatively the At-Large Election and the way the At-Large Membership is structured. Finally the third part combines the findings of the two previous parts and probes options for improved and restructured user participation and representation within ICANN.

This Interim Report is preliminary in nature. A final report, including a more complete analysis and recommendations for action by ICANN, will be presented in September. The Interim report is intended to promote discussion and inform the ongoing debate within the ICANN community. The NAIS team members recognize the potential limitations imposed by the compressed timeframe of this study. We invite and welcome feedback, comments, and discussion.

The NGO and Academic ICANN Study is comprised of:

- **Izumi Aizu**, Asia Network Research
- **Jerry Berman, Alan Davidson, and Rob Courtney**, Center for Democracy & Technology, USA
- **Adam Peake**, Center for Global Communications (GLOCOM), International University of Japan
- **Christian Ahlert**, Center for Interactive Media, University of Giessen, Germany
- **Scott Harshbarger, Don Simon, Andy Draheim, Scott Albert Johnson**, Common Cause, USA
- **Alan Levin**, Future Perfect, South Africa
- **Raúl Echeberría**, Instituto Nacional de Investigación Agropecuaria, Uruguay

- **Clement Dzidonu**, International Institute for Information Technology (INIIT), Ghana
- **Stefaan Verhulst**, Programme in Comparative Media Law and Policy, Oxford University, United Kingdom
- **Myungkoo Kang**, Department of Communication, Seoul National University, Seoul, South Korea
- **Jeanette Hofmann**, Wissenschaftszentrum Berlin/NEXUS, Germany

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](mailto:comments@naisproject.org). Those interested in following the deliberation of NAIS may subscribe to the NAIS project advisory list by sending mail to [advisory@naisproject.org](mailto:advisory@naisproject.org).

This study was conducted through a generous grant from the Markle Foundation (New York, USA), and through an additional supporting grant by DENIC (Frankfurt, Germany).

## **1. The Public Voice, Legitimacy and ICANN**

The need for user participation and representation to legitimize Internet governance and consequently, ICANN itself is the proper basis of all debates with regard to the At-Large Membership. While ICANN's founding documents and other communications indicate an institutional commitment by ICANN to "At-Large" or other public representation on the Board, we begin our defense of public representation's abiding importance with a value-based analysis of ICANN's need for a strong public voice, rooted in the impact that ICANN's activities have on the Internet community.

### **1.1. A Value-based and Conceptual Approach**

Participation and representation are widely accepted governance values and are based upon the concept that those who are affected by decisions or policies initiated by the relevant bodies should participate or be represented in the policy making processes. Participation creates empowerment and empowerment yields a sense of collaboration. The more comprehensive the level of participation, or the more inclusive the level of representation, the less likely that those subject to a resulting policy will consider that policy unfair or illegitimate.

The appropriate structure of internal governance for ICANN is therefore largely a question that depends in important part on two related threshold questions: what is the essential organizational *character* of ICANN? And what is the essential nature of its *mission*?

The relationship among these questions arises because, to the extent that ICANN functions as a public or quasi-public entity that engages in the formulation of public policy about the Internet, i.e., decision-making that has broad impact on the general public, then the legitimacy of ICANN depends, at least in substantial part, on having some public voice as an important part of the structure of its decision-making.

#### ***Character: Private or Public?***

The threshold questions about the character and mission of ICANN are significant because they define its location on a continuum that extends from a purely private business, on the one hand, to the effective equivalent of a government agency, on the other. Where an entity is located on this continuum can, in a strong sense, inform the question of whether public participation in its internal governance is essential to the organization's legitimacy.

Thus, for instance, to the extent that ICANN is viewed as a purely private business, the case for a public role in the selection of its directors, or otherwise in its decision-making process, is weak; to the extent ICANN is viewed as the functional equivalent of a

governmental or quasi-governmental agency, the case for public participation in its internal governance is strong.

A model of ICANN that describes the organization as a private company engaged in a service business would likely not include any need for a public voice in its decision-making. Private organizations or companies are governed by boards of directors. The boards of private for-profit companies are typically chosen by the company's shareholders. The boards of not-for-profit companies can have electorates that vary widely, from self-selection by sitting directors to election by the membership of the organization. But in almost no case would the public-at-large choose the directors of a private company.

On the other hand, an organization or agency exercising public influence is usually seen as legitimate only to the extent that it is headed or controlled by one or more decision-makers who are directly or indirectly accountable to the public.

Much of the debate (and confusion) on the issue of what, if any, the proper role should be for public participation in the election of ICANN's directors, is due to the indeterminacy of the underlying question of how to best locate and describe ICANN on the continuum between a purely private and a purely public organization.

This indeterminacy about ICANN, in turn, arises from the fact that ICANN is best viewed as a hybrid entity, having important elements in its character and mission of *both* a private and a public entity.

ICANN is formally organized in the United States as a private, not-for-profit corporation. In this sense, its structure is the same as other corporate entities with strictly private effects on society. Yet ICANN was formed through contract with a U.S. government agency (an arbiter of public authority, at least in the U.S.), and carries out functions that may impact millions of Internet users worldwide. Thus, its legal structure is consistent (again, at least in the U.S.) with a *private* set of activities, but those activities are in many ways *public*.

