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ARTICLE

A CONSTITUTIONAL SOLUTION FOR INTERNET GOVERNANCE<sup>†</sup>

Rolf H. Weber<sup>\*</sup> & R. Shawn Gunnarson<sup>\*\*</sup>

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<sup>\*</sup> Dr. Rolf H. Weber is ordinary Professor for Civil, Commercial and European Law at the University of Zurich, Switzerland, and a Visiting Professor at the University of Hong Kong. His main fields of research are Internet and Information Technology Law, International Business Law, Telecommunications and Media Law, Competition Law and International Financial Law. Longer information section for the website: Rolf H. Weber is director of the European Law Institute and the Center for Information and Communication Law at the University of Zurich. Since 2008 Rolf H. Weber is member of the Steering Committee of the Global Internet Governance Academic Network (GigaNet) and of the European Dialogue on Internet Governance (EuroDIG) and since 2009 he is member of the High-level Panel of Advisers of the Global Alliance for Information and Communication Technologies and Development (GAID). Besides, he is engaged as an attorney-at-law and as a member of the editorial board of several Swiss and international legal periodicals and serves as expert for several international and national organizations in his wide-spread fields of research. Prof. Weber has intensively published in form of books and peer-reviewed articles on matters of Internet Governance, of the Internet of Things, of international financial law and generally on global governance. His research focus lies on the legal problems related to his research topics, in particular the strengths and weaknesses of possible regulatory regimes. For the publication list and a more detailed CV please visit: <http://www.rwi.uzh.ch/lehre/forschung/alphabetisch/weberr/person.html>

<sup>\*\*</sup> R. Shawn Gunnarson received his J.D. (cum laude) from Brigham Young University Law School in 1994, where he served as a staff member on the BYU Law Review and received the Scholarly Writing Award. He received his B.A. (magna cum laude) from Brigham Young University with University Honors and Honors in Philosophy in 1991, majoring in Philosophy and Political Science. Today he is a shareholder with Kirton McConkie, where his practice

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includes advising global organizations on Internet governance. Mr. Gunnarson’s research papers, *Accountability After the AOC* (2010) and *Theorizing Fact-Based Policy for ICANN* (2011), were accepted by the Global Internet Governance Academic Network (GigaNet) for presentation at its Fifth and Sixth Annual Symposiums. In addition to his scholarly work, he has been quoted in *The Economist* and *The Financial Times* in articles discussing Internet governance and ICANN, and his blogs on those topics have attracted over 70,000 hits.

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## INTRODUCTION

Internet governance is dominated by the Internet Corporation for Assigned Names and Numbers (ICANN),<sup>1</sup> the organization in charge of the Internet’s technical infrastructure, and ICANN’s most pressing institutional problem is its weak accountability. This article proposes solutions to the persistent questions of what standard of accountability ICANN should adopt and how that standard can be achieved.<sup>2</sup> Our thesis is that ICANN needs binding and independent accountability and that this standard is best achieved by applying traditional principles of constitutional law to ICANN’s corporate governance.

Determining what standard of accountability ICANN should be held to and how to achieve that standard are among the most consequential questions in Internet governance today. Concerns about ICANN’s accountability have sparked controversy from its inception<sup>3</sup> and continue to unite its diverse stakeholders.<sup>4</sup> The combination of its coercive or regulatory power and the absence of meaningful constraints on the exercise of that power cause ICANN’s stakeholders considerable anxiety because of the Internet’s global penetration and economic value.<sup>5</sup>

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1. Rolf H. Weber, *Shaping Internet Governance: Regulatory Challenges* 154 (2009) (“One of the most important bodies in the Internet framework is ICANN.”).

2. This article is adapted in part from our previous work. *See, e.g., id.* at 132-48; Rolf H. Weber, *Accountability in Internet Governance*, 13 *Int’l J. Comm’n’s L. & Pol’y* 152 (Winter 2009); Rolf H. Weber, *Constitutional Clothes for ICANN*, *jusletter-it*, 27 February (2012), available at [http://jusletter-eu.weblaw.ch/magnoliaPublic/issues/2012/IRIS/jusletterarticle\\_1090.html](http://jusletter-eu.weblaw.ch/magnoliaPublic/issues/2012/IRIS/jusletterarticle_1090.html); R. Shawn Gunnarson, *A Fresh Start for ICANN* (2010), available at [http://www.techpolicyinstitute.org/files/gunnarson\\_icann%20white%20 paper.pdf](http://www.techpolicyinstitute.org/files/gunnarson_icann%20white%20paper.pdf).

3. *See* Jonathan G.S. Koppell, *Pathologies of Accountability: ICANN and the Challenge of “Multiple Accountabilities Disorder,”* 65 *Pub. Admin. Rev.* 94, 99 (2005) (“The Internet Corporation for Assigned Names and Numbers has been a controversial entity since its birth.”).

4. *See infra* at section II.B.

5. *See* Int’l Telecomm. Union, *Key Global Telecom Indicators for the World Telecommunication Service Sector* (June 29, 2012), available at [http://www.itu.int/ITU-D/ict/statistics/at\\_glance/KeyTelecom.html](http://www.itu.int/ITU-D/ict/statistics/at_glance/KeyTelecom.html) (reporting that

Such anxiety has contributed to international conflict. Western governments and developing countries have divided over ICANN's unique authority to manage the Internet domain name system (DNS) and the feasibility or desirability of the multi-stakeholder model of Internet governance.<sup>6</sup> Under that model, policy-making processes have been open (at least nominally) to all stakeholders: governments, businesses, NGOs, and individuals have participated alike in formulating the policies that have shaped and reshaped the Internet. The alternative to multi-stakeholder governance is a government-centered model where ICANN's powers over the DNS are transferred to an inter-governmental organization.

Ultimately at stake in this conflict is the character of the Internet as a "living embodiment of an open market in ideas."<sup>7</sup> The Internet has thrived because it has been lightly regulated with policies grounded in the free market.<sup>8</sup> Replacing the current model of multi-stakeholder governance with heavy government control could threaten and perhaps eliminate the advantages of flexibility and market-oriented arrangements that have characterized the Internet so far. Innovation and growth could give way to the inefficiency and delay of a sclerotic bureaucracy. Apart from the commercial reasons to resist such a change, replacing the multi-stakeholder model of Internet governance with a government-centered one could prove an incalculable loss to basic human values like political freedom.

Solving ICANN's longstanding problem of accountability is indispensable to shoring up the future prospects of the multi-stakeholder model of Internet governance. The status quo appears to impose a Hobson's choice: It is said that ICANN must be permitted unchecked corporate autonomy or the multi-stakeholder

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in 2008 there were 1.56 billion Internet users around the world); U.S. Census Bureau, *E-Stats* 3 (May 28, 2009), available at <http://www.census.gov/econ/estats/2007/2007reportfinal.pdf> (noting that U.S. online retail sales amounted to nearly \$127 billion in 2007).

6. See *infra* at section II.D.

7. John Naughton, *A Brief History of the Future: From Radio Days to Internet Years in a Lifetime* 22 (1999).

8. See McKinsey Global Institute, *Internet Matters: The Net's Sweeping Impact on Growth, Jobs, and Prosperity* 43 (May 2011), available at [http://www.mckinsey.com/Insights/MGI/Research/Technology\\_and\\_Innovation/Internet\\_matters](http://www.mckinsey.com/Insights/MGI/Research/Technology_and_Innovation/Internet_matters); Organisation for Economic Co-operation and Development, *OECD Input to the United Nations Working Group on Internet Governance (WGIG)*, DSTI/ICCP(2005)4/Final 6 (2005), available at <http://www.oecd.org/dataoecd/34/9/34727842.pdf>.

model will be replaced by its government-centered alternative. This dichotomy is not only unattractive, but false. Unchecked corporate autonomy turns out to be the enemy of ICANN's continued role as the global manager of the Internet DNS by defeating the accountability that ICANN needs to sustain that role.

Identifying the correct standard of accountability is no easy task. No single definition has been adopted as the standard around which to rally the concerns of ICANN's stakeholders, and ICANN's own definition is so catholic as to be meaningless. But its stakeholders have insisted that accountability means what ICANN must do rather than what it can be persuaded to do. Our analysis concludes that ICANN should adopt and achieve independent and binding accountability.

Given this standard, ICANN's core accountability problem is the absence of a mechanism binding its Board of Directors to act within ICANN's authority and in a manner consistent with its commitments. This is a problem of power beyond right, the quintessential problem for constitutional law. It follows that constitutional principles furnish the most effective tools for ICANN to achieve independent and binding accountability. Indeed, they may supply the only tools capable of controlling the exercise of global, coercive powers like ICANN's. For their great virtue is proven effectiveness in taming power.

Extending the frontiers of constitutional law into the 21st century setting of Internet governance furnishes a compelling solution to the problem of ICANN's accountability. Accountability goes to questions of human character and human power. On those ultimate questions the tradition of constitutional government offers a rich history and literature from which to draw intellectual tools and instructive experiences to control power for the protection of those it affects.

Still, our argument for a constitutional solution might appear to be a category mistake. Constitutional law ordinarily applies to the organization of nation-states, not of private corporations. One answer is that placing effective limitations on ICANN's powers will enhance sensible corporate governance. The more trenchant answer is that ICANN's global and coercive powers over the Internet DNS must be effectively limited to preserve the freedoms that the Internet now engenders.

In section I, we begin with a brief overview of ICANN's powers, legal form, and origins. It describes how a California nonprofit corporation came to exercise unique powers over the global Internet. Section II explores ICANN's accountability gap—

the disparity between the accountability ICANN needs and the accountability it delivers. In section III we explain ICANN's struggles to adopt a workable standard of accountability and argue that its institutional needs can only be satisfied by a standard of accountability grounded in law, binding, and independent. To achieve that standard, we propose in section IV that ICANN should apply traditional principles of constitutional law to its own internal governance and we describe such principles, including written charters or constitutions, the separation of powers, enumerated powers, declaration of rights, and an independent judicial system. Finally, in section V, we apply these familiar principles of constitutional law to the new context of ICANN's internal governance and offer specific recommendations for revising ICANN's internal organization. We conclude that making such changes offers the most promising way for ICANN to achieve the binding and independent accountability it needs.

## I. ICANN'S BOARD OF DIRECTORS AS THE GLOBAL INTERNET MANAGER

### A. *ICANN's Unique Organization and Powers*

ICANN enjoys an undeserved obscurity. Because many readers will be unfamiliar with what it is, what it does, and how it came to exercise its unique powers over the Internet, this section briefly describes ICANN's background as a prelude to our discussion of its accountability gap.

ICANN is a California nonprofit corporation<sup>9</sup> that acts as the Internet's technical manager. This combination of private legal form and global power makes ICANN virtually unique,<sup>10</sup> and it creates unusual challenges for making ICANN accountable.

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9. Internet Corp. For Assigned Names & Nos., *Articles of Incorporation of Internet Corporation for Assigned Names and Numbers*, § 3 (rev. Nov. 21, 1998), <http://www.icann.org/en/general/articles.htm> [hereinafter *Articles of Incorporation*] (explaining that ICANN is a private corporation "organized under the California Nonprofit Public Benefit Corporation law for charitable and public purposes.").

10. See Centre for Global Studies, *Enhancing Legitimacy in the Internet Corporation for Assigning Names and Numbers: Accountable and Transparent Governance Structures* 1 (Sep. 18, 2002), available at <http://www.globalcentres.org/programs/globalgov/ICANN%20Final%20Sept18.pdf> ("ICANN is a unique organization. There is no parallel for this public-private corporation, with its regulatory functions that have material consequences across a broad spectrum of interests . . .").

ICANN is a dominant force in Internet governance because it wields the authority to preserve the Internet's key feature of enabling any computer connected to the Internet to communicate with every other computer connected to it. This feature of "universal resolvability" requires ICANN to carry out certain tasks, collectively known as the Internet Address Naming Authority (IANA) functions. These require ICANN to (i) "[c]oordinate the assignment of technical protocol parameters"; (ii) "[p]erform administrative functions associated with root management"; and (iii) "[a]llocate Internet Numbering Resources."<sup>11</sup> ICANN's authority to carry out the IANA functions comes from a purchase agreement with the U.S. Department of Commerce's National Telecommunications and Information Administration (NTIA).<sup>12</sup> How this public-private relationship arose will be explained shortly.

The IANA functions that ICANN performs order the chaos of individual computers and devices on the Internet into an organized system. As the phrase "domain name" might suggest, the DNS assigns names to Internet Protocol (IP) addresses, thereby enabling the user's computer to find other computers and devices on the Internet and communicate with them using domain names instead of numbers.<sup>13</sup> Like a jeweler's mark, domain names must be unique to be useful. Their uniqueness enables them to identify the destination of communications, strengthen the organizational identity of the addressee, increase accessibility to information, and carry economic value as trademark substitutes.<sup>14</sup>

The unique names and numbers composing the DNS form a system that is decentralized but hierarchical:<sup>15</sup> decentralized because the catalogue of domain names is distributed among millions of Internet Service Providers (ISPs) and other resolver

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11. U.S. Dep't of Commerce, Contract No. SA1301-12-CN-0035 § C.2.9 (July 2, 2012), *available at* [http://www.ntia.doc.gov/files/ntia/publications/sf\\_26\\_pg\\_1-2-final\\_award\\_and\\_sacs.pdf](http://www.ntia.doc.gov/files/ntia/publications/sf_26_pg_1-2-final_award_and_sacs.pdf).

12. *Id.*

13. *See generally* Paul Mockapetris, Request for Comments 1034, *Domain Names—Concepts and Facilities* (Nov. 1987).

14. *See* Weber, *supra* note 1, at 4 n. 23; *accord* Karl W. Grewlich, Governance in "Cyberspace": Access and Public Interest in Global Communications 194-95 (1999).

15. A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 Duke L.J. 17, 46-47 (2000).

servers rather than being collected in a single master list;<sup>16</sup> hierarchical because the multiple layers of address names terminate in “a single, globally unique root.”<sup>17</sup> The Internet’s reliance on a single root “is a technical constraint inherent in the design of the DNS,”<sup>18</sup> a condition for the Internet to remain “a global network.”<sup>19</sup> Permitting more than one root would create “a very strong possibility”<sup>20</sup> that two Internet users that type in or link to the same address from two different ISPs would land at two different destinations. It would be as if two people requested directions to “Moscow” and one ended up in Idaho and the other in Russia. The DNS requires this single root to be “supported by a set of coordinated root servers administered by a unique naming authority.”<sup>21</sup> ICANN is that authority.

ICANN’s performance of the IANA functions vests it with coercive power that extends wherever the Internet DNS operates. Simply put, ICANN decides who may connect to the Internet and under which names by deciding questions of root zone management, IP allocation, and technical protocols.<sup>22</sup> Once ICANN denies permission to operate under a particular name, that name does not appear on the Internet. No computer connected to the Internet can find it. Like an Orwellian unperson,<sup>23</sup> a name

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16. A master list had characterized the Internet before the advent of the DNS. Host names were then stored on a central file maintained by the Stanford Research International Network Information Center (SRI-NIC) on its NIC name server to be downloaded to every computer on the then (D)ARPANET as “NETINFO:HOSTS.TXT.” Unanticipated growth in the number of domain names on the Internet led the technical community to translate these numbers into words and to organize them hierarchically. *See generally* Weber, *supra* note 1, at 28-72.

17. Internet Architecture Board, Request for Comments 2826, *IAB Technical Comment on the Unique DNS Root 1* (May 2000), available at <http://tools.ietf.org/pdf/rfc2826.pdf>.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Viktor Mayer-Schönberger & Malte Ziewitz, *Jefferson Rebuffed: The United States and the Future of Internet Governance*, 8 Colum. Sci. & Tech. L. Rev. 188, 192-93 (2007); Jonathan Weinberg, *ICANN and the Establishment of Legitimacy*, 50 Duke L.J. 192, 209-12 (2000); Wolfgang Kleinwächter, *ICANN as the “United Nations” of the Global Information Society?: The Long Road Towards Self-Regulation of the Internet*, 62 Int’l Comm. Gazette 451, 456-62 (2000).

23. *See* George Orwell, 1984, at 48 (Everyman’s Library 1992) (1949) (“Withers, however, was already an *unperson*. He did not exist; he had never existed.”).

disapproved<sup>24</sup> or removed<sup>25</sup> by ICANN simply ceases to exist.<sup>26</sup> ICANN's power over the DNS is no less coercive than the regulatory power exercised by governments in related settings, such as the FCC's authority over broadcast licenses.<sup>27</sup> Even though ICANN exercises its authority through contractual agreements rather than direct regulation, the practical effect is that ICANN sets the terms by which access to the Internet is available.

*B. How ICANN Acquired Management of the Internet DNS*

ICANN owes its authority over the IANA functions and, by extension, over the Internet DNS to its contractual relationship with the U.S. government. That relationship originated with the Clinton Administration's decision in 1997 to privatize management of the DNS.<sup>28</sup> Before that decision, the DNS had been managed

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24. See *In re Indep. Review Process (ICM Registry, LLC v. Internet Corp. for Assigned Names & Nos.)*, Declaration of the Independent Review Panel, 2010 Int'l Centre for Disp. Resol. 50 117 T 00224 08, at 27 (Feb. 19), available at <http://www.icann.org/en/irp/icm-v-icann/irp-panel-declaration-19feb10-en.pdf>.

25. Letter from John O. Jeffrey, Gen. Counsel & Sec'y, Internet Corp. for Assigned Names & Nos., to Brian Johnson, Gen. Counsel, & Ray Fassett, EVP, Operations & Policy, Employ Media LLC (Feb. 27, 2011) (on file with author), available at <http://www.icann.org/en/correspondence/jeffrey-to-johnson-fassett-27feb11-en.pdf> (notifying the registry operator for .jobs of a breach of its registry agreement with ICANN and threatening to terminate the agreement unless the breach is cured).

26. Hans Klein, *ICANN and Internet Governance: Leveraging Technical Coordination to Realize Global Public Policy*, 18 *Info. Soc'y* 193, 196 (2002) ("Network administrators who refused to obey the regulations in their contracts could be delisted from the name space and *made to disappear.*") (emphasis added).

27. See 47 U.S.C. § 307(a) (2012) (authorizing the F.C.C. to issue broadcast licenses).

28. See U.S. Dep't of Commerce, Nat'l Telecomm. & Info. Admin., *Mgmt. of Internet Names & Addresses*, 63 Fed. Reg. 31741, 31741 (June 10, 1998) [hereinafter *DNS White Paper*] ("the President directed the Secretary of Commerce to privatize the [DNS] in a manner that increases competition and facilitates international participation in its management"). Having identified the commercial potential of the DNS, the United States developed a "soft Internet policy" by making an effort to institutionalize DNS management. Initially managed by Network Solutions, a company incorporated in the US, in 1989, the US Department of Commerce concluded a contract about the management of the IP addresses with the Information Sciences Institute (ISI) at the University of Southern California (USC). USC established the Internet Assigned Numbers Authority (IANA) that became the "super-" or "root-registrar" for all top level domains. Later that year, on 24 December 1998, USC entered into a transition agreement with ICANN under which it secured directly from USC all necessary resources critical to the continued performance of the IANA functions. In

through “a series of contracts between the [U.S.] Department of Defense’s Advanced Research Projects Agency (DARPA) and the University of Southern California.”<sup>29</sup> In June 1998, NTIA published a landmark statement of policy known as the *DNS White Paper*, declaring that

“[t]he U.S. Government is prepared to recognize, by entering into agreement with, and to seek international support for, a new, not-for-profit corporation formed by private sector Internet stakeholders to administer policy for the Internet name and address system.”<sup>30</sup>

In November 1998, the Department of Commerce entered a Memorandum of Understanding endorsing ICANN as the private non-profit organization qualified to assume responsibility for managing the DNS.<sup>31</sup> And in February 2000, the NTIA formally delegated performance of the IANA functions to ICANN by means of a sole-source purchase contract.<sup>32</sup> Subsequent agreements with NTIA have continuously maintained ICANN’s authority to perform the IANA functions; the current IANA functions agreement was executed in July 2012.<sup>33</sup>

C. *ICANN’s Authority Over the Internet Rests with Its Board of Directors.*

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February 2000, the NTIA delegated the IANA function to ICANN by means of a sole-source purchase contract. Although IANA’s tasks were transferred to ICANN to a great extent, IANA among other things is still responsible for the global coordination of the IP addressing system allocating the IP addresses from the pools of unallocated addresses to the regional Internet address registries (RIRs) according to their needs.