This indeterminacy is not unintended; indeed, it is the whole point of the organization. ICANN was formed for the purpose of *privatizing public functions*. It was formed to be the private organizational recipient of powers of public import but for which no public institution yet existed to exercise them efficiently, fairly, and in a manner consistent with the global nature in the Internet.

But to say that ICANN was intended to privatize authority over the Internet does not resolve the underlying question about the location of ICANN on the public-private continuum, for two reasons.

First, the decision by the U.S. government to press for the privatization of functions now performed by ICANN<sup>4</sup> was due not simply to a judgment that those powers should be privately held, but to a belief that the Internet's unique, global character called for a new administration system that mirrored its trans-national quality.

This goal could have been achieved by a transfer of functions to a multi-lateral quasi-public entity such as an international treaty organization. But instead, ICANN was created and structured to incorporate global participation in its internal governance. Thus, the creation of ICANN was as much an effort to internationalize control of central Internet functions as it was simply to privatize them.

But in any event, the coalescence of authority in ICANN as a private entity does not alone resolve the issue of how ICANN itself should be governed in order to legitimately exercise the power it has been given. Simply to say that ICANN is a creation of privatization does not mean that ICANN should be governed like a private corporation. If ICANN retains substantial attributes of the character and mission of a public entity, then ICANN should be grounded on a governance model that confers the legitimacy of a public or quasi-public entity.

The questions about the character and mission of ICANN are closely interrelated. In many ways ICANN retains the character of a public entity because of its mission. That character is additionally influenced by the fact that some of the most important functions ICANN carries out have been transferred to it by, and in a sense ICANN is the immediate successor to, an agency of the U.S. government for the purpose of performing those functions. Because those functions were performed by a government agency, and especially because of their broad public effect, they retain the characteristics of basically *public functions*. And ICANN as the entity now performing those functions inevitably thereby assumes the character of a public agency, at least to some extent.

There is an ongoing effort by some, at least rhetorically, to re-characterize ICANN. When ICANN staff refer to it as the company, a reference they increasingly use, that is a subtle linguistic attempt to stress the private, corporate nature of ICANN, as opposed to its public character. And of course that characterization in turn reinforces the view that as a private company there is no basis for public participation in its governance.

More directly instructive, however, is the actual experience of ICANN, which has now been in operation for over \_\_\_ months. Over the course of that time, ICANN has exercised its decision-making authority in a variety of matters. And it is the analysis of that experience — a review of the kinds of decisions that ICANN actually makes --which provides the best basis for assessing the character and mission of the organization.

---

<sup>4</sup> Prior to ICANN's creation, many of the functions now under its administration were performed on an *ad hoc* basis by a wide variety of individuals and organizations many of whose participation was supported by research grants from the American government.

In the first analysis, it is important to take account of ICANN's overall mission, which is to manage the DNS and ultimately, the root server system. The DNS is a fundamental operational attribute of the Internet. And of course the operation of the root server system is at the core of the Internet — in an important sense it *is* the Internet. In this regard, the role of ICANN in managing the DNS and the root server system is central to the good functioning of the Internet.

This of course makes ICANN tremendously important to the worldwide public at large. As the Internet has become more pervasive, more international, more accessible and more multi-faceted, it has taken on the character of a global public resource. The custody and trusteeship of that resource — the management of the policies that determine the functionality of the resource — certainly take on the characteristic of serving a public or quasi-public role.

Indeed, it is ultimately the public at large which has the greatest stake in those policies because it is the public that is the end user and beneficiary of the Internet. Issues which go to the accessibility and functionality of the Internet are questions in which there resides an inherent public interest because of the increasingly pervasive utilization of the Internet in a broad set of applications — commercial, governmental, educational and inter-personal -- that cut across the spectrum of daily global life at the individual level. As such public participation within ICANN is a prerequisite to ensure that the public interest is taken into account when implementing its mission.

***Mission: Technical and/or Policy?***

The argument made contrary to this broad view of ICANN is not to deny the importance of the Internet, but rather to minimize the importance of the role ICANN plays in regard to the Internet. Under this argument, ICANN's role or mission is not to manage or regulate or govern the Internet, but rather to serve merely as a technical coordinating body.

Indeed, much (but not all) of ICANN's work neatly fits this more modest description. And it is assumed by those who make this argument that technical coordination is a function so arcane or inaccessible that it should be exercised by experts whose decisions are dictated — and thereby narrowly bounded -- by the objectivity of the science or technical reasoning involved, rather than by unbounded discretionary policy-making. Within this bounded sphere of technical reasoning, it is argued, legitimacy is sufficiently conferred by expertise alone, and there is simply no need for a broader reference to public will or public accountability in order to ground the decisions made.

There are at least two major flaws with this argument.

The application of expertise to decisions that affect matters of public interest does not thereby insulate those decisions from the need for public accountability. To claim a decision is technical does not mean it can be made without oversight that protects the public interest in the decision being made correctly.