29. See U.S. Dep’t of Commerce, Nat’l Telecomm. & Info. Admin., *Request for Comments on the Internet Assigned Numbers Authority (IANA) Functions*, 76 Fed. Reg. 10569, 10569 (Feb. 25, 2011).

30. *DNS White Paper*, 63 Fed. Reg. at 31749.

31. Memorandum of Understanding Between the U.S. Dep’t of Commerce and the Internet Corp. for Assigned Names and Numbers, § II(B) (Nov. 25, 1998), available at <http://www.icann.org/en/about/agreements/mou-jpa/icann-mou-25nov98-en.htm> (“DOC has determined that this project can be done most effectively with the participation of ICANN.”).

32. See Contract for Internet Domain Name Technical Functions, (Aug. 11, 2006), available at [http://www.ntia.doc.gov/ntiahome/domainname/iana/ianacontract\\_081406.pdf](http://www.ntia.doc.gov/ntiahome/domainname/iana/ianacontract_081406.pdf) [hereinafter *IANA Functions Contract*].

33. *Id.* at § C.1.1.

ICANN's coercive powers over the Internet DNS are exercised by its Board of Directors.<sup>34</sup> No other officer or entity directly controls the Board's membership. Only the Board may remove a director by a three-quarters vote,<sup>35</sup> and the Board may remove any officer, including the president, by a two-thirds vote of all Board members.<sup>36</sup> No one else can reverse the Board's decisions. They may be reviewed only through procedures known as (1) a Request for Reconsideration or (2) an Independent Review Panel (IRP).<sup>37</sup>

A Request for Reconsideration may be submitted to the Board to correct the acts or omissions of staff members or a Board decision that lacked material information.<sup>38</sup> The Request must be directed to the Board Governance Committee, which is authorized to stay the challenged action, investigate the facts, request written submissions from affected parties and others, and "make a recommendation to the Board of Directors on the merits of the request."<sup>39</sup> But such a recommendation is not binding on the Board.<sup>40</sup> It may deny a Request despite the Committee's recommendation to grant it.

Board decisions also may be reviewed through an IRP, a procedure available for "[a]ny person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the [ICANN] Articles of Incorporation or Bylaws."<sup>41</sup> Such a

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34. Bylaws for Internet Corp. for Assigned Names & Numbers, art. 2, § 1 (as amended Dec. 20, 2012), *available at* <http://www.icann.org/en/about/governance/bylaws> [hereinafter *Bylaws*] ("Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board.").

35. *Id.* at art. 6, § 11.1.

36. *Id.* at art. 13, § 3.

37. Another accountability mechanism is the ICANN Ombudsman, whose charter is to "facilitate the fair, impartial, and timely resolution of problems and complaints" by members of the ICANN community. *Id.* at art. 5, § 3.1. However useful the Ombudsman may be in resolving certain kinds of complaints, that office was not designed to address the difficult problems raised when a stakeholder alleges an out-and-out violation of ICANN bylaws and written commitments by the Board of Directors—the paradigm case for which many stakeholders have expressed concerns. In addition, the Ombudsman has only the power to "facilitate" the resolution of stakeholder complaints, not to issue decisions with binding effect on the Board. *Id.* For these reasons, we do not discuss the Ombudsman further.

38. *Id.* at art. 4, § 2.2(b).

39. *Id.* at art. 4, § 2.3(e).

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

41. *Id.* at art. 4, § 3.2.

Panel is provided by an international arbitration authority that ICANN appoints.<sup>42</sup> The Panel is authorized to “declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and . . . [to] recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.”<sup>43</sup> However, as with a Request for Reconsideration, the Board is not bound by an IRP declaration.<sup>44</sup> The first (and only) IRP in ICANN’s history concluded, for instance, that “the intention of the drafters of the IRP process was to put in place a process that produced declarations that would not be binding and that left ultimate decision-making authority in the hands of the Board.”<sup>45</sup>

An additional token of the Board’s power is ICANN’s decision not to have statutory members,<sup>46</sup> as authorized for California nonprofit corporations.<sup>47</sup> ICANN concedes that it is “accountable to the global community” but insists that its “unique mission does not permit ‘members’ of the organization that could exert undue influence and control over ICANN’s activities.”<sup>48</sup> ICANN tries to put an appealing face on this decision, asserting that “by not having any statutory members, ICANN is accountable to the public at-large rather than to any specific member or group of members.”<sup>49</sup> Also, ICANN admits that the Board owes “fiduciary duties,” such as the duties of “care, inquiry, loyalty and prudent investment,” but these are said to run “to the public at-large rather than to any specific member or group of members.”<sup>50</sup>

ICANN’s Board relies for policymaking expertise and proposals on a complex network of Supporting Organizations

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42. *Id.* at art. 4, § 3.4.

43. *Id.* at art. 4, §§ 3.8(b)-(c).

44. *Id.* at art. 4, § 3.15.

45. *In re ICM Registry*, *supra* note 24, at 61.

46. Bylaws, *supra* note 34, at art. XVII (“ICANN shall not have members, as defined in the California Nonprofit Public Benefit Corporation Law . . . notwithstanding the use of the term ‘Member’ in these Bylaws, in any ICANN document, or in any action of the ICANN Board or staff.”).

47. *See* Cal. Corp. Code § 5310(a) (West 2012) (providing the right to add people as members into a corporation using its articles of incorporation or bylaws. Alternatively, a corporation may have no members).

48. *Accord* Internet Corp. for Assigned Names and Numbers, *Accountability & Transparency: Frameworks and Principles* 5 (Jan. 2008), available at <http://www.icann.org/en/about/transparency/acct-trans-frameworks-principles-10jan08-en.pdf> [hereinafter *Frameworks & Principles*].

49. *Id.*

50. *Id.*

(SOs) and Advisory Committees (ACs), organized by the presumed subject matter expertise or interest of its members.<sup>51</sup> Furthermore, the Technical Liaison Group advises the Board on technical matters pertinent to ICANN's activities, and the Board is also entitled to seek advice from external experts. This complex policy-making apparatus further complicates the task of establishing appropriate accountability mechanisms for the Board itself.<sup>52</sup> Neither the SOs nor ACs displaces the Board's primacy as the sole decision-making authority for ICANN.<sup>53</sup> Even the Governmental Advisory Committee (GAC), a body composed of nation-state representatives, must ultimately bow to a Board decision contrary to its advice.<sup>54</sup>

Together these elements of ICANN's corporate organization vest virtually unconstrained power in its Board of Directors. The Board may be influenced or even pressured by particular stakeholders on particular issues at particular times. But it remains legally free to remove directors and officers; disregard community consensus; reject recommendations by the Board Governance Committee or the IRP regarding challenges to a Board decision; and reject policy recommendations from any source, including the GAC and its nation-state representatives. There are no statutory

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51. SOs include the Generic Names Supporting Organization (GNSO), Bylaws, *supra* note 34, at art. X; the Council of the Country Code Names Supporting Organization (ccNSO), *id.* at art. IX; and the Address Supporting Organization (ASO), *id.* at art. VIII. ICANN's Bylaws prescribe four ACs, including the Governmental Advisory Committee (GAC), consisting of representatives from national governments; the Security and Stability Advisory Committee (SSAC) that advises ICANN on security and integrity matters of the Internet's naming and address allocation systems; the Root Server System Advisory Committee (RSSAC) that brings together the root name server operators to advise the Board about the operation of the root zone; and the At-Large Advisory Committee (ALAC) that advises the Board of Directors regarding the interests of individual Internet users. *See id.* at art. XI.

52. *See generally* The Berkman Ctr. for Internet & Soc'y at Harvard Univ., *Accountability and Transparency at ICANN: An Independent Review* (Oct. 20, 2010), in *Final Recommendations of the Accountability and Transparency Review Team* 70 app. C (Dec. 31, 2010), available at <http://www.icann.org/en/reviews/affirmation/atrt-final-recommendations-31dec10-en.pdf> [hereinafter *Berkman Ctr. Report*].

53. *See* Bylaws, *supra* note 34, at art. XI, § 1 (declaring that ACs have no power to bind ICANN).

54. *Id.* at art. XI, §§ 2.1(j) & (k) (When no "mutually acceptable solution" can be found to resolve a dispute between the Board and the GAC, the Board may "take an action that is not consistent with the [GAC] advice," and the Board need only notify the GAC and "state in its final decision the reasons why the [GAC] advice was not followed.").

members to challenge its decisions or to hold the Board to its duties under the bylaws through derivative litigation. Its fiduciary duties—arguably the most legally significant duties owed by corporate directors—run not to any particular person or body, but “to the public at-large.”<sup>55</sup>

ICANN holds unique global authority to manage the Internet DNS, in short, but exercises its authority through a Board of Directors that ICANN’s organization leaves virtually unconstrained. In the next section we explain how this exercise of unconstrained power leads to an accountability gap for ICANN.

## II. ICANN’S ACCOUNTABILITY GAP

ICANN’s exercise of unconstrained power over the Internet DNS is associated with a conspicuous gap between the accountability ICANN needs and the accountability it delivers. ICANN needs sufficient accountability, at least, to honor its written commitments and to satisfy its stakeholders’ expectations. In this section, we describe how ICANN’s performance falls short in both regards. We also explain why accountability is difficult for ICANN to achieve and some of the risks of ICANN’s accountability gap for Internet governance.

### A. *Repeated Commitments, Disappointing Results*

Accountability was intended to be one of ICANN’s most basic attributes. When announcing its final policy of transitioning coordination of the Internet DNS to a private organization, the U.S. government suggested that the absence of formal accountability under the former contractual arrangements was a central reason for that transition.<sup>56</sup> Since 1998, when it was formed, ICANN has entered a string of agreements committing to acquire certain institutional attributes, especially accountability. Unfortunately, ICANN’s performance has fallen short of its promises.<sup>57</sup>

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55. *Id.*

56. *DNS White Paper*, 63 Fed. Reg. at 31742 (“As Internet names increasingly have commercial value, the decision to add new top-level domains cannot be made on an *ad hoc* basis by entities or individuals that are not *formally accountable* to the Internet community.”) (emphasis added).

57. See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 Minn. L. Rev. 342, 437 (2004) (“ICANN’s success in fulfilling a [democratic] governance vision is far more controversial. Indeed, it has been characterized by some commentators as ‘an institution besieged’ and ‘utterly disastrous,’ and ‘accused of everything from bias, through self-service, to out-and-out conspiracy.’”) (quoting Dan Hunter,

## 1. Legal Commitments

### a. MOUs and JPA

ICANN's legal relationship with the U.S. government has always consisted of two types of agreements: the IANA agreements described above, authorizing ICANN to act as the Internet's technical coordinator, and separate agreements, obligating ICANN to implement certain institutional features, such as formal accountability.

Accountability figured in the first Memorandum of Understanding (MOU) between ICANN and the United States.<sup>58</sup> The fifth amendment to the original MOU refined that commitment by committing ICANN to implement "accountability mechanisms to address claims by members of the Internet community that they have been adversely affected by decisions in conflict with ICANN's bylaws, contractual obligations, or otherwise treated unfairly in the context of ICANN processes."<sup>59</sup> ICANN reaffirmed and repeated this commitment verbatim in the sixth and final amendment to the MOU.<sup>60</sup>

ICANN's obligation to implement formal accountability measures was reiterated in the Joint Project Agreement (JPA)<sup>61</sup> that replaced the amended MOU. In the JPA, ICANN agreed to "take action on the Responsibilities set out in the Affirmation of Responsibilities . . . ." <sup>62</sup> Attached as an appendix to the JPA, those

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*ICANN and the Concept of Democratic Deficit*, 36 *Loy. L.A.L. Rev.* 1149, 1153-54 (2003)).

58. Memorandum of Understanding Between the U.S. Dep't of Commerce and the Internet Corp. for Assigned Names and Numbers, § V(C)(8) (Nov. 25, 1998) [hereinafter 1998 Memorandum of Understanding] ("ICANN agrees to . . . [c]ollaborate on the design, development, and testing of appropriate membership mechanisms that foster accountability to and representation of the global and functional diversity of the Internet and its users . . .").

59. Memorandum of Understanding Between the U.S. Dep't of Commerce and the Internet Corp. for Assigned Names and Numbers, amend. 5, § II(C)(4) (Sep. 19, 2002) [hereinafter 2002 Memorandum of Understanding] (emphasis added).

60. See Memorandum of Understanding Between the U.S. Dep't of Commerce and the Internet Corp. for Assigned Names and Numbers, amend. 6, § II(C)(4) (Sep. 16, 2003) [hereinafter 2003 Memorandum of Understanding].

61. Joint Project Agreement between the United States Dep't of Commerce and the Internet Corp. for Assigned Names and Numbers (Sep. 29, 2006), available at <http://www.icann.org/en/general/JPA-29sep06.pdf> [hereinafter Joint Project Agreement or JPA].

62. *Id.* § II(C)(1).

Responsibilities included a commitment “to develop, test, maintain, and improve on accountability mechanisms . . . .”<sup>63</sup>

As the JPA neared expiration in September 2009, the U.S. government invited public comments “regarding the progress of the transition of the technical coordination of and management of the Internet DNS to the private sector, as well as the model of private sector leadership and bottom-up policy development which ICANN represents.”<sup>64</sup> These comments, submitted from around the world, provide an especially useful barometer of stakeholder opinions about ICANN, because they are recent, on the record, and framed as a referendum on ICANN as an institution. Although a few respondents argued that ICANN had matured sufficiently to manage and coordinate the Internet DNS free from oversight,<sup>65</sup> many more cited ICANN’s weak accountability as a reason for extending the JPA.<sup>66</sup>

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63. *Id.* at Annex A, § 3.

64. Nat’l Telecomm & Info. Admin., Notice of Inquiry, Assessment of the Transition of the Technical Coordination and Management of the Internet’s Domain Name and Addressing System, 74 Fed. Reg. 18688, 18689 (Apr. 24, 2009).

65. Internet Soc’y, *Comments Submitted to the United States Department of Commerce, National Telecommunications and Information Administration, Notice Of Inquiry “Assessment of the Transition of the Technical Coordination and Management of the Internet’s Domain Name and Addressing System,”* Docket No. 090420688-9689-01, at 2, available at <http://www.isoc.org/pubpolpillar/docs/ISOC-NOI-comments.pdf>; The Number Resource Organization, *NRO’s Comments Submitted to the United States Department of Commerce, National Telecommunications and Information Administration’s (NTIA) Notice of Inquiry (NOI), “Assessment of the Transition of the Technical Coordination and Management of the Internet’s Domain Name and Addressing System”* Docket No. 090420688-9689-01, 1 (June 5, 2009), available at <https://lists.afrinic.net/pipermail/announce/attachments/20090612/2be23159/respone-ntia-noi-0001.pdf>.

66. *See, e.g.*, Comments of AT&T, Inc., *Assessment of the Transition of the Technical Coordination and Management of the Internet’s Domain Name and Addressing System* at 12 (June 8, 2009) (“ICANN’s existing ‘accountability’ mechanisms are inadequate, and were recognized as such from the start . . . . They do not rest on a fundamental standard and formal set of obligations against which ICANN’s actions can be measured, and as ICANN considers them merely advisory, they do not offer meaningful recourse to either contracted parties or non-contracted party stakeholders.”); Commission of the European Communities, Communication From the Commission to the European Parliament and the Council, *Internet Governance: The Next Steps* 8 (June 18, 2009), available at [http://ec.europa.eu/information\\_society/policy/internet\\_gov/docs/communication/comm2009\\_277\\_fin\\_en.pdf](http://ec.europa.eu/information_society/policy/internet_gov/docs/communication/comm2009_277_fin_en.pdf) (“One element of an evolution of the current

## b. Affirmation of Commitments and the ATRT

Despite broad support for its extension, the U.S. government allowed the JPA to expire and entered an entirely new agreement with ICANN known as the *Affirmation of Commitments* (*Affirmation*).<sup>67</sup> In the *Affirmation* the U.S. once again endorsed the *DNS White Paper's* model of delegating management and coordination of the Internet DNS to a private corporation.<sup>68</sup> ICANN's relationship with the U.S. is now formed by the IANA Contract and the *Affirmation*, which commit ICANN to "(a) ensure that [its] decisions . . . are made in the public interest and are accountable and transparent; (b) preserve the security, stability and resiliency of the DNS; (c) promote competition, consumer trust, and consumer choice in the DNS marketplace; and (d) facilitate international participation in DNS technical coordination."<sup>69</sup>

The *Affirmation* highlights the importance of ICANN making its decisions in the public interest and not just in the interest of a particular set of stakeholders.<sup>70</sup> Essential to its institutional identity are ICANN's commitments to maintain its legal status as a non-profit corporation and its headquarters in the United States.<sup>71</sup>

Unlike the JPA, the *Affirmation* does not authorize the U.S. government to monitor ICANN's progress toward meeting its institutional benchmarks or to conduct periodic reviews,<sup>72</sup> and it has no expiration date.<sup>73</sup> In place of external supervision, the *Affirmation* commits ICANN to perform two kinds of voluntary reviews. First, a form of internal review commits ICANN to

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governance system could be the completion of an *internal* ICANN reform leading to full accountability and transparency.").

67. *Affirmation of Commitments by the United States Dep't of Commerce and the Internet Corp. for Assigned Names and Numbers* (Sep. 30, 2009), available at <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm> [hereinafter *Affirmation*].

68. *Id.* ¶ 4 ("DOC [U.S. Department of Commerce] affirms its commitment to a multi-stakeholder, private sector led, bottom-up policy development model for DNS technical coordination that acts for the benefit of global Internet users.").

69. *Id.* ¶ 3.

70. *Id.* ¶ 4.

71. *Id.* ¶ 8 ("ICANN affirms its commitments to . . . remain a not for profit corporation, headquartered in the United States of America . . .").

72. *Id.* ("ICANN is a private organization and nothing in this Affirmation should be construed as control by any one entity.").

73. *Id.* ¶ 11 ("The agreement is intended to be long-standing, but may be amended at any time by mutual consent of the parties.").

“perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS.”<sup>74</sup> Second, apart from such ongoing internal reviews are periodic reviews of ICANN conducted by “volunteer community members.”<sup>75</sup> These reviews are aimed at measuring ICANN’s transparency and accountability and whether it acts in the public interest; its implementation of the security plan and whether that plan is sufficiently effective and robust to meet current and future challenges and threats; and whether expanding the availability of new generic Top-Level-Domains (gTLDs) will have promoted competition, consumer trust and consumer choice, and the effectiveness of the application and evaluation process for new gTLDs.<sup>76</sup> These community reviews are to be conducted by independent panels, consisting of volunteer community members, the GAC Chair, ICANN’s Chairman of the Board, and representatives of the relevant ACs.<sup>77</sup>

The first community review organized under the *Affirmation’s* mandate<sup>78</sup> was the Accountability and Transparency Review Team (ATRT). It divided its mission of reviewing ICANN’s accountability and transparency among four Working Groups (WGs) whose assignments were determined by subject matter.<sup>79</sup> WGs were assigned to review (i) the ICANN Board of Directors’ governance, performance, and composition; (ii) the role and effectiveness of the GAC and its interaction with the ICANN Board; (iii) the public comment processes and the policy development process; and (iv) the review mechanisms for Board decisions. The ATRT engaged the Berkman Center for Internet & Society at Harvard University to act as its Independent Expert with the mandate to “provide recommendations that are exclusively fact-based,” using case studies as part of “a multi-pronged fact-

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74. *Id.* ¶ 4.

75. *See id.* ¶¶ 9.1(e).

76. *See id.* ¶¶ 9.1-9.3.1.

77. *Id.*

78. *Id.* ¶ 9.1(e) (“ICANN will organize a review . . . [that] shall consider the extent to which the assessments and actions undertaken by ICANN have been successful in ensuring that ICANN is acting transparently, is accountable for its decision-making, and acts in the public interest.”).