Much of what governments do is highly technical — from operating air traffic control systems to predicting the weather -- and at least as arcane as what ICANN does. Those functions are performed by experts, but experts who are ultimately subject to public control through elected officials. If experts running the air traffic control system repeatedly fly planes into each other, there will certainly be public pressure brought to bear on elected officials who will — undoubtedly in consultation with new experts — replace those who have not performed well. If such steps are not taken, the public will likely replace the officials who fail to act. Thus, to describe a function as technical does not in any important way address the question of whether it pertains to a matter of great public interest, and therefore whether there should be public accountability for, or a public voice in, the management of that function.

The second flaw in the argument based on technical coordination is more important. Even though much of what ICANN does can be characterized as technical coordination, it is sometimes nonetheless inextricably intertwined with policy-making of precisely the sort that requires a grounding in some form of public legitimacy. Further, some of what ICANN does is simply and forthrightly policy-making that has no particular patina of technical expertise to it. Several of the most important decisions that ICANN has made since its founding are exercises of discretion of the kind typically associated with public agencies. Three examples illustrate this point.

First, arguably the most important (and certainly the most publicly visible) decision made by ICANN to date was the award of new gTLD s. Both the decision on how many gTLD s to award, and then the selection of the chosen gTLD s themselves, were exercises in discretionary policy making, not technical coordination. The ICANN Board s discussion on the selection of new gTLD s had all the characteristics of a public agency exercising subjective policy judgment in the application of its values about how to best serve the public interest in expanding the DNS. In this instance, the judgments were based not simply on how best to run a test of the introduction of new gTLD s, but rather on which new domain names would best serve public purposes. There is nothing improper in that basis for judgment — indeed, it is arguably the correct basis for judgment -- but it highlights the need for the decision-makers to have some underlying legitimacy to make inherently value-laden policy choices, particularly where they result in the granting of an economically lucrative franchise to a quasi-public resource.

A second example of a policy-type decision making is the creation of the UDRP process. ICANN established this process in order to create a tribunal for resolving issues relating to the protection of intellectual property rights in the DNS. In establishing the UDRP process, the ICANN board has responded to the claims that *it* should protect, or provide a mechanism for protecting, the rights of trademark holders. Making this judgment was itself a substantive policy decision, and certainly the design of an adjudication process involved a host of policy determinations about how to balance the rights and interests of Internet users and trademark holders, how to allocate the costs of dispute resolution, and how to establish a means for fair, legitimate and supposedly neutral adjudication. None of these are technical questions . All involve policy judgment based on some underlying conception of whose interests should be protected, to what degree and how.

Finally, even though ICANN does not conceive of itself as a regulatory body, it has in fact engaged in a process of regulation by contract, which has resulted in a range of substantive policy making not through the issuance of rules, but through the drafting of private contracts. For instance, in recently renegotiating its contract with VeriSign, ICANN argued that modifying the contractual terms of its relationship with VeriSign would promote competition in the DNS marketplace. That may be a legitimate, even desirable, goal for ICANN to implement, but a policy of enhancing competition — a kind of policy typically implemented by a government, not by a private company -- depends on judgments about the nature of the marketplace and the degree and form of competition that will best serve the public interest.

Similarly, the contracts ICANN has negotiated with the registries that were awarded the new gTLD s contain a host of regulatory provisions about the permissible uses of the new domain names. These contractual rules in many instances go well beyond what is strictly required to implement a test of expanding the DNS. Such collateral policy goals of ICANN may be laudable, certainly they are controversial, but in either event they again illustrate a kind of substantive regulatory policymaking that ICANN engages in through contract.

These three illustrations — the award of new gTLD s, the creation of the UDRP process and the imposition of regulatory-type controls through private contracts — are among the most important, visible and controversial actions that ICANN has taken. None of these actions can be accurately described as technical or arising from mere technical coordination of parameters necessary for the operation of the Internet.

Instead, each involved overt policy making — decisions about how to facilitate the development of the Internet as a public, global resource, about how to shape the marketplace for key Internet services to best create competition, and about how to balance the protection of private economic rights against claims of free speech in the management of the DNS. All of these decisions must be based on some underlying substantive conception of how the DNS, and hence the Internet, is to function best. And to the extent that the Internet is, or will become, a global quasi-public resource, these decisions must at a deeper level involve some conception of the general public good. For that reason, these decisions — all of which lie within the sphere of authority that ICANN claims to have — resemble the kinds of decisions typically made by public agencies.

Thus, the minimalist account of ICANN as a merely technical coordination body that is not engaged in broad policy-making affecting matters of the public interest is, at the very least, an incomplete description of the organization. Even though ICANN is in the form of a private company, its functions, at least in part, appear very much to embody the consideration of public issues. Thus, even as a unique and experimental hybrid entity, its legitimacy to resolve these issues must be based on a process that reflects some reference to the public will or public accountability.

### *Additional reasons*

There is an additional reason this is true as well. In many ways, ICANN rests on unstable ground. It is a voluntary association which has the ability to implement its decisions only to the extent that those decisions are perceived as legitimate by the relevant community — governments, private companies and Internet users.

ICANN has little in the way of coercive authority through which to enforce its decisions. Thus, legitimacy for its decision-making is particularly crucial for ICANN since it is constantly in danger of being discredited or ignored. ICANN ultimately has no ability to stop the creation of alternative root servers with alternative DNS systems. The voluntary adherence by the worldwide Internet community to its decisions will likely continue only to the extent those decisions appear to be based on a decision-making process that is fair and legitimate.

Nor can ICANN borrow the legitimacy of another institution, or of any government, since ICANN is structured as a freestanding private entity. The legitimacy of its decision-making must be generated by its own internal governance procedures. And if it fails to do so, it runs the risk of being deemed irrelevant, or inviting governments to take control of it or to regulate it in the name of imposing governmental policies of consumer protection, competition or other nationalistic goals.

### *The need to limit ICANN's mission*

Finally, it is important to recognize one limiting principle of overriding importance: that however ICANN resolves the issue of how to provide for adequate public participation in its internal governance, it still must -- in a clear, explicit and binding fashion -- impose constraints on the scope of its mission.

The argument for some form of public participation in the internal governance of ICANN is dependent, in part, on the fact that any reasonable description of ICANN's current mission includes policy-making that ranges well beyond a mere technical coordination of Internet parameters.

In grounding the need for public participation on the fact of ICANN's policy-making, there is a tension with the widely shared view that ICANN's mission is, and should remain, highly limited. On the one hand, ICANN must provide for public participation because it inherently engages in a form of public policy-making, yet on the other hand, even with public participation the scope of that policy-making should remain as constrained as possible.

One common fear expressed about ICANN is that it will gradually lessen its resistance to undertaking more forthrightly policy decision-making, and thereby extend its agenda into highly charged areas of substantive regulation of the Internet, such as content regulation, privacy, speech protection, taxation and other such matters.

This fear is fuelled by a concern that pressures will be brought on ICANN to assume responsibility in these and other similar areas because there is no alternative forum for the

global resolution of these kinds of controversial questions of Internet policy. ICANN may be pressured to fill the vacuum. Further, there is a well-recognized tendency for organizations to succumb to mission creep, and to extend their jurisdiction bit by bit into related areas. In ICANN's case, this kind of mission creep would almost inevitably embroil it in matters of even more overt policy-making than it has to date ventured.

For some, these fears are heightened by proposals that there be some strong form of public participation in ICANN's internal governance, particularly in the form of elections for its board. The fear is that elections for ICANN's board may make it look like a legislature, and then the board may start to think of itself as a legislature, and in particular, as having the public legitimacy to undertake a decision making role on broader questions of substantive policy. In other words, the concern is that too much legitimacy could be conferred on ICANN if it addresses the need for public participation, with the result that others will start viewing ICANN, and ICANN will view itself, as freer to engage in forthright and unbounded policy making.

This is a real concern, and we do not diminish it. But there are three responses that should be considered as well.

First, if the concern is that ICANN may be tempted to abuse its legitimacy, it is a poor answer to state that it should therefore be kept illegitimate. In other words, ICANN engages in a bounded policy-making now, within the mostly respected confines of its current mission. For the reasons stated above, it is necessary to base its current policy making on some form of public participation. The fear that ICANN may extend its policy making to additional areas should not be used as an excuse for blocking the legitimacy ICANN needs for what it actually does now.

Second, some believe that a stronger public voice in ICANN's decision making will retard rather than accelerate any impulse within ICANN to extend its jurisdiction. The public voice may well serve as a check on internal pressures to extend its mission.

Finally, and most importantly, ICANN should address the question of its mission creep directly, effectively, and independently of the need to provide for public participation in its internal governance. The suggestion has been made repeatedly that ICANN find a way to constrain its jurisdiction in a binding fashion. Whether this is by amending its Articles of Incorporation, by writing a limitation into its bylaws that is not easily altered, or by issuing some strong prime directive that limits its jurisdiction, ICANN should directly confront the reasonable fear that it will venture into an even broader policy agenda than it now does.

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 needs to address this problem squarely, and in so doing, to lessen the fears that it will abuse the very legitimacy it needs to gain.

## 1.2. ICANN's History and its Commitment to Public Representation

As a new and unique body in need of a long-term system of public representation, ICANN has a special need to review its own past and to learn what it can from the discussion of the last several years. Many of the issues that the community now faces have persisted from ICANN's early days; they are of obvious importance but are complicated and, frequently, divisive.

From the time it was conceived, through its formation, and in its current infancy, ICANN has had a clear responsibility to establish a public role in its decision-making. Such responsibility in itself has frequently placed ICANN at the center of controversy. While the organization has several times declared its intention to build in a lasting role for the community of Internet users (sometimes in response to pressure from outside interests), consensus on the form and responsibilities of that role has been elusive, and progress has been slow.

In this section, we attempt to trace the development of ICANN's responsibility to public participation, and the obstacles it has encountered along the way.