79. *See* Final Recommendations of the Accountability and Transparency Review Team 1 (Dec. 31, 2010), *available at* <http://www.icann.org/en/reviews/affirmation/atrt-final-recommendations-31dec10-en.pdf> [hereinafter *Final Recommendations*].

based approach.”<sup>80</sup> Utilizing distinct methodologies and analytical tools,<sup>81</sup> it delivered an extensive report that was incorporated into the ATRT Final Recommendations.<sup>82</sup> All four WGs reviewed ICANN bylaws, policies, and procedures, as well as the analysis provided by the Berkman Center relevant to their assigned topics.<sup>83</sup> They also relied on public comments and conducted surveys to determine what improvements to recommend.<sup>84</sup>

WG1 examined the composition of the ICANN Board, its skill-set requirements, and the transparency of its decision-making process.<sup>85</sup> It recommended benchmarking Board skill sets against similar corporate and other governance structures, tailoring the required skills to suit ICANN’s unique mission through an open consultation process, and increasing transparency in the nomination process by publishing decisions and requirements.<sup>86</sup> WG1 also recommended that the Board provide a thorough and reasoned explanation of decisions taken, the rationale for them, and the sources of data and information on which ICANN relied.<sup>87</sup> Curiously, this recommendation duplicates commitments contained in the *Affirmation*<sup>88</sup> without mentioning that ICANN has fallen short in meeting them.<sup>89</sup>

WG2 evaluated the current relationship between ICANN’s Board of Directors and the GAC, concluding that it has long been dysfunctional and in need of improvement.<sup>90</sup> It recommended that the Board and the GAC clarify what constitutes GAC “advice” under the ICANN bylaws.<sup>91</sup> It also recommended engaging the GAC earlier in the policy development procedures.<sup>92</sup>

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80. See *Berkman Ctr. Report*, *supra* note 52. **Error! Bookmark not defined.**, t 89 (footnote omitted).

81. See Urs Gasser et. al, *ICANN: Observations from an Information Law Perspective*, in *Kommunikation*, Festschrift für Rolf H. Weber zum 60. Geburtstag 469, 475 (Rolf Sethe, et al. eds., 2011).

82. See *Berkman Ctr. Report*, *supra* note 52 at 69-156.

83. See *Final Recommendations*, *supra* note 79, at 7.

84. See *id.*

85. See *id.* at 10. For further details see Gasser et al., *supra* note 81, at 476.

86. See *id.* at 19 (recommendation 1).

87. See *id.* at 28-29 (recommendation 7).

88. *Affirmation*, *supra* note 67, ¶ 7.

89. See Letter from Lawrence E. Strickling, Ass’t Sec’y for Commc’ns & Info., U.S. Dep’t of Commerce, to Rod Beckstrom, Chief Exec. Officer, Internet Corp. for Assigned Names & Nos. at 2. (Dec. 2, 2010), *available at* <http://forum.icann.org/lists/5gtld-guide/pdf4SSmb5oOd5.pdf>.

90. See *Final Recommendations*, *supra* note 79, at 37.

91. See *id.* at 38 (recommendation 9).

92. See *id.* (recommendations 11, 12).

WG3 found that the timeliness and effectiveness of ICANN's policy making were a serious concern among participants in ICANN processes.<sup>93</sup> It recommended that the Board specify a timeline for implementing public notice and comment processes.<sup>94</sup> WG3 also recommended that the Board begin providing multilingual support for and documentation within the policy development processes.<sup>95</sup>

Each WG studied issues connected with accountability, but WG4 addressed perhaps the most consequential issue of all. Its assignment to study mechanisms for appealing Board decisions confronted it with the stark fact that none of ICANN's existing accountability review mechanisms can appeal a Board decision with binding authority.<sup>96</sup>

WG4's discovery that ICANN has no effective appeal mechanism is troubling, given ICANN's origins and its repeated written agreements with the United States. Even before ICANN was created, the U.S. government announced that the private organization with management authority over the Internet DNS must establish an effective appeal procedure as an element of formal accountability.<sup>97</sup> Government approval of ICANN's application to be the new DNS manager was withheld, in fact, until ICANN amended its bylaws to authorize appellate review of Board decisions.<sup>98</sup> ICANN's first MOU with the U.S. stated "that the mechanisms, methods, and procedures developed under the DNS Project . . . will ensure sufficient appeal procedures for adversely affected members of the Internet community."<sup>99</sup> ICANN's obligation to "ensure sufficient appeal procedures" survived six amendments to the MOU, as well as the JPA, none of which modified or repealed it.<sup>100</sup> The *Affirmation* reiterated the same understanding in substance—that "assessing and improving ICANN

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93. *See id.* at 44.

94. *See id.* (recommendation 15).

95. *See id.* at 45 (recommendation 18).

96. *See id.* at 53.

97. *DNS White Paper*, 63 Fed. Reg. at 31747 ("Entities and individuals would need to be able to participate by expressing a position and its basis, having that position considered, and *appealing if adversely affected.*") (emphasis added).

98. *See* Weinberg, *supra* note 22, at 228 n. 211 (suggesting that the U.S. government demanded that ICANN amend its bylaws to subject the board to external review before it would to approve ICANN as the new manager of the DNS).

99. 1998 *Memorandum of Understanding*, *supra* note 58, § V(A)(2).

100. *Id.*

Board of Directors (Board) governance” included “the consideration of an appeal mechanism for Board decisions.”<sup>101</sup>

To be sure, there was a subtle change in emphasis as successive MOUs gave way to the JPA and then to the *Affirmation*. The MOUs committed ICANN to implement “accountability mechanisms” directed at “claims by members of the community” of being “adversely affected” or “treated unfairly” by ICANN.<sup>102</sup> With the JPA, ICANN promised “accountability mechanisms” that would render it “responsive” to stakeholders and would “improve openness and accessibility for enhanced participation” in ICANN’s policy-making. But the point still holds. ICANN has failed to implement an effective mechanism for stakeholders to appeal adverse decisions by the Board of Directors, in violation of multiple agreements with the United States.

Besides noticing the absence of an effective appeal, WG4 concluded that ICANN had no other procedure sufficiently independent of the ICANN Board of Directors and binding on it to qualify as truly accountable. WG4 found that the Request for Reconsideration is not independent of the Board and that any decision in response to such a Request is not binding on it.<sup>103</sup> Only the Independent Review Panel (IRP) was considered sufficiently independent, and its suitability was questioned because “its decisions and recommendations are not binding on the ICANN Board.”<sup>104</sup>

In struggling to determine whether the IRP could be modified to issue binding decisions or whether some other form of binding review could be devised, “WG4 queried ICANN about California law governing ICANN and any implications for a possible recommendation from the ATRT.”<sup>105</sup> ICANN replied with a one-page document stating that under California law “the board *cannot* empower any entity to overturn decisions or actions of the board.”<sup>106</sup> WG4 determined that resolving the impasse caused by

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101. *Affirmation*, *supra* note 67, ¶ 9.1(a).

102. See 2003 *Memorandum of Understanding*, *supra* note 59, § II(C)(4).

103. AoC/ATRT Working Group #4, Independent Review of Board Decisions, *Findings and Recommendations (Draft)* (Oct. 8, 2010), <https://community.icann.org/display/atr/Findings+and+Recommendations>.

104. *Id.*

105. *Final Recommendations*, *supra* note 79, at 52.

106. See Internet Corp. for Assigned Names and Numbers, *Limitations on Third Party Review of Corporate Board Actions Under California Law* (Aug. 31, 2010), available at <http://www.icann.org/en/reviews/affirmation/third-party-review-of-board-actions-31aug10-en.pdf> [hereinafter *ICANN Limitations*] (emphasis added).

ICANN's legal position was "critical to establishing an appeals mechanism that is *both binding and independent*, and essential to the viability of the ICANN model itself."<sup>107</sup> Based on these concerns, WG4 tentatively recommended that "pending further research" it would "[c]hallenge ICANN's interpretation of California corporate governance law as it applies to ICANN policy development."<sup>108</sup>

WG4's recommendation to challenge ICANN was rejected by the full ATRT—the only Working Group recommendation so rejected. Consensus broke down over "whether binding authority was the standard upon which to judge ICANN's accountability."<sup>109</sup> Resolving this internal dispute was elusive, despite "concern from the Community and, in part, from the Berkman Case Studies, over the fact that none of the three accountability mechanisms can review and potentially reverse ICANN Board decisions with binding authority."<sup>110</sup> Instead of engaging this problem directly, the ATRT recommended that ICANN revive the quiescent idea of seeking advice from a committee of independent experts.<sup>111</sup>

Doubts about whether California law permits ICANN's Board to be subject to binding review influenced both ATRT's review and the Berkman Center's analysis on which it relied.<sup>112</sup> The Berkman Center concluded it was inadvisable to establish a broad-reaching binding third-party review of Board decisions.<sup>113</sup> This conclusion rested on doubts "whether a binding general third-party review mechanism applicable to all Board decisions and actions would improve the status quo" and "whether such a broad regime would hold under Californian corporate law."<sup>114</sup> These doubts about subjecting ICANN's Board to binding authority turn out to be unfounded, for reasons we explain below.

On the all-important question of whether ICANN's accountability requires "an appeals mechanism that is both binding and independent,"<sup>115</sup> the Berkman Center and the ATRT punted.

Nor has the ball advanced since the ATRT issued its Final Recommendations in December 2010. The ICANN Board

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107 AoC/ATRT Working Group #4, *supra* note 103 (emphasis added).

108. *Id.*

109. *Final Recommendations*, *supra* note 79, at 53.

110. *Id.*

111. *See id.* at 55.

112. *Id.*

113. *See id.* at 115.

114. *Id.*

115. AoC/ATRT Working Group #4, *supra* note 103 (emphasis added).

approved those Recommendations in full,<sup>116</sup> but it did not commission the expert study of Board review mechanisms called for by the ATRT until September 2012.<sup>117</sup> The Report of Accountability Structures Expert Panel (ASEP) proposed several changes to ICANN bylaws governing the Request for Reconsideration and IRP,<sup>118</sup> which the Board of Directors already has approved.<sup>119</sup> Disappointingly, however, the ASEP Report does not address what standard of accountability ICANN should be held to or tackle the problem identified by the ATRT's WG4—that ICANN has no procedure binding the Board to reverse a decision or policy that contravenes ICANN's bylaws or other written commitments. ASEP's work does not move ICANN any closer to embracing a coherent standard of accountability or adopting measures reasonably designed to achieve it.

Meanwhile, other community review teams are laboring on similar reports directed at the security, stability, and resiliency of the DNS; competition, consumer trust, and consumer choice; and WHOIS policy.<sup>120</sup>

Even before these community review teams complete their work, serious doubts have been raised whether the *Affirmation* is improving ICANN's performance. The U.S. government has expressed "concern regarding the apparent failure" of ICANN to "carry out its obligations as specified in the *Affirmation of Commitments*."<sup>121</sup> Invoking his status as "a signatory to the *Affirmation*," Assistant Secretary Strickling reminded ICANN of his expectation "that ICANN would make significant improvements in its operations to meet the obligations identified in

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116. Internet Corp. for Assigned Names and Nos., *Adopted Board Resolutions*, no. 2 (June 24, 2011) (consent agenda), available at <http://www.icann.org/en/minutes/resolutions-24jun11-en.htm#2>.

117. See <http://www.icann.org/en/news/announcements/announcement-11sep12-en.htm>.

118. *Report by Accountability Structures Expert Panel (ASEP)* (Oct. 2012), available at <http://www.icann.org/en/news/in-focus/accountability/asep/report-26oct12-en>.

119. Internet Corp. for Assigned Names and Nos., *Adopted Board Resolutions*, nos. 17-19 (Dec. 20, 2012) (main agenda), available at <http://www.icann.org/en/minutes/resolutions-24jun11-en.htm#2>.

120 ICANN's website describes the *Affirmation* review teams, their composition, and their activities. See <http://www.icann.org/en/reviews/affirmation>.

121. See Letter from Lawrence E. Strickling, Ass't Sec'y for Commc'ns & Info., U.S. Dep't of Commerce, to Rod Beckstrom, Chief Exec. Officer, Internet Corp. for Assigned Names & Nos. 1 (Dec. 2, 2010), available at <http://forum.icann.org/lists/5gtld-guide/pdfDBwaP78ZvQ.pdf>.

the *Affirmation*,” including “accountability.”<sup>122</sup> ICANN’s performance has fallen short of that expectation, he wrote, because “[o]ver a year later . . . those improvements have yet to be seen.”<sup>123</sup>

ICANN takes a sharply different view of the *Affirmation*, apparently interpreting it as a declaration of independence from U.S. oversight. Its 2010 Annual Report declares that “[w]ith the *Affirmation*, the United States and ICANN formally recognized that no single party should hold undue influence over Internet governance” and that “ICANN is independent and not controlled by any one entity.”<sup>124</sup> This reading elevates a single sentence of the *Affirmation*<sup>125</sup> without taking into account its remaining contents. ICANN’s interpretation of the *Affirmation* in these reductionist terms and the U.S. government’s announcement that ICANN is failing to meet its commitments under the *Affirmation* suggest that ICANN does not regard it as a serious agreement deserving of wholehearted adherence.

## 2. Representation and Other Accountability Gestures

This is not to say that ICANN has entirely neglected to take steps that would seem to enhance its accountability. Perhaps the most important of them is to establish representation within the ICANN policymaking community for different stakeholder groups. The *DNS White Paper* contemplated that “the principle of representation should ensure that DNS management proceeds in the interest of the Internet community as a whole.”<sup>126</sup>

Unfortunately, things have not quite worked out that way. While representation superficially characterizes ICANN’s policymaking process, ICANN’s decisions still too often fail to reflect the interests of the whole Internet community. Each Supporting Organization and Advisory Committee selects leaders intended to represent the diverse interests of its members.<sup>127</sup> A complex representational calculus determines who is selected for the Board

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122. *Id.* at 2.

123. *Id.*

124. Internet Corp. for Assigned Names and Nos., 2010 Annual Report 12 (2011), available at <http://www.icann.org/en/annualreport/annual-report-2010-en.pdf> [hereinafter 20120 Annual Report]

125. *Affirmation*, *supra* note 67, ¶ 8 (“ICANN is a private organization and nothing in this *Affirmation* should be construed as control by any one entity.”).

126. *DNS White Paper*, 63 Fed. Reg. at 31743.

127. See Bylaws, *supra* note 34, at art. 10, § 3 (describing composition of the GNSO Council).

of Directors.<sup>128</sup> Most directors are selected by the Nominating Committee,<sup>129</sup> whose members in turn are selected by SOs, ACs, and other bodies like the IETF. Non-voting liaisons are appointed by the GAC, the RSSAC, the SAC, the TLG, ALAC, and IETF.<sup>130</sup> One of ICANN's more significant democratic reforms has been to support individual Internet users' participation within ICANN's policy-making processes and to authorize a voting seat on the Board of Directors<sup>131</sup> for ALAC.<sup>132</sup> Representation has proven to be a necessary but insufficient condition of ICANN's accountability. It connects ICANN's decisions to the interests of several well-established portions of the Internet community. But those connections do not take into account all sectors of the heterogeneous community of Internet users and stakeholders. Representation by itself has not ensured ICANN's accountability, or even its legitimacy.<sup>133</sup>

ICANN has commissioned reports on its accountability. At ICANN's request, the One World Trust issued a lengthy report acknowledging that "accountability and transparency are central to ICANN" but concluding that "while ICANN have the policies and procedures in place to foster transparency and accountability they are not always consistently followed."<sup>134</sup> The Report found that ICANN provided an unusual amount of information on its website

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128. *Id.* at art. 6, § 1 (composition of the Board); *id.* at art. 6, § 2.1.f (membership of President *ex officio* as a voting member of the Board).

129. *Id.* at art. 6, § 2.1(a).

130. *Id.* at art. 6, § 9.1(a)-(f).

131. *See ICANN Board Unanimously Approves Voting Seat for At-Large Community* (August 27, 2009), <http://www.atlarge.icann.org/announcements/announcement-27aug09-en.htm>.

132. The At-Large Advisory Committee (ALAC) consists of two members selected by the Regional At-Large Organizations (RALO's), and five members selected by the Nominating Committee. ALAC's members are elected to represent the different regions of the world, the better to serve the Committee's function of providing advice regarding the activities on ICANN as they relate to the interests of individual Internet users.

133. *See* Nat'l Research Council, *Signposts in Cyberspace: The Domain Name System and Internet Navigation* 202 (2005), available at <http://www.nap.edu/catalog/11258.html> ("No composition of the ICANN board, no matter how arrived at, is likely by itself to confer the perception of legitimacy on ICANN among all its possible constituency groups."); Rolf H. Weber & Mirina Grosz, *Legitimate Governing of the Internet*, 2 Int'l J. Private L. 300, 311 (2009) ("Representation only has a legitimizing effect, if the outcomes reflect the values of the represented stakeholders.").

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

but needed to “improve their practice in explaining more clearly how stakeholder input is used when making decisions.”<sup>135</sup> It also cautioned that “[i]f basic good practice principles such as explaining to stakeholders how their inputs made an impact on the final decision are not met, levels of engagement will fall.”<sup>136</sup> These recommendations remain unimplemented.

The same holds true of the recommendations proposed by the President’s Strategy Committee (PSC). Its draft report in February 2009 proposed 24 “detailed recommendations.”<sup>137</sup> Among them were measures to “enhance its public consultation process,”<sup>138</sup> manage its revenue growth “in line with ICANN’s not-for-profit status and its core mission and mandate,”<sup>139</sup> and “[s]eek advice from a committee of independent experts on the restructuring of the review mechanisms to provide a set of mechanisms that will provide for improved accountability in relation to individual rights.”<sup>140</sup> These recommendations, developed at ICANN’s request over an extensive three-year process, have not been put into practice.<sup>141</sup>

ICANN’s self-initiated attempts to improve its accountability have been ineffective because, for the most part, they have remained unimplemented. As such, they are more accurately classified as accountability gestures than accountability measures.

### B. *Rough Consensus*

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135. *Id.* at 5.

136. *Id.*

137. Internet Corp. for Assigned Names and Nos., *Draft Implementation Plan for Improving Institutional Confidence* 3 (Feb. 26, 2009), available at <http://archive.icann.org/en/jpa/iic/draft-iic-implementation-26feb09-en.pdf>.

138. *Id.* at 24.

139. *Id.* at 31; accord Gerald J. Kovach, *NeuStar Response to NTIA’s Notice of Inquiry on ICANN and the Joint Project Agreement*, at 3 (June 8, 2009), available at [http://www.ntia.doc.gov/legacy/ntiahome/domainname/jpacomments2007/jpacomment\\_130.pdf](http://www.ntia.doc.gov/legacy/ntiahome/domainname/jpacomments2007/jpacomment_130.pdf) [hereinafter *NeuStar Comments*] (“ICANN has increasingly expanded its activities and mission to justify its growing budgets rather than reduce its revenues to meet its narrow role as envisioned in the DNS White Paper and Memorandum of Understanding.”).

140. *Id.* at 7.

141. New life has been breathed into the PSC by the ICANN Board’s adoption of the ATRT’s Recommendation 23, calling for “a committee of independent experts” to conduct “a broad, comprehensive assessment of the accountability and transparency of the three existing [review] mechanisms.” *Final Recommendations*, *supra* note 79, at 55.

A resonant credo for the Internet age is that “[w]e believe in: rough consensus and running code.”<sup>142</sup> ICANN’s pattern of exceeding its powers or flouting its own bylaws and other commitments has led a surprisingly diverse cross-section of its stakeholders to agree that ICANN lacks the necessary accountability for an organization with its global power and responsibilities. As the Berkman Center wrote in a line of delicious understatement, “ICANN’s present approach to accountability is the subject of considerable criticism.”<sup>143</sup>

A leading illustration of ICANN’s accountability gap and the intense controversy it generates is ICANN’s program to add new generic Top Level Domains (gTLDs) to the Internet. That program prompted a congressional hearing, where ICANN’s deficient accountability figured prominently.<sup>144</sup> Apart from the hearing, unresolved concerns about new gTLDs have been

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142. David Clark, *A Cloudy Crystal Ball—Visions of the Future*, in Corporation for National Research Initiatives, Proceedings of the Twenty-Fourth Internet Engineering Task Force 539, 543 (Megan Davies, Cynthia Clark, Debra Legare compilers & eds., 1992).

143. *Berkman Ctr. Report*, *supra* note 52, at 70.

144. See, e.g., *ICANN Generic Top-Level Domains (gTLD): Hearing Before the Subcomm. on Intellectual Prop., Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 3 (2011) (statement of Rep. Bob Goodlatte, Chairman, H. Subcomm. on Intellectual Prop., Competition, and the Internet), available at [http://judiciary.house.gov/hearings/printers/112th/112-37\\_66155.PDF](http://judiciary.house.gov/hearings/printers/112th/112-37_66155.PDF) (“I look forward to hearing from all of our witnesses and hope that we can have a spirited discussion on the gTLD proposal and the steps that need to be taken to ensure that the backbone of the Internet remains strong, effective, and accountable to the global Internet community.”); *id.* at 45 (statement of Michael D. Palage, President and CEO, Pharos Global) (“The third point which I would like to address is holding ICANN accountable.”).

Later in 2011, committees in both houses of Congress held hearings on ICANN’s new gTLD program. By then, however, the focus had shifted to whether ICANN should abandon the program, or at least delay it, in response to a public campaign by the Coalition for Responsible Internet Domain Oversight and the Association of National Advertisers. See *ICANN’s Top-Level Domain Name Program: Hearing Before the Subcomm. on Commc’ns and Tech. of the H. Comm. on Energy and Commerce*, 112th Cong. 1 (2011) (statement of Daniel L. Jaffe, Executive Vice President, Government Relations, Association of National Advertisers), available at <http://republicans.energycommerce.house.gov/Media/file/Hearings/Telecom/121411/Jaffe.pdf>; *ICANN’s Expansion of Top Level Domains: Hearing Before the S. Comm. On Commerce, Science, and Transp.*, 112th Cong. 1 (2011) (statement of Daniel L. Jaffe, Executive Vice President, Government Relations, Association of National Advertisers), available at [http://commerce.senate.gov/public/?a=Files.Serve&File\\_id=8c7e6c3b-a6b8-41a9-b59a-681dd278249f](http://commerce.senate.gov/public/?a=Files.Serve&File_id=8c7e6c3b-a6b8-41a9-b59a-681dd278249f).

expressed by the GAC<sup>145</sup> and trademark holders.<sup>146</sup> These concerns are heightened by doubts that ICANN has adequately measured the costs to consumers against the benefits.<sup>147</sup>

Another decision prompting widespread concern about ICANN's accountability occurred with its approval of .xxx as a TLD designated for adult content. In May 2011, representatives of the United States and the European Union discussed the EU's objections, including the its concerns with the "potential collateral implications for global Internet stability"<sup>148</sup> if countries opposed to pornography blocked traffic from the new .xxx TLD. Following their meeting, these government representatives announced they would continue working for "the sustainability of the multi-stakeholder private sector-led model of Internet governance" while stressing that "reforms [of ICANN] are necessary[.]"<sup>149</sup> Heading their list of reforms was a call "to reinforce the transparency and accountability of the internal corporate governance of ICANN . . . ."<sup>150</sup>

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145. See Internet Corp. for Assigned Names and Nos., GAC Communiqué—Singapore 1 (June 23, 2011), available at [https://gacweb.icann.org/download/attachments/1540134/Singapore+Communique+-+23+June+2011\\_2.pdf?version=1&modificationDate=1312392506000](https://gacweb.icann.org/download/attachments/1540134/Singapore+Communique+-+23+June+2011_2.pdf?version=1&modificationDate=1312392506000) ("The GAC appreciates the potentially beneficial opportunities provided by new gTLDs. However, the GAC is concerned that several elements of its advice on important public policy issues . . . were not followed by the Board prior to the approval of the gTLD programme.").

146. *ICANN Generic Top-Level Domains (gTLD) Oversight Hearing Before the Subcomm. On Intellectual Prop., Competition and the Internet, 112th Cong.* 38 (2011) (statement of Mei-lan Stark, Senior Vice President of Intellectual Property, Fox Group Legal, and Treasurer, International Trademark Association (INTA)) ("These principles have not been satisfied, and INTA believes that more multi-stakeholder collaboration is required before ICANN can satisfy its own stated objectives for the introduction of new gTLDs") (footnote omitted).

147. See Strickling Letter, *supra* note 121, at 2 ("I am troubled that despite ICANN's commitments in the *Affirmation* . . . you still have not performed the studies to answer the threshold question whether the benefits of expansion outweigh the costs.").

148. Letter from Neelie Kroes, Vice-President, European Commission, to Gary Locke, Secretary, U.S. Dep't of Commerce (Apr. 6, 2011), available at <http://news.dot-nxt.com/2011/04/06/kroes-letter-locke-xxx>.

149. Press Release, *Neelie Kroes Discusses Internet Governance with US Administration*, MEMO/11/298, at 1 (May 13, 2011), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/298&format=HTML&aged=0&language=EN&guiLanguage=en>.

150. *Id.* This meeting occurred, in part, based on news reports that the government of India planned to block all traffic under .xxx. See Harsimran Julka, *India to Oppose XXX Domain for Porn Sites*, Economic Times (Mar. 24,

Other ICANN policies have likewise garnered criticism because of the organization's weak accountability. ICANN fails to police the most basic requirements of domain name ownership, as demonstrated by an independent report stating that only 23% of all domain names reviewed provided fully accurate information.<sup>151</sup> And an ICANN working group has reported the ICANN Board's "failure to minute Board discussions regarding the re-delegation of ccTLDs [country-code Top-Level Domains] contrary to the procedures as laid out in the ICANN Bylaws for this."<sup>152</sup>

ICANN's accountability gap provokes criticism not only of particular decisions, but of ICANN's institutional processes and even of its capacity to continue acting as the trusted manager of the Internet DNS. Too often ICANN ignores its own policies and bylaws, and its interactions with stakeholders sometimes amount to soliciting community opinions and then doing what it pleases.<sup>153</sup>

### C. *Natural Obstacles to Accountability*

To be fair, accountability does not come naturally to ICANN. Its Janus-like aspect of private form and public function impedes clear thinking about what accountability means for ICANN and how it may be achieved. It is first a private corporation. That is its legal form, the organizational structure through which its powers are exercised. But it is also vested with the powers of management and coordination over the Internet DNS, a global

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2011), *available at* [http://articles.economictimes.indiatimes.com/2011-03-24/news/29181495\\_1\\_new-domain-internet-corporation-websites](http://articles.economictimes.indiatimes.com/2011-03-24/news/29181495_1_new-domain-internet-corporation-websites).

151. *See* NORC at the Univ. of Chicago, Draft Report for the Study of the Accuracy of WHOIS Registrant Contact Information 2 (Jan. 17, 2010). Recently, the second Affirmation of Commitments review team specifically targeted ICANN's shortcomings in WHOIS compliance. *See* Affirmation of Commitments WHOIS Review Team, Final Report 9 (Dec. 5, 2011), *available at* <http://www.icann.org/en/reviews/affirmation/whois-rt-draft-final-report-05dec11-en.pdf> ("ICANN should take appropriate measures to reduce the number of unreachable WHOIS registrations . . . by 50% within 12 months and by 50% again over the following 12 months.").

152. *See* Final Report of the Delegation, Re-delegation and Retirement Working Group of the ccNSO ICANN-CCNSO-DRDWG 5 (Feb. 17, 2011), *available at* <http://ccnso.icann.org/workinggroups/final-report-drd-wg-17feb11-en.pdf>.

153. *See* Kieren McCarthy, *A Damaged Process and a Damaged Community* (Jan. 25, 2011), <http://kierenmccarthy.com/2011/01/25/a-damaged-process-and-a-damaged-community> ("ICANN can no longer adopt this haphazard, by-the-seat-of-its-pants approach. It is time it grew up. And that means \*not\* creating new processes out of thin air just because you don't like where the current process is leading you.").

telecommunications network of increasing economic value and human significance. Those powers are coercive or regulatory. Each face of its identity holds implications for the proper sources and methods of achieving accountability. Nation-states hold coercive power and, at least in most modern democracies, are subject to numerous internal checks and balances. Corporations do not hold coercive power, generally. Even monopolies are prevented from exercising coercive power for long because of virtually inevitable market competition or legal regulation.

ICANN falls outside these familiar categories. It exercises coercive power through its management of the DNS, but it is subject neither to meaningful internal checks and balances, nor market competition, nor legal regulation. Its *sui generis* institutional character defeats any effort to supply accountability from familiar sources. Other private corporations have shareholders, major donors, or corporate members to hold the board of directors accountable. ICANN has no shareholders because it is a not-for-profit corporation. It collects revenue—not donations—through contracts that determine whether registries and registrars can do business at all. And it has rejected the creation of corporate members, preferring the conceit of being “accountable to the public at-large rather than to any specific member or group of members.”<sup>154</sup> Other organizations with coercive power are typically governments and intergovernmental organizations. Governments are typically bound in some sense by law. Decision-makers are held to standards that are enforceable by a political or legal tribunal independent of them and whose decisions are binding on them. Intergovernmental organizations are typically bound by treaties whose terms may be enforced through various legal and political mechanisms.

ICANN has none of these natural sources of accountability. Its hybrid form deprives it of the legitimating relationships that belong to other organizations with global powers. It has no citizens or Westphalian state structure with its presumed legitimacy of control over a particular territory.<sup>155</sup> It does not derive its powers from the consent of nation-states like treaty organizations or international organizations. Instead, its powers and responsibilities over the DNS stem from agreements with the United States.<sup>156</sup> While

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154. *Frameworks & Principles*, *supra* note 48, at 5.

155. See Max Weber, *Politics as a Vocation*, in *The Vocation Lectures* 33 (David Owen & Tracy B. Strong, eds. & Rodney Livingstone trans., 2004).

156. See IANA Functions Contract, *supra* note 32, at cls. C.2.2.1.1-3 (describing the IANA functions delegated to ICANN); *Affirmation*, *supra* note

ICANN has the responsibility for managing the DNS, the U.S. Department of Commerce retains the ultimate capacity of implementing decisions of ICANN to insert new top-level domains into the Internet root.<sup>157</sup> This arrangement makes ICANN heavily dependent on the United States for its authority and, in turn, for its relevance.<sup>158</sup>

Any strategy to close ICANN's accountability gap will be ineffective unless it acknowledges the difficulty of locating sources of accountability compatible with ICANN's hybrid identity as a private corporation with global coercive powers.

#### *D. The Risks of Unaccountability*

ICANN's accountability gap does not occur in a political vacuum. It carries profound risks for Internet governance by making ICANN vulnerable to international calls for abandoning the multi-stakeholder model of DNS management or fundamentally altering ICANN's form as a private corporation.

The *Affirmation* declares the U.S. "commitment to a multi-stakeholder, private sector led, bottom-up policy development model for DNS technical coordination that acts for the benefit of global Internet users."<sup>159</sup> NTIA has voiced that commitment repeatedly, expressing its support for the multi-stakeholder model of Internet governance "where all stakeholders participate in relevant decision making, not one where governments, or other stakeholders, dominate."<sup>160</sup> Conversely, it opposes "establishing a governance structure for the Internet that would be managed and controlled by nation-states" because a government-centered model

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67, ¶ 3. See generally Rolf H. Weber, *Internet Corporation for Assigned Names and Numbers (ICANN)*, in *Handbook of Transnational Economic Governance Regimes* 603-19 (Ch. Tietje & A. Brouder eds., 2009) (tracing the historical origins of Internet DNS to defense projects for the U.S. government).

157. See *ICM Registry*, *supra* note 24, at 6.

158. See A. Michael Froomkin, *Form and Substance in Cyberspace*, 6 J. Small & Emerging Bus. L. 93, 94-95 (2002). The U.S. government's special role vis-à-vis ICANN forms a major objection to ICANN's authority over the DNS. Because the U.S. has consistently declined to consider sharing or abandoning its unique position with respect to the DNS, however, practical suggestions for reform must start from the premise that U.S. policy will not change on this point in the foreseeable future.

159. *Affirmation*, *supra* note 67, ¶ 4.

160. Remarks by Lawrence E. Strickling, Ass't Sec'y of Commerce for Commc'ns & Info., Internet Governance Forum—USA (July 18, 2011), <http://www.ntia.doc.gov/speechtestimony/2011/remarks-assistant-secretary-strickling-internet-governance-forum-usa> (as prepared for delivery).

of governance “could lead to the imposition of heavy-handed and economically misguided regulation and the loss of flexibility the current system allows today, all of which would jeopardize the growth and innovation we have enjoyed these past years.”<sup>161</sup>

Major Western governments, represented by the OECD, G8, and the Council of Europe, have echoed U.S. support for the multi-stakeholder model of Internet governance and, by extension, for ICANN’s continued role as the technical coordinator for the Internet DNS.<sup>162</sup>

Opposition to the multi-stakeholder model of Internet governance has been mounted publicly by developing nations. IBSA, a trilateral organization composed of India, Brazil, and South Africa, declared that “an appropriate body is urgently required in the UN system to coordinate and evolve coherent and integrated global public policies pertaining to the Internet.”<sup>163</sup> Striking a similar tone, China, the Russian Federation, Tajikistan, and Uzbekistan have insisted that “policy authority for Internet-related public issues is the sovereign right of States” and pledged “[t]o promote the establishment of a multilateral, transparent and

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161. Lawrence E. Strickling, Ass’t Sec’y of Commerce for Comm’ns & Info., Keynote Remarks, 40th Meeting of the Internet Corp. for Assigned Names & Numbers (March 14, 2011), available at [http://www.ntia.doc.gov/presentations/2011/LES\\_ICANNRemarks\\_03142011.html](http://www.ntia.doc.gov/presentations/2011/LES_ICANNRemarks_03142011.html).

162. See Organisation for Economic Co-operation and Development, *OECD Council Recommendation on Principles for Internet Policy Making* (Dec. 13, 2011), available at <http://www.oecd.org/dataoecd/11/58/49258588.pdf> (“The Council ... recommends that, in developing or revising their policies for the Internet Economy, Members ... [e]ncourage multi-stakeholder co-operation in policy development processes ....”); G8 Declaration: Renewed Commitment for Freedom and Democracy, G8 Summit of Deauville ¶ 20 (May 26-27, 2011), <http://www.g20-g8.com/g8-g20/g8/english/the-2011-summit/declarations-and-reports/declarations/renewed-commitment-for-freedom-and-democracy.1314.html> (“As we support the multi-stakeholder model of Internet governance, we call upon all stakeholders to contribute to enhanced cooperation within and between all international fora dealing with the governance of the Internet.”); Council of Europe, Committee of Ministers, *Declaration by the Committee of Ministers on Internet Governance Principles* (adopted Sep. 21, 2011) (“The development of international Internet-related public policies and Internet governance arrangements should enable full and equal participation of all stakeholders from all countries.”).

163. IBSA, IBSA Multistakeholder Meeting on Global Internet Governance, *Recommendations* 1 (Sep. 13, 2011), [http://www.culturalivre.org.br/artigos/IBSA\\_recommendations\\_Internet\\_Governance.pdf](http://www.culturalivre.org.br/artigos/IBSA_recommendations_Internet_Governance.pdf).

democratic international Internet management system . . . .”<sup>164</sup>  
 This appeal to sovereignty and a proposal for the creation of a “multilateral”—but not a multi-stakeholder—system of Internet governance may be read to imply the termination of ICANN’s management and technical responsibilities over the Internet. A couple of countries reaffirmed these claims at the last year’s World Conference on International Telecommunications (WCIT) in Dubai.<sup>165</sup>

U.S. officials are warning that this conflict between the West and emerging nations over the future of the multi-stakeholder model of governance—and ICANN’s role with it—herald serious efforts to impose more stringent top-down regulations on the Internet. Secretary Strickling of the NTIA has decried proposals by some countries “moving oversight of critical Internet resources into the ITU [International Telecommunications Union], including naming and numbering authority from multistakeholder institutions such as ICANN.”<sup>166</sup> Commissioner McDowell of the FCC has even more pointedly declared that “scores of countries, including China, Russia and India, are pushing hard for international regulation of Internet governance. . . . The reach, scope and seriousness of this effort are nothing short of massive.”<sup>167</sup>

ICANN’s accountability gap has also prompted calls to reorganize ICANN as an international organization to provide the legal accountability that ICANN’s strained interpretation of California law denies.<sup>168</sup> While certainly a more moderate

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164. Permanent Reps. of China, the Russian Federation, Tajikistan, and Uzbekistan to the U.N., Letter dated Sep. 12, 2011 from the Permanent Reps. of China, the Russian Federation, Tajikistan, and Uzbekistan to the United Nations addressed to the Secretary-General, U.N. Doc. A/66/359, at Annex 3, 4 (Sep. 14, 2011).

165. World Conf. on Int’l Telecom., Resolution Plen/3 (Dubai, 3-14 Dec. 2012), available at <http://www.itu.int/en/wcit-12/Documents/final-acts-wcit-12.pdf>.

166. Remarks by Lawrence E. Strickling, Ass’t Sec’y of Commerce for Commc’ns & Info., Brookings Institution, *Principles of Internet Governance: An Agenda for Economic Growth and Innovation* 3 (Jan. 11, 2012), available at <http://www.ntia.doc.gov/speechtestimony/2012/remarks-assistant-secretary-strickling-brookings-institutions-center-technology> (as prepared for delivery).

167. Remarks of Robert M. McDowell, Comm’r, FCC, Practicing Law Inst. and Fed. Commc’ns Bar Ass’n Telecomm. Policy & Regulation Inst., *2012: The Year of U.N. Regulation of the Internet?* 3 (Dec. 8, 2011), available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2011/db1208/DOC-311420A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db1208/DOC-311420A1.pdf) (as prepared for delivery).

168. *Danish Comments to the Accountability and Transparency Review Team—Draft Proposed Recommendations* 2 (Nov. 23, 2010), available at <http://forum.icann.org/lists/atrr-draft-proposed-recom->

response to ICANN's deficient accountability than the wholesale transfer of the IANA functions to an international body like the ITU, transforming ICANN into an independent international organization carries the risks of partisanship, capture, and corruption that have troubled even the most reputable international organizations.<sup>169</sup>

These varying points of opposition to ICANN as a multi-stakeholder institution organized as a private corporation demonstrate that ICANN's accountability gap risks altering the private-led multi-stakeholder model of DNS management and the concomitant light regulatory touch on which the Internet's astonishing growth has relied.<sup>170</sup> Pushing DNS management into government-only institutions would potentially sacrifice the flexibility and innovation that the *DNS White Paper* tried to preserve by delegating DNS management to the private sector.<sup>171</sup> Remaking ICANN into an international organization carries significant risks of partisanship, capture, and corruption that could distort the stable and secure operation of the Internet.

ICANN's most pressing institutional need is ironically its most serious weakness. The potential consequence of an ICANN without sufficient accountability is not an ICANN with angry

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mentations/pdfoiAmlyqn5B.pdf; *French Comments to the Draft Proposed Recommendations made by the Accountability and Transparency Review Team (ATRT) 2* (Dec. 3, 2010), available at <http://forum.icann.org/lists/atrt-draft-proposed-recommendations/pdfgPmYRPNQq8.pdf>; *Norwegian Comments to the Draft Proposed Recommendations—The Accountability and Transparency Review Team 2* (Nov. 30, 2010), available at <http://forum.icann.org/lists/atrt-draft-proposed-recommendations/pdfzqiu2aN5zy.pdf>.

169. See 1 Independent Inquiry Committee Into the United Nations Oil-for-Food Programme, *The Management of the United Nations Oil-for-Food Programme* 3 (Sept. 7, 2005), available at [http://www.iicoffp.org/documents/Sept05/Mgmt\\_V1.pdf](http://www.iicoffp.org/documents/Sept05/Mgmt_V1.pdf) (“The Committee Reports reveal serious instances of illicit, unethical, and corrupt behavior within the United Nations ....”); 1 The World Bank Group, Department of Institutional Integrity, *Detailed Implementation Review: India Health Sector 2006-2007*, at 1 (Dec. 19, 2007), available at [http://siteresources.worldbank.org/EXTDOII/Resources/WB250\\_Web\\_Vol1\\_012\\_408.pdf](http://siteresources.worldbank.org/EXTDOII/Resources/WB250_Web_Vol1_012_408.pdf) (“The India DIR [Detailed Implementation Review] found significant indicators of fraud and corruption in all five [public health] projects....”).