**Early Commitments to the Internet Public.** While responsible management of the Internet's addressing, naming, and protocol resources are of clear international concern, the history of ICANN's development as an organization was largely the result of negotiation with the American government.<sup>5</sup> In 1998, partly spurred on by recent international efforts to promote globally responsive naming and addressing administration,<sup>6</sup> the U.S. Department of Commerce (Commerce) released two policy documents calling for the creation of the corporate entity that eventually became ICANN. Known as the Green and White Papers, these documents provided an early conceptual sketch of the founding principles, authorities and responsibilities, and proposed organizational structure on which ICANN would be built.

Representation was one of the four founding principles that these documents laid out for ICANN. As the White Paper, put it:

The development of sound, fair, and widely accepted policies for the management of DNS will depend on input from the broad and growing community of Internet users. Management structures should reflect the functional and geographic diversity of the Internet and its users.

---

<sup>5</sup> The U.S. government maintains policy authority over the A-root server that is the nexus of the DNS root system. As a result, USG has played a significant role in negotiations regarding the fate of the DNS, and, by extension, other centralized Internet resources.

<sup>6</sup> Especially notable was the Internet Ad Hoc Committee (IAHC), a group of concerned volunteers who in 1997 proposed that an international non-profit body be established in Geneva to deal with the Internet's centralized naming/addressing/protocol issues.

Mechanisms should be established to ensure international participation in decision-making.

In imagining a governance structure for ICANN that would serve this principle, the Green and White Papers suggested a Board of Directors that would balance — in a roughly even way — the interests of specific domain name and IP number stakeholders with those of Internet users. But these documents did not provide a specific blueprint for how the user half of the Board would be constituted or created. They suggested only that commercial, not-for-profit, and individual users were all likely participants. Thus, the key questions that would have to be addressed in providing opportunities for public or user participation in ICANN were left unanswered in the principal DOC policy documents regarding ICANN.

**Initial Board Authority Over the At-Large Process.** In early October 1998, ICANN submitted its proposal to become the corporation envisioned in the Green and White Papers. The proposed bylaws submitted in this process established a governing structure for ICANN that attempted to strike the balance called for in the Green and White Papers. ICANN proposed a 19-member board, which would include the corporation's appointed president. Nine board members would be selected three each by three Supporting Organizations created to represent specific Internet stakeholders — the IP number registries, domain name registries, domain name registrars, and the technical community. The remaining nine seats would be occupied by At-Large Directors though once again the form and function of those Directors was largely undefined.

To guide ICANN in its formative stages, a nine-member Initial Board of experienced people from industry, academia, and the research sector was created. ICANN's process for selecting this Initial Board was widely criticized for its lack of openness and inclusiveness, and many questioned the fundamental legitimacy of this Board (and still do, as four of its members remain on the ICANN Board today).<sup>7</sup>

One of the chief responsibilities placed this Initial Board was to determine the process for selecting the At-Large Directors who would later replace the Initial Board itself. Early drafts of the bylaws suggested that this would involve the creation of an At-Large membership to elect these nine directors. However, these bylaws left the Initial Board with broad discretion to fill in the details regarding the selection of the At-Large Directors, and even to determine whether or not a membership system would be part of the process.

These initial bylaws received significant criticism from groups like the Boston Working Group<sup>8</sup> for giving overbroad authority to the Initial Board. Should they so desire, there

---

<sup>7</sup> It should be noted that the Initial Board was originally known as the Interim Board, and that they were generally expected to act only as placeholders for a later, more legitimate set of Directors.

<sup>8</sup> The Boston Working Group (BWG) is an informal coalition that has participated in some of the deliberations and discussion surrounding Commerce's call for the creation of an entity like ICANN. It has taken, and continues to take, a position in favor of strong representation for the broad user community in ICANN.

were no protections against the Initial Board simply deciding not to have any kind of At-Large membership whatsoever. Some went so far as to express concerns that the Initial Board had the power to reject not only the notion of a At-Large membership, but also the more general underlying principle of having At-Large Directors who would represent users to begin with.

The BWG strongly lobbied Commerce for revisions to the ICANN that would require the Initial Board to create some kind of membership structure (the specifics of which had not yet been determined). Ultimately, Commerce agreed, and ICANN, under pressure, revised its bylaws accordingly. Shortly thereafter, a Memorandum of Understanding was signed between ICANN and Commerce, under which ICANN began assuming the responsibilities set forth in the Green and White Papers.

**The MAC Report.** Since neither the MoU between ICANN and Commerce, nor the Green Paper, nor the White Paper, included any strong definition of what the At-Large Membership would look like or how it would run, ICANN appointed a 13-member Membership Advisory Committee (MAC) to address these questions. As MAC Co-Chair George Conrades put in an early committee conference, the questions the MAC faced boiled down to: "Who will be the members of the corporation? And what will the members do?" After thoroughly discussing these issues, the MAC made its final recommendations to the ICANN Board at its May 1999 meeting in Berlin. Among them were the following:

- Only individuals (not organizations) should be eligible for At-Large membership;
- Membership registration should be open to all individuals worldwide willing to provide their name, e-mail address, and a verifiable physical address;
- A committee should be set up to identify high-quality candidates to join self-nominated ones from the membership; and
- An election should be held for the At-Large Directors with all members registered at least 30 days in advance of the election eligible to vote.