170. See Organisation for Economic Co-operation and Development, *supra* note 8, at 6 (“The Internet has flourished essentially because most countries have recognised the need to avoid introducing unnecessary regulatory burdens on the Internet.”).

171. *DNS White Paper*, 63 Fed. Reg. at 31749 (“A private coordinating process is likely to be more flexible than government and to move rapidly enough to meet the changing needs of the Internet and of Internet users.”).

international stakeholders, but the end of ICANN's management authority over the Internet DNS. Unless ICANN's accountability is strengthened, the multi-stakeholder model of Internet governance may ultimately fail.

### III. SETTING THE STANDARD

#### A. *Deciding Not to Decide*

##### 1. Definitional Disagreement

Our previous discussion shows that ICANN exercises global, coercive powers over the Internet through its management authority over the DNS; those powers are placed in the hands of the ICANN Board of Directors, where they are virtually unconstrained; and ICANN suffers from an accountability gap between what it needs and what it delivers that compromises its written commitments, disappoints its stakeholders, and threatens the multi-stakeholder model of governance on which ICANN and other Internet governance institutions are based.

We propose to solve ICANN's predicament by mapping out a strategy for strengthening its accountability from within. That strategy must begin by deciding what standard of accountability ICANN should adopt. Unfortunately, the ICANN community has not adopted a single definition as the standard around which to rally its concerns. Although it is a word with many shades of meaning, a standard definition of accountability is "liability to give account of, and answer for, discharge of duties or conduct."<sup>172</sup> In contrast, ICANN's own definition encompasses public sphere accountability, legal and corporate accountability, and accountability to the participating community.<sup>173</sup> This multi-dimensional conception appears to include every effort that ICANN makes to act in good faith, from disclosing information voluntarily to encouraging public participation in its policy-making processes. While broad enough to cover some of ICANN's more admirable efforts, the very catholicity of this definition pits ICANN against its stakeholders. They have insisted on a more sharp-edged definition of accountability that has to with what ICANN must do rather than with what it can be persuaded to do.<sup>174</sup>

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172. *Oxford English Dictionary*, s.v. "accountability" (compact ed., 1971).

173. *Frameworks & Principles*, *supra* note 48, at 7, 16, 20 (describing these forms of accountability).

174. *See, e.g., NeuStar Comments*, *supra* note 139, at 3 ("Truly independent accountability measures must be *binding*.") (emphasis added); *Next Steps*, *supra*

## 2. Vagueness by the ATRT and the Berkman Center

Given its mandate, the ATRT was expected to tackle the problem of defining accountability for ICANN. But its 56-page Final Recommendations discusses the issue of accountability from several perspectives without offering a definition of this key term, conceding that it “did not reach consensus on whether binding authority was the standard upon which to judge ICANN’s accountability.”<sup>175</sup>

The ATRT’s internal conflicts might be explained, at least partly, by the Berkman Center’s analysis. The Berkman Center observed that “[d]espite the importance accorded to considerations of accountability for ICANN, there is neither a standard working definition of accountability nor agreement on metrics to monitor and measure progress.”<sup>176</sup> While recognizing the lack of a workable definition, Berkman declined to endorse “a single traditional theory of accountability” because of ICANN’s multiple roles and responsibilities.<sup>177</sup> Berkman’s unwillingness to hazard a single definition evidently influenced the ATRT not to endorse a particular definition of accountability either. The first community review of ICANN’s accountability surprisingly finished its work without resolving the thorny question of how that accountability should be defined. Until resolved, this definitional impasse deprives ICANN and its stakeholders of a fixed standard against which to measure ICANN’s performance.

## 3. Academic Analysis

Given a lack of definitional consensus, academic work on ICANN provides a useful starting point for determining what standard of accountability ICANN should adopt. Scholars have contributed a typology of accountability that discriminates among types or modes of accountability applicable to ICANN. Milton Mueller has identified four types:

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note 66, at 6 (“Accountability means an organization like ICANN being *answerable* for its decisions”) (emphasis added).

175. *Final Recommendations*, *supra* note 79, at 53.

176. *Berkman Ctr. Report*, *supra* note 52, at 81.

177. *See id.* at 81 (“While the areas of review are further specified in paragraph 9.1 (a-d) of the AoC [*Affirmation*], no comprehensive definitions of the key concepts *accountability* and *transparency* are provided.”); *id.* at 70 (“The manifold challenges for ICANN, often summarized under the conceptual umbrella of accountability, derive in large part from its ground in a variety of diverse institutional models.”).

“Direct” accountability that “allows people to influence the organization through voting for the key decision makers in the organization.”<sup>178</sup>

“Exit” accountability that permits one to “escape the authority or services of the entity if its policies or performance is unacceptable.”<sup>179</sup>

“External” accountability, consisting of “an oversight or appeals process conducted by an independent entity with the authority to reverse the organization’s decisions or impose sanctions on it for failure to comply with agreed rules.”<sup>180</sup>

“Voice” accountability that facilitates people “deliberating over, formulating and promoting desired decisions and policies, as well as protesting or criticizing undesired decisions and policies.”<sup>181</sup>

In a similar vein, Jonathan Koppell has identified five “dimensions of accountability”:

“Transparency” imposes on decision-makers the obligation to “be subject to regular review and questioning.”<sup>182</sup>

“Liability” attaches consequences to performance “in the form of professional rewards or setbacks, added or diminished budget authority, increased or diminished discretion, or reduced or increased monitoring.”<sup>183</sup>

“Controllability” depends on whether the organization does “what its principal . . . command[s].”<sup>184</sup>

“Responsibility” denotes the “out of fashion” ideal of constraint “by laws, rules and norms,” or in other words, “[f]idelity to law.”<sup>185</sup>

“Responsiveness” involves “an organization’s attention to direct expressions of the needs and desires of . . . constituents (or clients),”<sup>186</sup> a standard measured in terms of whether organizations “meet the needs of the population they are serving.”<sup>187</sup>

While largely independent of each other, these modes of accountability have some areas of overlap. Mueller’s “external” accountability resembles Koppell’s “responsibility” dimension of

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178. Milton Mueller, *ICANN, Inc.: Accountability and Participation in the Governance of Critical Internet Resources*, Internet Governance Project 4 (Nov. 16, 2009), available at <http://www.internetgovernance.org/pdf/ICANNInc.pdf>.

179. *Id.*

180. *Id.*

181. *Id.*

182. Koppell, *supra* note 3, at 96.

183. *Id.* at 97 (punctuation altered).

184. *Id.* (punctuation altered).

185. *Id.* at 98.

186. *Id.*

187. *Id.* at 99.

accountability. Also, Mueller's "voice" accountability resembles Koppel's "responsiveness."

Mueller and Koppel have identified seven non-overlapping modes of accountability. They include (1) direct, (2) exit, (3) external or responsibility, (4) voice or responsiveness, (5) transparency, (6) liability, and (7) controllability. These elements enable a more sophisticated analysis of ICANN's accountability by disaggregating traits commonly lumped together under the single word "accountability." But this analysis, by itself, does not identify the standard of accountability that ICANN should adopt. Neither Mueller nor Koppel endorses a particular definition of accountability, though each criticizes ICANN's approach.<sup>188</sup>

Applying the process of elimination brings the definitional issues into sharper focus. Direct accountability through voting is of doubtful importance for ICANN, given the disproportionate power of the Nominating Committee over the selection of directors. Exit accountability does not exist, because ICANN's exceptional powers are a function of the technical need for a single DNS root<sup>189</sup> and dividing the root is so far unattractive or unworkable.<sup>190</sup> ICANN already has a strong record of voice or responsiveness that does not quell criticisms of it by important stakeholders. Transparency is indispensable to the multi-stakeholder model of Internet governance, because it ensures that stakeholders remain informed of issues and decisions affecting them and that decision makers remain subject to the discipline of disclosure. ICANN appears to carry out its transparency policies only inconsistently,<sup>191</sup> however, and even if achieved consistently those policies would not capture the full meaning of accountability as described by ICANN's dissatisfied stakeholders. Liability seems not to apply to ICANN, given that there is no external body authorized to give or withhold funding or compensation or monitoring or other professional advantages. Theoretically, the United States could exercise such power, but only at the cost of calling into question the authenticity of the multi-stakeholder model of DNS management. Controllability seems equally inapt because no one really "commands" ICANN, with the possible exception of the

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188. See Mueller, *supra* note 178, at 18; Koppel, *supra* note 3, at 105.

189 RFC 2826, *supra* note, at 1 ("To remain a global network, the Internet requires the existence of a globally unique public name space. The DNS name space is a hierarchical name space derived from a single, globally unique root.").

190. Mueller, *supra* note 178, at 7 ("There is no credible Exit option, aside from the costly, unlikely 'nuclear option' of forming an alternate DNS root.").

191. One World Trust, *supra* note 134, at 7.

technical and reporting requirements of the IANA functions contract, and few would dispute that ICANN carries out its responsibilities under that contract reasonably well.

This analysis leaves what Mueller calls “external accountability”<sup>192</sup> and Koppell labels “responsibility.”<sup>193</sup> Mueller’s formulation contemplates “an oversight or appeals process conducted by an independent entity with the authority to reverse the organization’s decisions or impose sanctions on it for failure to comply with agreed rules.”<sup>194</sup> He adds that “[t]his is the core concept behind the rule of law or legal/constitutional accountability.”<sup>195</sup> Koppell, on the other hand, intends the term “responsibility” to denote “constrain[t] by laws, rules, and norms,” or what he calls “fidelity to law.”<sup>196</sup> It is this family of concepts—“appeals process,” “sanctions . . . for failure to comply with agreed rules,” “legal/ constitutional accountability,” or “fidelity to law”—that should occupy the focus of any effort to identify the standard of accountability for ICANN.

#### *B. Binding and Independent Accountability*

As explained above, the work of the ATRT’s WG4 came nearer to engaging these concepts than any other official body in ICANN’s history. Tasked with reviewing “an appeal mechanism for Board decisions,”<sup>197</sup> WG4 concluded that only the IRP was found to be sufficiently independent, and its suitability was questioned because “its decisions and recommendations are not binding on the ICANN Board.”<sup>198</sup> Against that conclusion ICANN stoutly denied the legal possibility of binding review over the Board, arguing that “the board *cannot* empower any entity to overturn decisions or actions of the board.”<sup>199</sup> ICANN’s legal position created an impasse that WG4 regarded as “critical to establishing an appeals mechanism that is *both binding and independent*, and essential to the viability of the ICANN model itself.”<sup>200</sup>

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192. *Id.* at 4.

193. Koppell, *supra* note 3, at 98.

194. Mueller, *supra* note 178, at 4.

195. *Id.*

196. Koppell, *supra* note 3, at 98.

197. *Affirmation*, *supra* note 67, ¶ 9.1(a).

198. *Id.*

199. *ICANN Limitations*, *supra* note 106 (emphasis added).

200. *Findings & Recommendations*, *supra* note 103, at 1.

In our opinion, WG4 got it right. Other forms of accountability are insufficient to satisfy ICANN's needs. Legal accountability is necessary for ICANN's sustainability or what the ATRT called "the long term viability of the multi-stakeholder ICANN model."<sup>201</sup>

Bringing together the analysis by Mueller and Koppell with the work of WG4 strongly supports the conclusion that ICANN needs a form of accountability that is grounded in law, binding, and independent. Although the criteria "grounded in law" and "binding" are closely related, they are not identical. To be grounded in law is to state a fixed standard of conduct for which noncompliance carries a legal sanction. To be binding is, more generally, to impose a rule of conduct for which compliance is required and not merely advised. Distilling these separate elements into a single definition looks like this: *ICANN is accountable when the actions of its Board of Directors, officers, and staff are governed by binding rules of conduct secured by mechanisms that constrain their authority and that permit their actions to be reversed when manifestly repugnant to ICANN's articles of incorporation, bylaws, and written policies.*<sup>202</sup> This is the standard of independent and binding accountability that ICANN should adopt and achieve.

### C. *Objections and Replies*

Our defense of binding and independent accountability must overcome certain objections. ICANN objects that California law prohibits the Board of Directors from submitting to any entity with the power to reverse its decisions. The ATRT expressed the concern that subjecting the ICANN Board to the authority of an entity with the power to reverse its decisions would raise novel

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201. *Final Recommendations*, *supra* note 79, at 54.

202. Mueller, *supra* note 178, at 3 ("Real *accountability* means that the actions of the Board and staff are held in check or reversed when they violate the rules and principles governing ICANN or clash with the interests of its constituents."); Weber, *supra* note 12, at 167 ("Accountability should contain at least three elements: (1) standards to which governing bodies are held; (2) information easily made available to the body or bodies responsible for holding governing bodies accountable; (3) accountability bodies hold power to impose sanctions on governing bodies for failure to meet standards."); Gunnarson, *supra* note 2, at 20 ("Accountability, as I mean it, would bind ICANN to (1) act in harmony with fixed standards of conduct; (2) disclose all information relevant to determining whether it has met those standards or fallen short; and (3) receive correction or sanctions by a person or persons empowered to hold ICANN to its commitments by legal force, if necessary.").

issues of accountability and transparency. The United States government has echoed that concern, adding that binding accountability is unnecessary if the ICANN Board adheres to the *Affirmation* with its high standard of policy-making. On careful consideration, none of these arguments offers a compelling reason to reject binding and independent accountability as the correct standard for ICANN.

### 1. California Law

ICANN asserts that under California law “the board cannot empower any entity to overturn decisions or actions of the board because that would result in that entity indirectly controlling the activities and affairs of the corporation and thus usurping the legal duties of the board.”<sup>203</sup> But its only support for this uncompromising conception of corporate autonomy rests on a misinterpretation of Section 5210 of the California Corporations Code.<sup>204</sup> ICANN nowhere mentions that Section 5210 expressly qualifies the apparent mandate that “the activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the board”<sup>205</sup> by making that authority “[s]ubject to the provisions of this part and any limitations in the articles or bylaws relating to action required to be approved by the members . . . , or by a majority of all members . . . .”<sup>206</sup> In short, the principle that ICANN relies on is circumscribed by multiple exceptions that ICANN omits.<sup>207</sup>

Board oversight of the kind ICANN rejects is available, first, through the creation of statutory members. Public benefit

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203. *ICANN Limitations*, *supra* note 106.

204. *Id.*

205. Cal. Corp. Code § 5210 (West 2012).

206. *Id.*

207. Its legal position opposing binding review over the Board is consistent with ICANN’s record of claiming greater corporate autonomy than afforded by California law. *See ICM Registry*, *supra* note 24, at 32-33 (rejecting ICANN’s argument that California’s “business judgment rule” entitled the ICANN Board to deference by the IRP except on proof of bad faith); *Auerbach v. Internet Corp. for Assigned Names and Nos.*, Judgment Granting Petitioner’s Summary Judgment Motion, Denying Respondents Summary Judgment Motion and for Issuance of Peremptory Writ of Mandamus 6 (Cal. Super. Ct. Aug. 5, 2002), *available at* [http://w2.eff.org/Infrastructure/DNS\\_control/ICANN\\_IANA\\_IAHC/Auerbach\\_v\\_ICANN/20020807\\_auerbach\\_judgment.pdf](http://w2.eff.org/Infrastructure/DNS_control/ICANN_IANA_IAHC/Auerbach_v_ICANN/20020807_auerbach_judgment.pdf) (holding that California law does not permit the ICANN Board to restrict a director’s right to inspect corporate records).

nonprofit corporations like ICANN “may admit persons to membership, as provided in its articles or bylaws.”<sup>208</sup> “Membership” under the statute means, “the rights a member has pursuant to a corporation’s articles, bylaws, and this division.”<sup>209</sup> By statute alone, membership carries “the right to elect and remove directors;” “the right to sue the directors in derivative actions, or third parties on behalf of the corporation, under certain circumstances and subject to specified limitations;” and “other rights spelled out in the statutes and in the corporation’s bylaws.”<sup>210</sup> Also, members may amend the bylaws and approve (or disapprove) of amendments to most articles, on the terms prescribed by the bylaws and articles.<sup>211</sup> It is well established that “[t]hese rights can be enforced in civil court actions.”<sup>212</sup>

Binding oversight also may be exercised by the California Attorney General. He is charged to oversee ICANN’s corporate affairs and, if necessary, subject a nonprofit corporation like ICANN to judicial proceedings “to correct the noncompliance or departure” from its basic purpose or the trusts it has assumed.<sup>213</sup> Although the Attorney General’s supervisory powers are established by statute and not by the Board, they tend to rebut ICANN’s central argument that the Board is legally required to maintain untrammelled autonomy.

Besides these specific grants of oversight authority, California law vests nonprofit corporations with broad powers to structure their internal affairs by amending the articles and bylaws. “California law permits a non-profit corporation like ICANN to limit its powers in its Articles of Incorporation without qualification.”<sup>214</sup> Section 5131 provides that “articles of incorporation may set forth a further statement limiting the

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208. Cal. Corp. Code § 5310(a) (West 2012).

209. *Id.* at § 5057.

210. Edmund G. Brown, Jr., *California Attorney General’s Guide for Charities* 24 (2005), available at [http://ag.ca.gov/charities/publications/guide\\_for\\_charities.pdf](http://ag.ca.gov/charities/publications/guide_for_charities.pdf).

211. See Cal. Corp. Code §§ 5150(b) (West 2012) (bylaws); 5812(a) (articles).

212. *Guide for Charities*, *supra* note 210, at 25.

213. Cal. Corp. Code § 5250 (West 2012).

214. Expert Report of Jack Goldsmith, *In re ICM Registry, LLC v. Internet Corporation for Assigned Names and Numbers*, ICDR Case No. 50 117 T 00224 08, at 11 & n.27 (Jan. 22, 2009) (citing Cal. Corp. Code §§ 5131, 5140 (2007), available at <http://www.icann.org/en/news/irp/icm-v-icann> (contained in *Witness Statements and Expert Reports Submitted in Support of ICM’s Memorial on the Merits*).

purposes or powers of the corporation,”<sup>215</sup> while section 5140 provides that a corporation has the powers of a natural person “[s]ubject to any limitations contained in the articles or bylaws.”<sup>216</sup> Unless doing so would violate a super-majority voting requirement, “[t]he articles or bylaws may restrict or eliminate the power of the board to adopt, amend or repeal any or all bylaws . . . .”<sup>217</sup> And “[b]ylaws may also provide that repeal or amendment of those bylaws, or the repeal or amendment of specified portions of those bylaws, may occur only with the approval in writing of a specified person or persons other than the board or members.”<sup>218</sup>

Together, these statutory provisions mean that California law permits the ICANN Board to limit its own powers. None of these broadly-worded provisions is qualified by the supposed requirement of preserving corporate autonomy. Instead, the law expressly allows ICANN to do what it says California law forbids: authorize some entity to exercise binding review of the Board.

Nor does ICANN’s legal position find support in the Board’s fiduciary duties. To be sure, California law places ICANN’s directors under certain obligations toward ICANN as an institution, including duties of loyalty, care, inquiry,<sup>219</sup> and adherence to prudent investment standards.<sup>220</sup> But the choice between fidelity to these duties and the Board’s subjection to independent and binding review is false. Since the Board does not unlawfully “abdicate” its authority by creating statutory memberships with their extensive powers, it surely cannot be said to abdicate its authority by adopting another form of binding review with lesser powers.

Indirect evidence that ICANN’s legal position is unsound comes from its registry agreements that dictate binding arbitration as the form of dispute resolution.<sup>221</sup> Binding arbitration produces

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215. Cal. Corp. Code § 5131 (West 2012) (emphasis added).

216. *Id.* at § 5140.

217. *Id.* at § 5150(c).

218. *Id.* at § 5150(d).

219. *Id.* at § 5231(a).

220. *See id.* at § 5240.

221. *See .com Registry Agreement between ICANN and VeriSign, Inc.* § 5.1 (Mar. 1, 2006), <http://www.icann.org/en/tlds/agreements/verisign/registry-agmt-com-01mar06.htm> (“Disputes arising under or in connection with this Agreement ... shall be resolved through binding arbitration ...”); *.info Registry Agreement between ICANN and Afilias Limited* § 5.1(b) (as amended May 26, 2010), <http://www.icann.org/en/tlds/agreements/info/registry-agmt-08dec06.htm> (same); *.org Registry Agreement between ICANN and Public Interest Registry* § 5.1(b) (Dec. 8, 2006), <http://www.icann.org/en/tlds/agreements/org/> (same).

decisions that may compel the Board to act or refrain from acting, as ICANN implicitly acknowledges in agreeing that an arbitration award issued under the registry agreements, if confirmed, entitles the prevailing party “to enforce a judgment . . . in any court of competent jurisdiction.”<sup>222</sup> To that extent, at least, the ICANN Board implicitly acknowledges that California law allows its decisions to be reversed.

The upshot of these registry agreements is that, when structuring its commercial relationships, ICANN agrees to binding arbitration enforceable in a court of law, yet when dealing with the question of whether a Board action on policy-related matters is allegedly “inconsistent with the Articles of Incorporation or Bylaws”<sup>223</sup> ICANN’s Board rejects the same authority. ICANN’s use of arbitration to resolve contractual disputes does not prevent it from opposing binding third-party review of Board decisions. But it surely precludes ICANN from justifying its opposition based on California law.

## 2. Super Board

Certain members of the ATRT opposed a binding appeals process out of a concern that “such a standard would create a new set of accountability and transparency issues by assigning to some new, unnamed set of individuals the power to overturn Board decisions.”<sup>224</sup> This concern we have labeled the “Super Board” problem. In a nutshell, it refers to the transfer of accountability issues from the ICANN Board to a “Super Board” authorized to reverse it.

It is difficult to see why novel issues would be raised by a binding appeals process that do not appear when ICANN submits itself to binding arbitration. To the extent that accountability issues were to shift from the ICANN Board of Directors to the tribunal deciding appeals from its decisions, the effect would seem to be no greater than that caused by binding arbitration. But the real defect of the Super Board objection is that it proves too much. If true, it would deprive ICANN’s stakeholders of any sanction to compel the Board’s adherence to its own rules.<sup>225</sup> The kind of limited

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222. *Id.*

223. Bylaws, *supra* note 34, at art. IV § 3.1.

224. *Final Recommendations*, *supra* note 79, at 55.

225. Eliminating ICANN’s obligation to establish an effective form of appellate review from Board decisions also would contradict longstanding U.S. government policy. *See* Weinberg, *supra* note 22, at 228-29 (explaining that the

review we propose would deprive the Board only of the power to act beyond the scope its actual authority. Continuing to trust that the Board will not act *ultra vires* puts ICANN's accountability on an insecure footing. "Trust us" is not a sound basis for global policy of any sort. It cannot be the basis for ICANN's future development as the technical manager for the DNS.

### 3. Binding Review Unnecessary?

In addition to the Super Board objection, the head of NTIA, Lawrence Strickling, argued before ICANN's Board of Directors that the U.S. government regarded a binding review of Board decisions as simply unnecessary:

[I]f we can get the quality of decision[-making] to go the type of level I'm talking about, there should never ever be the need for an independent review panel with some kind of binding authority to overturn you . . . . There's no way, anybody, any three people anywhere, are going to do a better job of this than you can if you've got the processes in place, if you're doing this as a feedback-based, evidence-driven process where—with all of the things that that entails is laid out in the AoC and laid out in our recommendations.<sup>226</sup>

We certainly agree that the faithful performance of ICANN's commitments would improve its policy-making, but we respectfully submit that this argument assumes away the essential element of institutional integrity or fidelity. Accountability has to do with what ICANN must do, not what its corporate culture influences directors to do or what individual stakeholders like the United States can persuade it to do. Accountability is not synonymous with sound policy-making, though the two are certainly related. While accountability fosters sound policy-making, it does not logically or practically follow that sound policy-making guarantees accountability. And only a secure form of accountability will satisfy ICANN's diverse stakeholders and the governments that represent them.

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U.S. compelled ICANN to accept independent review of board decisions as a condition of approving ICANN's proposal to manage the DNS).

<sup>226</sup> Transcript of Meeting between Lawrence E. Strickling, Assistant Secretary of Commerce for Communications and Information, and the ICANN Board of Directors 16 (Dec. 7, 2010), *available at* <http://cartagena39.icann.org/node/25353>.

D. *The Challenges of Achieving Accountability*

Armed with a standard of accountability both independent and binding, we now consider how to reform ICANN for the purpose of achieving that standard. In pursuing that effort, significant challenges arise.

First, one must determine what body of law is binding on ICANN. It is from that body of law that any binding rules of conduct and the mechanisms necessary to secure ICANN's fidelity to those rules in practice must be drawn. As a California not-for-profit public benefit corporation, ICANN is legally bound by the California Nonprofit Public Benefit Corporation Law.<sup>227</sup> That point deserves emphasis. Despite ICANN's protestations that it is a "multi-national organization,"<sup>228</sup> it is unmistakably subject to California law.<sup>229</sup> It follows that California law is the Archimedean point on which any effort to reform ICANN's accountability must stand.

Second, one must determine how far reform should be permitted to change ICANN's legal status. After considerable study, we conclude that ICANN should remain a private nonprofit corporation. Transforming it into an intergovernmental organization could destroy the multi-stakeholder model by excluding businesses, NGOs, and other elements of civil society from policy-making decisions regarding the Internet DNS. Transforming ICANN into an international organization risks similar kinds of exclusion and could be counterproductive if ICANN were emboldened by its liberation from the strictures of California and U.S. federal law to become even less accountable to its stakeholders. For these reasons, we endorse ICANN's commitments to "remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community."<sup>230</sup>

Third, one must determine how far third parties will be given binding authority over ICANN. Nation-state governments offer the most obvious source of binding and independent authority. Yet they cannot act as the guarantors of ICANN's accountability

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227. Cal. Corp. Code §§ 5110-6910 (West 2012).

228. *ICANN 2010 Annual Report*, *supra* note 124, at 10.

229. *See Frameworks & Principles*, *supra* note 48, at 17 ("ICANN is ... subject to both the state laws of California, and United States federal laws"); *Articles of Incorporation*, *supra* note 9, § 3 (explaining that ICANN is "organized under the California Nonprofit Public Benefit Corporation Law . . .").

230. *Affirmation*, *supra* note 67, ¶ 8.

without jeopardizing the multi-stakeholder model, even if they were determined to preserve it. Governments act through force—even modulated force in the form of regulatory or administrative proceedings—and the multi-stakeholder model relies on participatory deliberation. The risk of turning to nation-states to secure ICANN’s accountability is that the multi-stakeholder model of DNS management could be undermined or even destroyed if governments acquired more and more power over DNS management policies and other stakeholders’ powers correspondingly diminished. Granting an international organization authority to oversee ICANN, whether an established organization or a special purpose coalition organized for that sole purpose, presents similar risks.

We are left with a conundrum. ICANN must acquire the binding and independent accountability it resists, but its legal form as a private nonprofit corporation should be retained and no external body should be empowered to oversee it. Until some way is found to close ICANN’s accountability gap within these constraints, ICANN, and Internet governance along with it, will remain at an impasse.

#### IV. PRINCIPLES OF CONSTITUTIONAL LAW

##### A. *The Relevance of Constitutional Principles for ICANN’s Accountability*

The way out of the impasse, we are convinced, is to apply traditional principles of constitutional law to the internal governance of ICANN itself.

Applying principles of constitutional law to the problem of ICANN’s deficient accountability might seem like cramming a round peg into a square hole. Constitutional law’s historical development, its terms of reference, its established course of interpretation and enforcement assume the existence of institutions that order whole countries.<sup>231</sup> Certainly, the European understanding of constitutional law rests on the concept of sovereignty underlying the Treaty of Westphalia,<sup>232</sup> a concept

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231. Ernst-Ulrich Petersmann, *Constitutionalism, Constitutional Law and European Integration*, 46 *Aussenwirtschaft* 247 (1991) (noting that in European thought the core precepts of liberal constitutionalism are traditionally applied only within the nation-state).

232. Daniel Thürer, *Recht der Internationalen Gemeinschaft und Wandel der Staatlichkeit*, in *Das Verfassungsrecht der Schweiz* 39 (Daniel Thürer/Jean-François Aubert & Jörg Paul Müller eds., 2001).

shaped by and limited to the boundaries of the Western nation-state.<sup>233</sup>

ICANN's hybrid identity as a private corporation with global quasi-regulatory powers illustrates how far this centuries-old pattern of sovereignty is changing.<sup>234</sup> Even as the number of constitutional democracies in the world has grown dramatically since World War II, the growing interdependence of nation-states and their declining regulatory capacity has led to a "partial outsourcing" of constitutional functions.<sup>235</sup> Protecting fundamental rights<sup>236</sup> and market access rights guaranteed by treaty principles of non-discrimination<sup>237</sup> are no longer secured exclusively by national constitutions. These considerations have been especially trenchant in Europe with respect to the constitutionalization of the European Union.<sup>238</sup> Europe has to reflect the negative experiences of World War II in the normative constitutional principles (for example, fundamental rights) of a new supreme law framework. At the same time, different organizational structures of states need a certain degree of harmonization to achieve a coherent system.<sup>239</sup> Non-state actors, such as international and non-governmental organizations and multinational corporations, are growing in international significance. A wholly state-centered concept of constitutionalism risks failing to offer a useful analytical tool in a world where the boundaries between domestic and international law have been progressively blurred and where new polities have emerged that challenge a state's exclusive legal and political authority.<sup>240</sup>

Despite these trends away from Westphalian sovereignty, one might still object that treating a private corporation like ICANN as a government for purposes of its structure and powers flies in the

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233. Thomas Cottier & Maya Hertig, *The Prospects of 21st Century Constitutionalism*, 7 Max-Planck Y.B.U.N.L. 261, 265 (2003).

234. The traditional concept of sovereignty goes back to the Westphalian Peace Treaty of 1648; see Rolf H. Weber, *Shift of Legislative Powers and Multi-Stakeholder Governance*, 1 Int. J. Public Law and Policy 4 (2011).

235. Giovanni Biaggini, *Die Idee der Verfassung-Neuausrichtung im Zeitalter der Globalisierung*, 119 Zeitschrift für Schweizerisches Recht 445, 454 (2000).

236. *Id.* at 454.

237. See Cottier & Hertig, *supra* note 233, at 269.

238. J.H.H. Weiler & Joel P. Trachtman, *European Constitutionalism and Its Discontents*, 17 Nw. J. Int'l L. & Bus. 354 (1996).

239. See "Schmerzliche Erfahrungen" der Vergangenheit und der Prozess der Konstitutionalisierung Europas 299-334 (Christian Joerges, Matthias Mahlmann & Ulrich K. Preuß eds., 2008).

240. Cottier & Hertig, *supra* note 233, at 297.

face of how private corporations are ordinarily viewed.<sup>241</sup> That objection is overcome by the reality that corporate law alone is an inadequate check on ICANN's power. A fiduciary duty of obedience or fidelity comes closest to preventing the ICANN Board from exercising power *ultra vires*,<sup>242</sup> yet this principle has been ineffective in practice because of ICANN's refusal to create corporate members with the power to enforce it. And although the California Attorney General has the legal authority to hold ICANN accountable, the exercise of that power depends on political circumstances that would leave ICANN's accountability on a tenuous and unpredictable foundation.<sup>243</sup>

Limiting ICANN's powers through the application of constitutional principles might be defended in the name of ensuring sensible corporate governance.<sup>244</sup> But the more trenchant reason for establishing such limitations is to preserve the freedoms that the Internet engenders. Accountability goes to questions of human character and human power,<sup>245</sup> and on those questions traditional principles of constitutional law offer a rich history and literature from which to draw instructive experiences and intellectual tools. ICANN's accountability gap arises not because of its peculiarities as a hybrid organization or its technical responsibilities for the Internet, but because there is no mechanism binding the Board of Directors to act within its authority and commitments. This defect presents the issue of power beyond right, the quintessential problem for constitutional law.

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241. Cal. Corp. Code §§ 5140 (West 2012) (conferring on a corporation "all the powers of a natural person").

242. See, e.g., Linda Sugin, *Resisting the Corporatization of Nonprofit Governance: Transforming Obedience Into Fidelity*, 76 Fordham L. Rev. 893, 900 (2007) ("Under the traditional doctrine, an action is *ultra vires* if it is beyond the powers of the corporation. The *ultra vires* approach implies that the duty of obedience is specifically tied to the purposes in the corporation's internal documents, and that actions beyond those purposes are not within the corporate powers.").

243. See Cal. Corp. Code § 5250 (West 2012).

244. See Organisation for Economic Co-Operation and Development, *OECD Principles of Corporate Governance* 17 (2004), available at <http://www.oecd.org/dataoecd/32/18/31557724.pdf> ("The legal and regulatory requirements that affect corporate governance practices in a jurisdiction should be consistent with the rule of law, transparent and *enforceable*." (emphasis added)).

245. See, e.g., Herodotus, *The Landmark Herodotus: The Histories* 245 (Robert B. Strassler ed. & Andrea L. Purvis trans., 2007) ("How could monarchy be a harmonious and coherent system when it permits the ruler to do whatever he wishes, to be accountable to no one? Even the best of men, if placed in this position of power, would lose his normal mental balance. . . .").

Constitutional principles offer a solution to ICANN's accountability gap because that gap arises from the coercive nature of the powers ICANN exercises rather than from its legal form as a private corporation. Those powers make ICANN more like a government—and a government of global reach and significance—than a private corporation.<sup>246</sup> Indeed, constitutional principles may be the only tools capable of controlling the exercise of global, coercive powers like ICANN's.

A brief survey of the intellectual tradition of constitutional government, some of its most influential historical experiences and its leading principles, is necessary to explain why a seemingly unrelated area of law holds the promise for solving the conundrum posed by ICANN's weak accountability.

### B. *Intellectual Tradition*

The principles of constitutional government form “a system of effective restraints upon governmental action”<sup>247</sup> or “the limitation of government by law.”<sup>248</sup> They embody a tradition of political understanding and activity with roots in ancient Greece,<sup>249</sup> reflecting the ideal that “in some important respects law transcends politics.”<sup>250</sup> Their aim is to establish the rule of law. Within English political thought, the cluster of principles animating constitutional government “emerges as a relatively permanent and central tradition.”<sup>251</sup> American constitutional thought likewise treats as a “central principle” the idea that “governments are not omnipotent; they are, or are supposed to be, of only limited authority.”<sup>252</sup> By limiting government authority, it is understood

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246. See Hunter, *supra* note 57, at 1154 (“ICANN is an institution besieged . . . . The basis for much of the criticism is that ICANN fails to meet the most fundamental test of political institutions: that it is, in short, undemocratic.”).

247. Carl J. Friedrich, *Constitutional Government and Democracy* 21 (1941).

248. Charles Howard McIlwain, *Constitutionalism Ancient and Modern* 24 (1940).

249. See Francis D. Wormuth, *The Origins of Modern Constitutionalism* 3-4 (1949) (“The tradition of constitutionalism begins in ancient Athens and has had a long, interrupted, and irregular history to the present day.”).

250 Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 9 (1983).

251. J.W. Gough, *Fundamental Law in English Constitutional History* 207 (1955)

252. Andrew C. McLaughlin, *The Foundations of American Constitutionalism* 107 (1932).

within both traditions that “a governmental act beyond the border of assigned authority is not law.”<sup>253</sup>

Closely associated with this tradition of constitutional government are the thinkers of classical liberalism who expressed the shared convictions that arbitrary power should be opposed and that good government, designed to preserve individual liberties, should be established.<sup>254</sup> Locke occupies a central place in this tradition. He defined absolute power as “Governing without settled standing Laws” and tyranny as “exercise of Power beyond Right.”<sup>255</sup> He explained further that government power “ought to be exercised by established and promulgated Laws: that both the People may know their Duty, and be safe and secure within the limits of the Law, and the Rulers too kept within their due bounds.”<sup>256</sup> Philosophical adversaries like Hobbes countered that “[t]he Liberty of a Subject, lyeth therefore only in those things . . . the Sovereign hath praetermitted” and that the sovereign “is not Subject to the Civill Lawes.”<sup>257</sup> In a similar vein, Filmer defended “the superiority of Princes above laws.”<sup>258</sup>

Arbitrary rule was the *bête noire* against which centuries of liberal thinkers strove. Milton thundered that “to say Kings are

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253. *Id.* at 108. Scholars have distinguished the cultural element, the power element, and the justice element of constitutions. See Donald S. Lutz, *Thinking about Constitutionalism at the Start of the Twenty-First Century*, 30 *Publius* 115 (2000). The cultural element encompasses, as already outlined by Aristotle, the way of life in general terms by laying out and using as organizing principles the values, major organizational assumptions, and definition of justice around which a people is organized and/or toward which they aspire. *Id.* at 128. The power element refers to the decision-making processes; power should be distributed in a way that leads to an efficient decision-making over the range of all possible issues; furthermore, rules should also provide a framework for continuing political struggle. *Id.* at 129. The justice element is the key ingredient for constitutionalism because the given political technology should attempt to marry power with justice leading to a “predictable” legal system. *Id.*

254. See Gough, *supra* note 251, at 207 (“Negatively, this [tradition] excluded ‘arbitrary power’; positively, it connoted a ‘mixed’ government, and a system of ‘checks and balances’, thus safeguarding what was presumed to be the main purpose of government—the preservation of the rights of the individual, notably his liberty and property.”); McLaughlin, *supra* note 252, at 108 (“The struggle for freedom in English history was largely directed against arbitrary government, against a system or a ruler with power to act capriciously and with no responsibility to the governed.”).

255. John Locke, *Two Treatises of Government* 359, 398 (Peter Laslett ed., 1988).

256. *Id.* at 360.

257. Thomas Hobbes, *Leviathan* 148, 184 (Richard Tuck ed., 1991).

258. Sir Robert Filmer, *Patriarcha and Other Political Works* 96 (Peter Laslett ed., 1949).

accountable to none but God, is the ouerturning of all Law and government.”<sup>259</sup> Mill wrote that the aim of patriots was “to set limits to the power which the ruler should be suffered to exercise over the community . . . .”<sup>260</sup> Hobhouse reasoned that “the first condition of free government is government not by the arbitrary determination of the ruler, but by fixed rules of law, to which the ruler himself is subject.”<sup>261</sup> Continental thinkers likewise conceived of liberty as the effective restraint of arbitrary government.<sup>262</sup>

*C. Distilling Historical Experience Into Workable Principles of Government*

The tradition of constitutional government is driven by a skeptical but not unrelievedly dark view of human nature<sup>263</sup> and by the unfashionable idea that history contains lessons for statesmen.<sup>264</sup>

Especially influential have been certain moments in English and American history where power has been placed (or attempted to be placed) under law. Such moments include the *Magna Carta*,

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259. John Milton, *The Tenure of Kings and Magistrates*, reprinted in *Political Writings* 112 (Martin Dzelzainis ed., 1991).

260. John Stuart Mill, *On Liberty*, in *On Liberty and Other Writings* 6 (Stefan Collini ed., 1989).

261. L.T. Hobhouse, *Liberalism and Other Writings* 11 (James Meadowcroft ed., 1994).

262. See Benjamin Constant, *Principles of Politics Applicable to All Representative Governments*, in *Political Writings* 291 (Biancamaria Fontana ed. & trans., 1988); 3 Alexis de Tocqueville, *Democracy in America* 724 (Eduardo Nolla ed. & James T. Schleifer trans., 2010) (bilingual edition); Immanuel Kant, *On the Common Saying: 'This May Be True in Theory, But It Does Not Apply in Practice,'* in *Political Writings* 73 (Hans Reiss ed. & H.B. Nisbet trans., 1991) (second enlarged ed.); Wilhelm von Humboldt, *The Limits of State Action* 82 (J.W. Burrow ed., 1993).