Yet the ICANN Board did not immediately implement the At-Large membership structure envisioned by the MAC. While reaffirming its intention to move forward with a system that would allow individuals to select At-Large directors, the Board resolutions passed in Berlin also recognized that developing such a system could be complex and expensive, and they directed the ICANN staff to analyze the MAC principles in the light of its discussion, and report back prior to the Santiago meeting.

**Community Pressure for a Timely Election.** In the period immediately following its Berlin meeting, ICANN continued to face strong outside pressure to realize the its founding principle of representation and replace its appointed Initial Board with an elected one. In June 1999, ICANN submitted its six-month status report to Commerce. In Commerce's response, Becky Burr wrote, ICANN's top priority must be to complete the work necessary to put in place an elected Board of Directors on a timely basis. This urgency to provide elected representation on the Board was restated in testimony that

another Commerce official gave before the U.S. Congress<sup>9</sup> and in letters to ICANN from the chair of a U.S. House of Representatives subcommittee.

Similar pressure also mounted in the online community. In responding to these concerns, ICANN reaffirmed its commitment to a representative Board of Directors. For example, in a July 1999 letter to Burr, ICANN said that putting in place an elected board is our highest priority and we have been working diligently to accomplish this objective as soon as possible.

**The At-Large Council Concept.** Just before the August 1999 meeting in Santiago, Chile, ICANN staff posted its report following-up on the MAC's work. The staff report reflected the MAC's notion of an open membership consisting of individuals. However, it also recommended that the Board create an At-Large Council with largely analogous to the councils already formed to represent professional stakeholders in the Supporting Organizations (SOs). The staff report argued that this would create parity between the At-Large membership and the SOs, and that it would equip ICANN with a formal entity to help build the At-Large membership and help oversee the At-Large elections.

A legal analysis that accompanied this report also suggested that ICANN could protect itself from burdensome derivative lawsuits under California state law, if it removed the power to directly elect the At-Large Directors from the At-Large membership and placed it in the hands of this At-Large council instead.

While the staff report did not explicitly recommend that an At-Large Council select the nine At-Large Board Directors, the Board discussed and passed resolutions to that effect at its meeting in late August 1999 in Santiago. It adopted the necessary bylaws changes that October.

Under the new bylaws, when the At-Large Membership reached a threshold population of 5,000, it would elect 18 members of an At-Large Council in two installments. The Council would then select the nine Board members.

**Opposition to the Indirect Election.** Some in the ICANN community liked the notion of indirect elections of the At-Large Board Members through an At-Large Council because it guarded against the threat of derivative suits, and would create a more deliberative setting for selecting directors than an direct popular election would provide. Many others attacked the plan as an effort to highjack the broad Internet user voice in ICANN, reasoning that no one would participate in a body that only provided the right to select individuals who would in turn select policy-makers. According to this critique, indirect elections also would result in no direct lines of accountability between the ICANN Board and the public.

---

<sup>9</sup> As an agency of the American government, the Department of Commerce is directly answerable to the President (then Bill Clinton), but also to the Congress, which maintains control over the budget available to Commerce and to all federal agencies.

At its March 2000 meeting in Cairo, the ICANN Board faced intense pressure to scrap the indirect election plan proposed by staff and hold direct At-Large elections. Advocates for the direct model argued that it offered enhanced accountability and legitimacy for a Board that, it was felt by some, was lacking in both. Ultimately, the Board accepted the validity of the direct election model and passed a compromise resolution, Resolution 00.18 also termed the Cairo Compromise.

Resolution 00.18 instructed staff to draft bylaws amendments that would:

- Establish a system for direct election of five At-Large Directors
- Adjust the terms of the Initial At-Large Directors
- Establish a committee to nominate candidates, as well as a system for member-nomination
- Initiate a study of the At-Large Membership
- Suspend any selection of At-Large Directors after the five until completion of the study

Instead of filling all nine Directors at once, the compromise stated that only five would be elected in 2000, after which the election process would be studied before future action. At the time, the compromise seemed acceptable to most parties; direct democracy advocates avoided setting a precedent of indirect elections and placed five elected Directors on the Board, while those with stability concerns were assured that, should the election go badly, the five At-Large Directors would constitute a minority of the nineteen-member Board.

At the Yokohama meeting in July 2000, however, the spirit of the Cairo Compromise was revisited.

**The Bylaws Amendments in Yokohama:** When the Board asked staff to prepare new bylaws to flesh out the Cairo Compromise, neither those at the meeting nor the ICANN community as a whole had reviewed all the Compromise's possible implications. When the proposed bylaws were published immediately before the Yokohama meeting, the Board once again encountered strong opposition from the community, and criticism that it had both betrayed the spirit of the Cairo Compromise and failed to accurately gauge community sentiment. Members of the public interest community strongly criticized both the proposed bylaws and the process behind it.