263. See *The Federalist* No. 55, at 378 (James Madison) (Jacob E. Cooke ed., 1961) (“As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust: So there are other qualities in human nature, which justify a certain portion of esteem and confidence.... Republican government presupposes the existence of these qualities in a higher degree than any other form.”).

264. See Thucydides, *The Landmark Thucydides* bk. 1, 16 (Robert B. Strassler ed. & Richard Crawley trans., 1996); Livy, *The History of Rome* 3-4 (Valerie M. Warrior ed., 2006); Lord Bolingbroke, *Letters on the Study and Use of History*, in *Historical Writings* 61-62 (Isaac Kramnick ed., 1972); Thomas Jefferson, *Letter to John Norvell* (June 14, 1807), reprinted in *Jefferson: Writings* 1176 (Merill D. Peterson, ed. 1984).

a peace treaty to end a civil war<sup>265</sup> that became “a sacred text”<sup>266</sup> by seeking “to establish the rights of subjects against authority and maintain [ ] the principle that authority was subject to law.”<sup>267</sup> Struggles for primacy between Crown and Parliament during the reign of England’s Charles I carry particular significance, as expressed in the Petition of Right, “the first statutory restriction of the powers of the Crown since the accession of the Tudor dynasty;”<sup>268</sup> the Grand Remonstrance, enumerating the King’s acts of misgovernment;<sup>269</sup> and the King’s execution based on an indictment for acting “out of a wicked design to erect and uphold in himself an unlimited and tyrannical power to rule according to his will, and to overthrow the rights and liberties of the people . . . .”<sup>270</sup> The American Revolution raised similar issues of law and arbitrary power. Parliament’s passage of act after act to subdue the Americans<sup>271</sup> was ultimately met with a Declaration of Independence asserting the Americans’ conviction that governments “deriv[e] their just powers from the consent of the governed”<sup>272</sup> and indicting King George III in terms reminiscent of the Grand Remonstrance.<sup>273</sup> Each of these events raised essentially the same question of enforceable limits on sovereign power.<sup>274</sup>

To this question the principles of constitutional government offer the most effective answers. These elegant generalizations of hard experience have proven capable of taming power. For that reason, a brief review of leading principles such as written charters or constitutions, the separation of powers, enumerated powers,

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265. See generally J.C. Holt, *Magna Carta 1188-1236* (2d ed. 1992) (describing the political crisis leading to the signing of *Magna Carta*).

266. 1 Sir Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I*, at 173 (2d ed. 1968).

267. Holt, *supra* note 265, at 19.

268. *The Constitutional Documents of the Puritan Revolution, 1625-1660*, at xx (Samuel Rawson Gardiner ed., 3d. ed. 1906).

269. *The Grand Remonstrance, 1641*, in 4 *Historical Collections of Private Passages of State* 437 (John Rushworth ed., 1691), reprinted in Gardiner, *supra* note 268, at 202-32.

270. *The Charge Against the King, 1648*, in 7 *Historical Collections of Private Passages of State* 1396 (John Rushworth ed., 1721) reprinted in Gardiner, *supra* note 268, at 371-72.

271. Robert Middlekauff, *The Glorious Cause: The American Revolution—1763-1789*, at 74-121, 234-37 (revised & expanded ed., 2005) (describing the Stamp Act crisis, along with the impetus and contents of the Intolerable Acts).

272. *The Declaration of Independence* para. 2 (U.S. 1776).

273. See, e.g., *id.* at paras. 11, 23-24.

274. Holt, *supra* note 265, at 19.

declaration of rights, and an independent judicial system is necessary to see how the tradition of constitutional government offers a solution to ICANN's weak accountability.

D. *Leading Principles of Constitutional Law and Government*

1. Charters and Constitutions

Written charters or constitutions express “the essential political commitments of a people” and a set of “architectonic plans;” they “make clear the locus of political authority and its basis” and “allocate [ ] political power through the distribution of offices and citizenship.”<sup>275</sup> They serve the purpose of “[p]lacing limits on political power,” where such limits consist of “a defined process of decision making,” “restricting government to actions that the population has already approved,” and restricting “the content of legislation” through making exceptions to legislative authority or declaring certain constitutional rights.<sup>276</sup> *Magna Carta* is a leading example. From American experience with colonial charters there emerged “the concept of a fixed, written constitution limiting the ordinary actions of government.”<sup>277</sup> Significantly, their long familiarity with instruments of local self-government developed into the practice where “Americans put everything of constitutional status in a *single* written instrument.”<sup>278</sup> Constitutions are, as James Madison explained, “superior in obligation to all [other laws], because they give effect to all others . . . . As metes and bounds of government, they transcend all other landmarks, because every public usurpation is an encroachment on the private right, not of one, but of all.”<sup>279</sup>

The metes and bounds established by a written charter or constitution consist of “an artfully divided system of authority” that “distribut[es] authority through law and require[s] it to be exercised through or at least under law.”<sup>280</sup> This practice of placing government under law by means of a single instrument of government and making it enforceable in courts of law has been

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275. Donald S. Lutz, *The Origins of American Constitutionalism* 3, 14 (1988).

276. *Id.* at 15.

277. Bernard Bailyn, *The Ideological Origins of the American Revolution* 192-93 (1967).

278. Lutz, *supra* note 275, at 9.

279. James Madison, *Charters, Nat'l Gazette* (Jan. 19, 1792), *reprinted in* *Writings* 503 (Jack N. Rakove ed., 1999).

280. Philip Hamburger, *Law and Judicial Duty* 620 (2008).

“the primary alternative to the consolidated and almost unlimited state authority that has flourished in much of the rest of the world.”<sup>281</sup> Far from being outmoded, this tradition of constitutional government represents “a remarkable achievement” that “at least thus far has proved singularly well adapted to the modern world.”<sup>282</sup> In European thought, the constitution refers to a coherent set of long-term principles and rules of a higher legal rank constituting the basic order of a political community or of a functionally limited community.<sup>283</sup>

## 2. Separation of Powers

Among the most distinctive constitutional principles identified by philosophers in the classical liberal tradition is that “the structure of the government itself, not some appeal to first principles, is the defense of liberty.”<sup>284</sup> Montesquieu explained that this self-conscious structuring of government served to avoid the abuse of power. “So that one cannot abuse power, power must check power by the arrangement of things. A constitution can be such that no one will be constrained to do the things the law does not oblige him to do or be kept from doing the things the law permits him to do.”<sup>285</sup> Behind this conception of government stands a profound skepticism based on the human tendency to abuse power.<sup>286</sup>

From the principle that “power must check power by the arrangement of things”<sup>287</sup> comes the idea of the separation of powers. It requires that the power to make, execute, and adjudicate the law should be kept in separate hands.<sup>288</sup> No matter

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281. *Id.*

282. *Id.*

283. Petersmann, *supra* note 232, at 31.

284. Anne M. Cohler, Introduction, Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws*, at xv (Anne M. Cohler, Basia Carolyn Miller, & Harold Samuel Stone, trans. & eds. 1989).

285. *Id.* at 155-56. *Accord* Constant, *supra* note 262, at 182 (“How is it possible to limit power other than through power itself?”).

286. Montesquieu, *supra* note 284, at 155 (“It [political liberty] is present only when power is not abused, but it has eternally been observed that any man who has power is led to abuse it; he continues until he finds limits.”); James Madison, *Speech in the Virginia Constitutional Convention* (Dec. 2, 1829), *in* Madison, *supra* note 279, at 824 (“The essence of Government is power; and power, lodged as it must be in human hands, will ever be liable to abuse.”).

287. Montesquieu, *supra* note 284, at 155.

288. *Id.* at 157 (“All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers:

how precisely stated, however, constitutional boundaries separating these powers do not suffice.<sup>289</sup> For the separation to be effective, the powers of government must be so arranged so as to furnish “the coercive provision belonging to Government and Law.”<sup>290</sup> Madison had the genius to see how the principle of countering power with power could be applied to the practical business of organizing government: “Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.”<sup>291</sup> He traced through the U.S. Constitution “[t]his policy of supplying by opposite and rival interests, the defect of better motives” and noticed it particularly in those “subordinate distributions of power; where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual, may be a centinel over the public rights.”<sup>292</sup> This principle of separation of powers has been influential in the constitutional development of many countries.

### 3. Enumerated Powers

The principle of enumerated powers is an innovation owed to the American constitutional experience. Rather than assuming that government could exercise any power not specifically excepted, it proceeds from the contrary assumption that only those powers may be exercised that are affirmatively expressed. In American constitutional theory, “[t]he powers delegated by the proposed Constitution to the Federal Government, are few and defined.”<sup>293</sup>

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that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.”); The Federalist No. 47, *supra* note 263, at 324 (James Madison) (“The accumulation of all powers legislative, executive and judiciary in the same hands ... may justly be pronounced the very definition of tyranny.”).

289. See The Federalist No. 48, at 332-33 (James Madison) (Jacob E. Cooke ed., 1961) (“Will it be sufficient to mark with precision the boundaries of these departments in the Constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? . . . [E]xperience assures us, that the efficacy of the provision has been greatly over-rated; and that some more adequate defence is indispensably necessary for the more feeble, against the more powerful members of the government.”).

290 Madison, *supra* note 286, at 825.

291. The Federalist No. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

292. *Id.*

293. The Federalist No. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961).

Enumerating the national government's powers grew out of America's rejection of the British theory of unlimited parliamentary sovereignty.<sup>294</sup> American constitutional theory holds that powers belonging to the national government are enumerated as an exercise of popular sovereignty.<sup>295</sup> Switzerland<sup>296</sup> and Germany<sup>297</sup> likewise follow the principle of enumerated powers as the rule by which to order their federated states. Their form of federalism relies on the concept of subsidiarity,<sup>298</sup> meaning that government control should be exercised by the most local authority competent to act.<sup>299</sup>

#### 4. Fundamental Rights

Setting forth a written declaration of rights is one of the oldest devices for controlling government.<sup>300</sup> As illustrated by the *Magna Carta*, its force consists of spelling out in writing what the king could and (more importantly) could not do. The famous 39th clause illustrates this device: "No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful

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294. See Alison L. LaCroix, *The Intellectual Origins of American Federalism* 103-04 (2010).

295. See *The Federalist* No. 46, at 315 (James Madison) (Jacob E. Cooke ed., 1961) ("The Federal and State Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes.").

296. See Andreas Auer, *The Constitutional Scheme of Federalism*, 12 J. Eur. Pub. Pol'y 419, 422 (2005) (discussing the principle of enumerated powers as implemented in the Swiss Constitution of 1848 and in Article 3 of the Constitution of 1999).

297. See Rüdiger Sannwald, *art. 30 GG*, in *GG Kommentar zum Grundgesetz* 845 (Hans Hofmann & Axel Hopfauf eds., 2011) (commenting on The German Basic Law ("Grundgesetz") articles 30, 70 and 72).

298. See J.M. Kelly, *A Short History of Western Legal Theory* 399 (1992).

299. Rolf H. Weber & Thomas Schneider, *Internet Governance and Switzerland's Particular Role in its Processes* 60 (2009).

300. It is also one of the most enduring. See, e.g., *Declaration of the Rights of Man and Citizen* (Aug. 1789), *reprinted in* *The Constitution and Other Select Documents Illustrative of the History of France, 1789-1907*, at 59-61 (Frank Maloy Anderson, ed., 1908); *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810 (1948). The contemporary phenomenon of "rights consciousness" suggests that declarations of rights are significant and continuing to grow in influence. Affiliated issues of social and political justice are increasingly addressed by courts, especially constitutional courts.

judgement of his peers or by the law of the land.”<sup>301</sup> Later English history produced other influential declarations of rights.<sup>302</sup>

American constitutions have included bills or declarations of rights almost from the beginning.<sup>303</sup> The first ten amendments to the U.S. Constitution, now known as the Bill of Rights,<sup>304</sup> are led by a stirring guarantee of fundamental liberties:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”<sup>305</sup>

Madison explained that

“the great object in view [in declaring rights] is to limit and qualify the powers of government, by excepting out of the grant of power those cases in which the government ought not to act, or to act only in a particular mode.”<sup>306</sup>

Although acknowledging the weakness of such “paper barriers,” he nonetheless maintained that “they have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community . . . .”<sup>307</sup> Setting forth a written declaration of rights has, he urged, “a salutary effect against the abuse of power.”<sup>308</sup>

Declaring rights is not enough to protect them. Benjamin Constant explained that

“[t]he fact is that a simple declaration is not sufficient; you need positive safeguards. You need bodies sufficiently

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301. Holt, *supra* note 265, at 461.

302. See The Petition of Right, 1628, 3 Car. I, c. I (Eng.), *reprinted in* Gardiner, *supra* note 268, at 66; Bill of Rights, 1689, 1 W. & M., c. 2 (Eng.), *reprinted in* Sources of English Constitutional History 599 (Carl Stephenson & Frederick George Marcham eds. & trans., 1937).

303. See The Massachusetts Body of Liberties (Dec. 1641), *reprinted in* Colonial Origins of the American Constitution 70 (Donald S. Lutz ed., 1998).

304. See U.S. Const. amends. I-X.

305. *Id.* at amend. I.

306. James Madison, *Speech in Congress Proposing Constitutional Amendments* (June 8, 1789), *in* Madison, *supra* note 286, at 446.

307. *Id.* at 446-47.

308. *Id.* at 449.

powerful to be able to employ, in favour of the oppressed, the means of defence sanctioned by the written law.”<sup>309</sup>

Experience has taught that the most effective such means are legal remedies administered by impartial judges.

### 5. Legal Remedies and Independent Courts

A good judge is indispensable to establishing and preserving the rule of law.<sup>310</sup>

“[I]t is the law that must be maintained against arbitrary will. And the one institution above all others essential to the preservation of the law has always been and still is an honest, able, learned, independent judiciary.”<sup>311</sup>

A judge’s core duty is “to decide in accord with the law of the land.”<sup>312</sup> A judge may not intervene in a dispute before it has ripened into a lawsuit.<sup>313</sup> In this tradition, courts must wait for a dispute to come before them in the form of justiciable cases over which they have jurisdiction. That is, the case must be amenable to judicial decision and come within the court’s power to act.

Perhaps the most significant power of an American judge is to disregard a statute, regulation, or ordinance found to be repugnant to a provision of the Constitution. This power, sometimes labeled judicial review, reflects long-held understandings of law and judicial duty.<sup>314</sup> Alexander Hamilton explained that “[a] constitution is in fact, and must be, regarded by the judges as a fundamental law” and that “the constitution ought to be preferred to the statute.”<sup>315</sup> He further explained that constitutional limitations on the exercise of power

“can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be declare all acts contrary to the manifest tenor of the

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309. Constant, *supra* note 262, at 289.

310. See John V. Orth, *Due Process of Law* 8-9 (2003).

311. McIlwain, *supra* note 248, at 144.

312. Hamburger, *supra* note 280, at 316.

313. See 1 Tocqueville, *supra* note 262, at 170.

314. See Hamburger, *supra* note 280, at 16-17.

315. The Federalist No. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.”<sup>316</sup>

Judicial independence is a key feature of constitutional government. Given the experience of English kings who repeatedly sought to intimidate and manipulate judges,<sup>317</sup> Parliament eventually established judicial independence by statute.<sup>318</sup> King George III’s interference with colonial judges was the source of complaint in the Declaration of Independence.<sup>319</sup> And the U.S. Constitution provided from the beginning that federal judges would hold their offices “during good behaviour” and receive fixed compensation “which shall not be diminished during their continuance in office.”<sup>320</sup>

Continental legal systems likewise make judicial independence and the availability of legal remedies a cornerstone of constitutional government. The Swiss Constitution expressly guarantees access to jurisdiction, including the right to appeal a decision of the court of first instance.<sup>321</sup> This right to appeal is one component of the broader *Rechtsstaat* principle, which encompasses a whole package of rights and entitles the individual citizen to have a judgment reviewed by an impartial court.<sup>322</sup> Laid down in Article 5 of the Swiss Constitution, the *Rechtsstaat* principle means that the state rules through law. Often the word *Rechtsstaat* is translated into English as the “rule of law,” but this

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316. *Id.* at 524. *Accord* Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 291 (1969) (“What in the final analysis gave meaning to the Americans’ conception of a constitution was not its fundamentality or its creation by the people, but rather its implementation in the ordinary courts of law.”).

317. *See, e.g.*, Sir Edward Coke, *Prohibitions del Roy*, 5 James I (1607), *reprinted in* 1 *The Selected Writings of Sir Edward Coke* 481 (Steve Sheppard ed., 2003).

318. Act of Settlement, 1701, 12-13 Will. III, c. 2, *reprinted in* *Sources of English Constitutional History* 612 (Carl Stephenson & Frederick George Marcham eds. & trans., 1937) (“And whereas it is requisite and necessary that some further provision be made for securing our religion, laws, and liberties . . . be it enacted [that] . . . judges’ commissions be made *quam diu se bene gesserint* [during good behavior], and their salaries ascertained and established. . .”).

319. The Declaration of Independence para. 11 (U.S. 1776) (accusing King George II of manipulating judges by controlling their tenure and salaries).

320. U.S. Const. art. III, § 1.

321. Bundesverfassung [BV] [Constitution] Apr. 18, 1999, SR 101, art. 29 (1999).

322. *See* Weber & Schneider, *supra* note 299, at 62.

translation does not encompass all aspects of the *Rechtsstaat*,<sup>323</sup> which include both formal and substantive elements. Formal elements include the principle of legality, procedural due process, the right to substantive review by an impartial court, and the separation of powers. Substantive *Rechtsstaat* elements concern aspects of execution of state activities, such as the principle of public interest, the proportionality principle and fundamental liberties.<sup>324</sup> German constitutional law similarly guarantees the independence of the judiciary<sup>325</sup> and provides that every person has the right to legal recourse if his rights have been violated by a German government authority.<sup>326</sup>

An effective legal system requires a sanction, a consequence for disobedience. “The most prominent general feature of law at all times and places is that its existence means that certain kinds of human conduct are no longer optional, but in *some* sense obligatory.”<sup>327</sup> Although the obligatoriness of law has been the special concern of political and legal theorists,<sup>328</sup> it may be that attaching a sanction to law so that it binds all who are subject to it is less a theoretical necessity than a practical one. “For it is but lost labour to say, ‘do this, or avoid that,’ unless we also declare, ‘this shall be the consequence of your noncompliance.’”<sup>329</sup>

## V. A CONSTITUTIONAL SOLUTION

We have said that ICANN is accountable when the actions of its Board of Directors, officers, and staff are governed by binding rules of conduct secured by mechanisms that constrain their authority and that permit their actions to be reversed when

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323. *Id.*

324. Thomas Fleiner, Alexander Misic & Nicole Töpperwein, *Swiss Constitutional Law* 29 (2005).

325. Werner Heun, *The Constitution of Germany: A Contextual Analysis* 37 (2011).

326. Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. I (Ger.), art. 9, para. 4.

327. H.L.A. Hart, *The Concept of Law* 6 (1961).

328. *See, e.g.*, *The Federalist* No. 15, at 95 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will in fact amount to nothing more than advice or recommendation.”); John Austin, *The Province of Jurisprudence Determined* 21, 151 (Wilfrid E. Rumble ed., 1995) (“Every *law* or *rule* . . . is a command” and “[t]he binding virtue of a law lies in the sanction annexed to it.”).

329. 1 William Blackstone, *Commentaries* \*57.

manifestly repugnant to ICANN's articles of incorporation, bylaws, and written policies. This binding and independent standard of accountability is best implemented through the application of the constitutional principles we have described.

ICANN's accountability gap presents the problem of power beyond right in 21st century guise. Its arbitrary course of decision-making presents the essential issue that united the barons at Runnymede, the Parliament under Charles, and Americans as they established their independence. The ICANN Board cannot throw a noisy critic into the Tower of London or exile him from the ICANN community. But its powers over the Internet DNS do enable it to exclude an applicant from operating a particular top level domain,<sup>330</sup> reverse its anti-trust policy without explanation,<sup>331</sup> and charge exorbitant application fees for the privilege of operating a top level domain.<sup>332</sup> Seen through the lens of history, concerns with taxation and representation, power and right, and effective accountability are fundamental indeed. In exercising coercive and unconstrained power ICANN's Board resembles the kings and parliaments of old.

Achieving binding and independent accountability for ICANN would require several measures intended to apply constitutional principles to ICANN's internal governance for the purpose of securing its accountability. Below are the measures we recommend with an explanation of how the constitutional principles we have described would contribute toward the accountability ICANN needs.

#### A. *Written Charter*

Institutional reforms to ICANN should be reduced to a written charter. Binding ICANN to a document with fixed standards of conduct and remedies for their violation would provide the most effective means of finally achieving the accountability necessary for ICANN to endure as a multi-stakeholder organization. Such a charter should describe ICANN's mission, powers, organizational structure, and obligations to the Internet community—in short, its basic commitments. Because of its importance, the *Affirmation*

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330. *In re ICM Registry*, *supra* note 24, at 27 (reciting the ICANN Board of Appeals decision denying ICM Registry's application to operate a TLD at .xxx).

331. Internet Corp. for Assigned Names and Nos., *Adopted Board Resolutions*, no. 2 (Nov. 5, 2010), available at <http://www.icann.org/en/minutes/resolutions-05nov10-en.htm>.

332. Internet Corp. for Assigned Names & Nos., *gTLD Applicant Guidebook* 1-40 (Jan. 11, 2012).

should be incorporated into the charter. And because the charter is intended to set ICANN on a more permanent foundation, it should be alterable only with some difficulty, perhaps only on a super-majority vote of the Board of Directors. Entrenching the charter against easy alteration is intended to furnish a more stable institutional foundation for ICANN.<sup>333</sup> Constitutional principles, binding leaders, and stakeholders alike generally establish stability<sup>334</sup> by assuring a degree of predictability and encouraging legitimate expectations by those they govern.<sup>335</sup>

This charter should be adopted through formal ratification. By this we mean that it would be presented for debate and amendment to a convention of members selected from the SOs and ACs except for the GAC. Because the principle of national sovereignty prevents the GAC from selecting some of its members to represent the entire body, it would not participate in the convention. A vote of two-thirds of all convention members would be required for ratification. Once ratified, the charter would be presented to the GAC for its advice with respect to issues of public policy and then to the ICANN Board of Directors for an up-or-down vote on a resolution to adopt the charter into ICANN's bylaws. Adoption would require a thoroughgoing review of the ICANN bylaws to determine what amendments would be necessary to make them consistent with the charter.

#### *B. Enumerating the Board's Powers*

Applying the principle of enumerated powers would help return ICANN to the narrow technical mission for which it was created. It was originally conceived as having “the authority to manage and perform a *specific set of functions* related to coordination of the domain name system.”<sup>336</sup> That authority included the power to

“(1) Set policy for and direct allocation of IP number blocks to regional Internet number registries; (2) Oversee operation of the authoritative Internet root server system;

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333. See Douglass C. North & Barry R. Weingast, *Constitutions and Commitment*, 49 J. Econ. Hist. 803, 803 (1989) (“Rules the sovereign can readily revise differ significantly in their implications for performance from exactly the same rules when not subject to revision.”).

334. Niklas Luhmann, *Verfassung als evolutionäre Errungenschaft*, 9 Rechtshistorisches J., 176, 181 (1990).

335. Cottier & Hertig, *supra* note 233, at 280.

336. *DNS White Paper*, 63 Fed. Reg. at 31749 (emphasis added).

(3) Oversee policy for determining the circumstances under which new TLDs are added to the root system; and (4) Coordinate the assignment of other Internet technical parameters as needed to maintain universal connectivity on the Internet.”<sup>337</sup>

Eschewing the very notion of “a monolithic structure for Internet governance,” U.S. policy as expressed in the *DNS White Paper* sought only to inaugurate “a stable process to address the *narrow* issues of management and administration of Internet names and numbers on an ongoing basis.”<sup>338</sup>

Later descriptions of ICANN’s mission by the U.S. have been equally constrained. The U.S. Principles on the Internet Domain Name and Addressing System described ICANN as “the technical manager of the DNS and related technical operations” and stated that “[t]he United States will continue to provide oversight so that ICANN maintains its focus and meets *its core technical mission*.”<sup>339</sup> The JPA characterized ICANN’s work as “the coordinator for the technical functions related to the management of the Internet DNS.”<sup>340</sup> Likewise, the *Affirmation* described ICANN as having the “*limited, but important technical mission* of coordinating the DNS.”<sup>341</sup> Statements like these demonstrate that the U.S. government—the body whose policy decisions led to ICANN’s creation and whose contract with ICANN continues to give it authority over the IANA functions today—has consistently viewed ICANN’s mission as “technical” and “limited.” The narrow mission for which ICANN was created marks the outer boundary of its legitimate authority. It was never intended to have an undefined reserve of powers over Internet governance; its powers to manage and administer the Internet DNS should be enumerated and thereby limited.

No one can seriously question whether ICANN currently intrudes into areas beyond its technical mandate.<sup>342</sup> ICANN’s

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337. *Id.*

338. *Id.* (emphasis added).

339. 2005 U.S. Principles on the Internet’s Domain Name and Addressing System, *available at* [http://www.ntia.doc.gov/ntiahome/domainname/usdnsprinciples\\_06302005.htm](http://www.ntia.doc.gov/ntiahome/domainname/usdnsprinciples_06302005.htm).

340. Joint Project Agreement, *supra* note 61, at preamble (emphasis added).

341. *Affirmation*, *supra* note 67, ¶ 9 (emphasis added).

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

mission creep may result from confused thinking about Internet governance. Issues affecting ICANN, its performance, and decisions too often get conflated with the term Internet governance, which comprises a broad array of issues, including legal and policy matters covering law enforcement, free speech, intellectual property, and the digital divide. But ICANN is not responsible for Internet governance, writ large.<sup>343</sup> No single organization performs that mission, nor should it.<sup>344</sup> ICANN serves indispensable but narrow technical purposes and should not try to resolve matters over which it has no authority.

ICANN's indulgence in mission creep (1) increases political pressure on ICANN; (2) diminishes ICANN's legitimacy by interjecting it in matters perhaps beyond its competence and certainly beyond the reasons for its creation; (3) tends to push ICANN toward empire building; and (4) detracts from the potential usefulness of the Internet Governance Forum and other potentially effective policy-making bodies. Requiring ICANN to return to its original technical mission would avoid or at least mitigate these problems. It would enhance ICANN's accountability and legitimacy<sup>345</sup> and reduce political pressure to include governments in policy matters outside ICANN's technical mandate.<sup>346</sup>

Careful enumeration cannot entirely eliminate ICANN's policy-making authority. For instance, the *DNS White Paper* anticipated that ICANN would set policy for the allocation of IP number blocks to regional Internet number registries and for the addition

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forays into competition policy, rate regulation, intellectual property policy, freedom of expression, and taxation).

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

344. *DNS White Paper*, 63 Fed. Reg. at 31749 ("The policy that follows does not propose a monolithic structure for Internet governance. "); *U.S. Principles*, *supra* note 339 ("Given the breadth of topics potentially encompassed under the rubric of Internet governance there is no one venue to appropriately address the subject in its entirety.").

345. Nat'l Research Council, *supra* note 133, at 199 ("ICANN is more likely to achieve perceived legitimacy with a narrower scope rather than a broader one.").

346. GoDaddy Group, Inc., Assessment of the Transition of the Technical Coordination and Management of the Internet's Domain Name and Addressing System 4 (June 8, 2009).

of new TLDs.<sup>347</sup> The problem is how to prevent ICANN from using its authority to drive “the public policy aspects of the technical coordination of the Internet DNS,”<sup>348</sup> or what might be called ancillary policymaking authority, to expand its own powers beyond its limited mandate.

The solution lies with identifying the boundary separating technical coordination from policy, a line that is hardly self-evident. An especially useful definition holds that “a matter is ‘technical coordination’ of the Internet only if ‘[a] wrong decision has an immediate and direct impact on the ability of the Internet to deliver its fundamental service, i.e., the end-to-end transport of IP packets. Otherwise it is a policy matter.’”<sup>349</sup> That distinction seems adequate to mark the boundary separating technical coordination from policy. It should be the starting point for enumerating ICANN’s powers.

### C. *Dividing the Board’s Powers*

Enumerating ICANN’s powers will be useful, but it will not be enough to confine ICANN within its rightful authority. ICANN’s unique global control over the Internet DNS is exercised by a Board of Directors whose decisions are unreviewable.<sup>350</sup> The tradition and history of constitutional government suggests that ICANN’s unconstrained power is intolerable because concentrated power is the enemy of accountability. As long as the Board holds unchecked authority to act on behalf of ICANN, the most precise enumeration of its powers will remain ineffective. Elections, standing alone, have proven to be an ineffective check.<sup>351</sup> Something more is needed.

The answer lies with Montesquieu’s insight that “power must check power.”<sup>352</sup> Solving ICANN’s persistent accountability gap requires a penetrating reconfiguration of the Board’s powers. Dividing the Board’s power consists at least in placing express

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347. See *DNS White Paper*, 63 Fed. Reg. at 31749.

348. *Affirmation*, *supra* note 67, ¶ 6.

349. Froomkin, *supra* note 15, at 172 (quoting e-mail from Karl Auerbach to ICANN wc-c Mailing List (Dec. 29, 1999), Domain Name Server Organization, <http://www.dnso.org/wgroups/wg-c/ARC01/msg00456.html>).

350. See *Bylaws*, *supra* note 34, at art. 2, § 1.

351. See Nat’l Research Council, *supra* note 133345, at 7 (“No composition of its board is likely by itself to confer the perception of legitimacy on ICANN among all its possible constituency groups.”).

352. Montesquieu, *supra* note 284, at 155.

limits on that power and in giving other organizations power to check or reverse the Board.

Express limits ought to begin with the principle that directors are bound by a charter and the bylaws and they may be removed if unfaithful to them. The practice of occupying more than one leadership position within ICANN should be prohibited. No person should be eligible to serve as a director until he has resigned any other position within ICANN, including its SOs and ACs. Other organizations with power to check the Board of Directors should include a new Board of Review, to be described shortly, and statutory or corporate members.

Establishing members of record for ICANN is necessary to secure binding and independent accountability.<sup>353</sup> California law permits a nonprofit public benefit corporation like ICANN to have statutory members.<sup>354</sup> Like shareholders in a for-profit corporation, members of a nonprofit corporation have the authority to hold the board of directors in check. ICANN has no members, by design.<sup>355</sup> ICANN's conceit of accountability "to the global community" or "the public at-large"<sup>356</sup> is accountability in name only. Without accountability to a particular person or persons, the Board may act with impunity because no one holds the legal right to sanction the Board for acting beyond its authority or in violation of its duties and prohibitions under the bylaws.<sup>357</sup>

Corporate members would be independent of the ICANN Board and their limited authority would be binding. Members might be given the power to remove a director found to be violating the ICANN bylaws; to remove the president for the same cause; to bring a derivative action against the corporation or to submit a petition requesting the enforcement assistance of the California attorney general.<sup>358</sup> Each of these powers would tend to

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353. See Internet Governance Project, *Comments of the Internet Governance Project on the DNS Transition* 2, 3 (n.d.), available at <http://internetgovernance.org/pdf/IGP-June09NTIAcomment.pdf> ("ICANN now claims to be accountable to anyone and everyone—and thus in reality, it is accountable to no one. If one believes that the membership provisions of California corporate law don't scale to a global level, then either the membership issue must be cleared up, or another legal framework found.").

354 See Cal. Corp. Code § 5310(a) (West 2012).

355. Bylaws, *supra* note 34, at art. XVII.

356. *Frameworks & Principles*, *supra* note 48, at 20.

357. Internet Governance Project, *Comments*, *supra* note 353, at 5 ("What has been missing is a legal framework with clear lines of accountability to real stakeholder/members.").

358 See Cal. Corp. Code § 5222 (West 2012); *id.* at § 5250.

solve the problem of holding ICANN's directors and officers within the bounds of their lawful authority by relying on California's "rigorous framework of legal accountabilities."<sup>359</sup>

D. *Declaring Rights*

ICANN's stakeholders should have clearly defined rights with predictable means of enforcement. A clear statement of rights and a stable procedural framework for legal appeal are essential elements of the rule of law. Such rights clarify that any violation of the bylaws that materially affected an adverse decision furnishes grounds to challenge it formally. Evidence of bias or prejudice against the losing party should also furnish grounds to bring a challenge.

At the same time, it should be clear that such rights inhere in the relationship between ICANN and a particular stakeholder under particular circumstances, not in every stakeholder at large. Unlike the Universal Declaration of Human Rights, they are not intended to inhere in each ICANN stakeholder *qua* contracting party or commercial entity or NGO or Internet user. It is the character of the right-holder's relationship with ICANN under the particular circumstances giving rise to the dispute, not the character of the right-holder itself, that determines the nature of the rights he or she can claim.

E. *A New Board of Review*

As the ATRT's WG4 found, ICANN's procedures to relieve aggrieved stakeholders are unsatisfactory. Reconsideration and the IRP furnish avenues for convincing the Board of Directors to revise or reverse its own decisions. But they are at most an incomplete form of relief because they yield recommendations that the ICANN Board remains free to accept or reject.<sup>360</sup> In a word, they are not binding.

This is a critical point in ICANN's governance where the Board's power must be altered for ICANN to become genuinely accountable. That was WG4's view, and it was right to conclude that establishing independent review of board decisions goes to the

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359. *Frameworks & Principles*, *supra* note 48, at 16.

360. *See* Bylaws, *supra* note 34, at art. 4, § 2.18 ("The Board shall not be bound to follow the recommendations of the Board Governance Committee."); *id.* at art. 4, § 3.15 ("Where feasible, the Board shall consider the IRP declaration at the Board's next meeting.").

foundation of ICANN's authority over the Internet.<sup>361</sup> Measured against ICANN's longstanding commitments,<sup>362</sup> the Board's unchecked autonomy is defective. "[T]he ultimate arbiter of any dispute is the very body which is alleged to have made the incorrect or inappropriate decision in the first place."<sup>363</sup> Allowing the ICANN Board to continue acting as the final arbiter of its own disputes is a "paradigm" of procedural unfairness in "making a man a judge in his own case."<sup>364</sup>

That is not to say that the current review procedures ought to be altogether scrapped. Reconsideration is worthwhile if it provides the board with a genuine second look at decisions that were made in haste or without all the facts.<sup>365</sup> Some procedure enabling the board of directors to reexamine its own decisions is unavoidable; perhaps further discussion among ICANN's stakeholders can identify refinements that would make Reconsideration more effective. The IRP as now formulated is inadequate, however, because it cannot reverse even the most mistaken board decision. Additional relief is needed to ensure that the Board's decisions remain consistent with the proposed charter and ICANN's bylaws.

Several organizations have called for a new mechanism that will enable aggrieved parties to reverse decisions of the board, not merely review them.<sup>366</sup> In keeping with this consensus, a Board of Review should be established. It should be composed of five

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361. *Findings & Recommendations*, *supra* note 103, at 1.

362. See 1998 *Memorandum of Understanding*, *supra* note 8, at § V(A)(2); *Affirmation*, *supra* note 67, ¶ 9.1(a).

363. *NeuStar Comments*, *supra* note 139, at 3.

364. Orth, *supra* note 310, at 86. Indeed, "[t]he problem of a man claiming jurisdiction in his own case appears in the very first book on English law ever printed ...." *Id.* at 16.

365. See *Bylaws*, *supra* note 34, at art. 4. § 2.2.

366. Council of the European Union, *International Management of the Internet Domain Name System*, Doc. 11960/09, Annex, at 4 (July 14, 2009) (on file with the authors) ("It is essential to ensure that ICANN has effective mechanisms for independent scrutiny and review of its Board decisions and independent appeal mechanisms to safeguard the rights of individuals and organisations affected by the decisions of such a private sector body."); *AT&T Comments on Accountability and Transparency Review Team Proposed Recommendations* 3 (Dec. 3, 2010), available at <http://www.docstoc.com/docs/7145018/Jeff-Brueggeman-Vice-President-Public-Policy-ATT-Services-Inc> ("As AT&T has previously discussed, we think there would be benefits to establishing an independent adjudicatory panel that is authorized to hear appeals of Board decisions or staff actions by affected stakeholders on specific grounds, such as assuring adherence to its charter and procedural guidelines.").

members possessing the narrow but critical jurisdiction to decide whether an action on behalf of ICANN by the Board of Directors is repugnant to or “inconsistent with the Articles of Incorporation or Bylaws.”<sup>367</sup> This limited jurisdiction would not permit a stakeholder to overturn policy decisions produced by a faithful adherence to the bylaws and other written policies. Unlike the IRP as now constituted,<sup>368</sup> decisions by the Board of Review would be final and binding on the parties, including the Board of Directors, and must be executed within one week of the decision unless the Board of Review otherwise directed.

Eligibility criteria for the Board of Review should be strict. Only persons with outstanding legal qualifications who can certify that they have no relationship with ICANN officers or directors indicating nepotism or another conflict of interest should be eligible. The independence of the Board of Review should be secured by guaranteeing members a salary that cannot be reduced during their time in office and a fixed term of office that cannot be cut short unless a two-thirds majority of all corporate members determines that a member of the Board of Review has used his office for personal gain.<sup>369</sup>

Deciding who should appoint Board of Review members raises particular difficulties. However neatly confined, the jurisdiction to issue decisions that bind the Board of Directors gives the Board of Review tremendous power. Limiting its jurisdiction guards against the possibility of usurping the Board of Directors’ authority to govern ICANN’s affairs. Additional precautions are necessary to avoid giving any discrete portion of the ICANN community power to control the appointment of Board of Review members.

For that reason, we propose to follow the model of the U.S. Constitution<sup>370</sup> by dividing the appointment power between the ICANN president and the new corporate members. The Board of Directors would retain the power to appoint the president, who in turn would appoint the Board of Review with the approval of the new corporate members. This structure is intended to avoid concentrating the important power to determine the composition of a body with the authority to reverse the Board of Directors.

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367. Bylaws, *supra* note 34, at art. 4 § 3.1.

368. *See id.* at art. IV §§ 3.8(c) & 3.15.

369. These guarantees of salary and office deliberately borrow from similar provisions in the English Act of Settlement, *supra* note 318, and the American Constitution, *supra* note 320.

370. *See* U.S. Const. art. II, § 2 (granting the President power to appoint members of the Supreme Court with the Senate’s approval).

Accomplishing that division of power admittedly comes with the risk that members of the Board of Review might be required to sit in judgment on the president that appointed them. On balance, that risk appears to be comparatively remote because the ICANN president has no authority to act on behalf of ICANN without direction by the Board of Directors.<sup>371</sup>

Rules of standing, like the grant of jurisdiction, would be intentionally narrowed to prevent the Board of Directors from being vexed by claims from stakeholders with no actual interest in the contested decision. Standing would extend beyond contracted parties but would require a showing of individual injury. Rules of court should be adapted from the rules of the International Court of Justice. Decisions should be issued in the form of written opinions explaining in what respect the disputed action did or did not comply with the charter and bylaws. In this manner, the ICANN community could finally acquire a fair arbiter of disputes against ICANN itself.

#### CONCLUSION

ICANN needs independent and binding accountability. No other standard can satisfy its stakeholders and fortify it against the political storms it attracts. Principles of constitutional law offer a promising means—perhaps the only effective means—of achieving this demanding standard. Adopting the constitutional solution we describe would strengthen ICANN's role as global manager of the DNS while bolstering the future prospects of the multi-stakeholder model of Internet governance.

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371. Evaluating the seriousness of this risk may depend on one's own constitutional tradition. European readers might be concerned with the prospect of requiring a Board of Review member to sit in judgment on the president that appointed him. For them, the risks of self-interested adjudication and even intimidation may be sufficient to shun the arrangement. American readers, on the other hand, may be more comfortable with the president-as-appointer scheme because of the U.S. Supreme Court's established record of adjudicating constitutional claims against the U.S. President without apparent partisan bias or personal intimidation. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 589 (1952) (holding that President Truman exceeded his constitutional authority when he directed the Secretary of Commerce to seize and operate most of America's steel mills during the Korean War).