While the proposed amendments did provide for the direct election of five At-Large Directors, followed by a period of study, they were self-extinguishing, deleting themselves from the ICANN bylaws as soon as the 2000 At-Large Election was finished. In the absence of direct action by the Board, this left ICANN with no process for ever selecting At-large Directors to the Board after 2000. At the same time, the amendments proposed that the placeholder At-Large Directors those Directors of the Initial Board would leave the Board at the end of 2001.

Since no process had been established to replace the departing Board members, the At-Large seats they occupied would vanish when their terms expired, leaving the At-Large community represented by just the five Directors elected in 2000. And even those Directors terms were set to expire in 2002. Barring direct action by the Board, At-Large representation on the Board would dwindle from nine seats, to five, to zero. Advocates urged the Board to rethink the proposed amendments, and to secure At-Large Directors positions for the foreseeable future.

Once again, the Board reversed course. It amended the bylaws to secure the positions of all nine At-Large Directors until late 2002 though the bylaws setting up an At-Large Election self-extinguished after the 2000 election. Under those terms, the 2000 At-Large election took place and ICANN was left, once again, without a clear concept of how to represent the public s interest in ICANN s activities.

**Where we find ourselves.** In a certain sense, the ICANN of 2001 and the ICANN of 1998 are not as far apart as they might seem. For both organizations, persistent questions demand quick resolution and for both, community sentiment is deeply fragmented in its ideas about ICANN s future direction. Yet where the ICANN of 1998 had little idea of what the At-Large Membership might mean, or the role it might play, the ICANN of 2001 at least has the benefit of hindsight in seeking to resolve those issues.

### **1.3. Public Participation and the At-Large Membership**

For structural and historical reasons, there is a need for improved public participation in the current internal governance of ICANN in order to establish its legitimacy as a quasi-public body that has a mission to decide policy matters of public interest and importance relating to the functionality of the Internet.

Addressing the need for public participation in turn suggests two subordinate questions: what is meant by the public? and what is understood by participation?

#### ***1.3.1 Definition of the public.***

There are various ways to define which public has an interest in ICANN. The answer is perhaps best thought of as a sliding scale from a narrow definition focused on domain name holders, those stakeholders who are most directly affected by ICANN policies, to a much broader definition that includes all those who use the Internet, such as all email address holders. And even beyond this, the broadest definition would essentially include the entire public — both those who currently use the Internet and those who are potential users in the future.

ICANN should recognize that its decisions have a broad impact. Because the Internet is a global resource, decisions about the functionality of the Internet have a global impact. And because the Internet is used directly by individuals on a global basis, that impact extends down to the individual level.

It is important as well to acknowledge that the class of those affected is dynamic. As the Internet expands, particularly in underdeveloped regions, the class of individuals who begin using it will grow. Yet these potential users of tomorrow will be impacted by the decisions ICANN makes today in setting domain name policy that will structure the Internet in the future.

For these reasons, we believe that ICANN should broadly construe the public affected, and potentially, affected by its decisions.

### ***1.3.2 Definition of participation***

Even if the public is defined broadly, that does not mean there must be only a single means for individuals to participate or be represented in ICANN's decision making. ICANN's structure suggests not one, but several avenues for the public to participate in ICANN's work. By far the most important — and under-developed — is the At-Large Membership (ALM). Before discussing the untapped potential of the ALM, we want to take note of the other existing avenues, as they ultimately impact the role the ALM can and should play

#### ***1.3.2.1 Participation through the Supporting Organizations.***

The three existing supporting organizations — the Address Supporting Organization (ASO), the Protocol Supporting Organization (PSO) and the Domain Names Supporting Organization (DNSO) -- provide open routes of input into decision-making by ICANN.

The supporting organizations each directly elect three members to the ICANN board. Further, each of the SOs, at least in principle, is consulted prior to board decisions affecting their particular area of interest. The supporting organizations in turn are as a formal matter open to participation by anyone who attends their meetings or participates in their listserv discussions.<sup>10</sup> Thus, any member of the public can indirectly participate in ICANN decision-making through participation in the supporting organizations.

There are, however, several limitations on the adequacy of this avenue for public participation. First, the supporting organizations are each forums of particularized and specialized interest — they do not easily contain the interests of the general public in ICANN's issues. The ASO and PSO in particular are viewed as bodies of technical specialists which, although formally open to any member of the public, are not natural or comfortable forums for general public participation. And past attempts to house the concerns of the general public within the DNSO have been unsuccessful. Indeed, the lengthy, and as yet unresolved, debate over whether even to create an Individual Domain Names Holder Constituency suggests that there is not any constituency group within the

---

<sup>10</sup> This is a matter of theory, rather than practice. In practice, none of the Supporting Organizations nor their independent constituencies has achieved target levels of efficiency, activity, and openness simultaneously.

DNSO that provides a forum for general public concerns. Even the IDNH constituency, were ICANN to charter it, would speak only for a small class of the general public—those with individual domain names but not for the public at large.

Further, the supporting organizations are largely viewed as forums for corporate and business interests within ICANN, not for individual interests. This perception weakens the ability of the SOs to serve as an effective vehicle for public participation within ICANN. It is one available route for expression of public voices, but an avenue within inherent limitations.

### ***1.3.2.2. Participation through governments.***

Democratic governments themselves are institutions that embody and represent the public (although governments can vary widely in the degree to which they are truly representative). But to the extent that governments, as such, have input into the decision-making process of ICANN, this is another avenue for public participation in ICANN's internal governance.

Again, however, this is an avenue with significant limits. Governments play a formal role in ICANN through the Government Advisory Committee (GAC), which provides institutional views to the ICANN board on matters of relevance to it. But the role of GAC is poorly delineated. Although it is supposed to be advisory only, the GAC exercises apparently significant influence. But it does so with poor mechanisms for transparency, and for public input and participation because it operates largely in a closed and inaccessible fashion.

In its current form, the GAC's influence may be unavoidable. Though their formal authority in ICANN is minimal, the actual effect of strong government statements or policy initiatives should not be discounted. In that light, *transparency* and *openness*, not attempts at structural limitations on influence, offer the best hope for equitable participation by governments.

Public participation in ICANN through representation by governments in the GAC is an unsatisfactory solution for a deeper reason as well.

The underlying principle of ICANN is that it is a *non-governmental* institution. Indeed, the very point of ICANN is as an experiment in non-governmental self-organization. Governments are viewed with suspicion by the Internet community, mainly because of their inefficiency and lack of responsiveness to rapidly changing social and technological developments that have marked the growth of the Internet.

As is discussed above, ICANN was deliberately structured to be non-governmental. Although it is to operate on a *global* basis, it is not to be an *inter-national* or *multi-lateral* organization such as other inter-governmental treaty entities. In this sense it is not, like many other international entities, an organization formed by governments or consisting of governmental representatives. Instead, it is to be a global organization operating on a quasi-public basis outside of international governmental control.

Public participation on a global basis should reflect this underlying premise of ICANN's structure. Thus, although governments, through the GAC, may indirectly reflect the views of their citizens, and thus provide another vehicle for indirect public participation in ICANN, this is again a highly restricted form of participation by the public.

### ***1.3.2.3 The At-Large Membership***

The third avenue for public participation in ICANN is through the At-Large Membership (ALM).

A concept that is anticipated in the foundational documents of ICANN (such as the White Paper), the ALM has yet to be adequately defined and institutionalized in ICANN's framework of operations. The ALM remains the great — and as yet unrealized — potential opportunity for public participation in ICANN.

The ALM has been organized to date only in the context of the election for five board seats held in October 2000. Although voting for board members may remain an important function of the ALM, its role does not need to be limited to serving as the electorate for At-Large director seats. Indeed, if the only role of the ALM is to participate in elections, the full potential for public participation in ICANN will remain unrealized, and even the role it plays in electing directors will be under-developed.

The ALM can serve diverse goals of participation, representation and accountability. In fulfilling each of these functions, a fully developed ALM will strengthen the legitimacy of ICANN to make the kinds of policy-based decisions about the functioning of the Internet in which it is now engaged.

In fostering *participation*, the ALM could become a means for communication and outreach to the broader public for ICANN. The ALM could create empowerment of the public and empowerment yields a sense of collaboration. It could also be a channel for consultation and input into organizational decision-making. Institutionalizing this sort of participation might be done through ALM forums or meetings that can be convened in conjunction with each ICANN meeting, or through the development of on-line mechanisms.<sup>11</sup> The ALM could be structured into more manageable sub-units or committees by region or by issue, or by some combination of both.

In fostering *representation*, the ALM can serve as the electorate for the At-Large board seats. Representation through election can make participation operative and give it meaning. The election could be structured in different ways, including the direct election not only of directors to the ICANN board, but also, for instance, to an At-Large Council which can serve as an intermediary entity between the general At-Large membership and the ICANN board. When the ICANN board is perceived as *representative*, then the mode

---

<sup>11</sup> There have been a number of attempts at such self-organization of the At-Large Membership as it was constructed for the 2000 election, but their activities have been complicated by the lack of certainty about the ALM's future role and form.

and degree of participation can be balanced to adapt to the goals and mission of the ICANN, the heterogeneity and size of the community, the need for stability and efficiency.

And in fostering *accountability*, the ALM can serve as a kind of public watchdog on the actions of the board, and can be a means to ensure that at least the elected At-Large directors reflect the views and interests of Internet users at large and act in a responsible manner. Accountability devices may include, for instance, the specific creation of substantive and procedural rules designed to enable board member responsiveness and a set of ex post mechanisms to allow responses to decisions taken (including rationales and justification for decisions made).

The ALM is a key piece of the structure of ICANN that has not yet been brought to maturity. Developing the ALM is necessary to make elections work in virtually any form. But institutionalizing the other roles of the ALM in providing the means for participation and accountability, as well as representation, will have additional and equally important consequences for establishing the public legitimacy of ICANN.