



DAVID G. POST AND DANIELLE KEHL

Controlling Internet Infrastructure

The “IANA Transition” and ICANN Accountability, Part II

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ABOUT THE OPEN TECHNOLOGY INSTITUTE

The Open Technology Institute at New America is committed to freedom and social justice in the digital age. To achieve these goals, it intervenes in traditional policy debates, builds technology, and deploys tools with communities. OTI brings together a unique mix of technologists, policy experts, lawyers, community organizers, and urban planners to examine the impacts of technology and policy on people, commerce, and communities. Our current focus areas include surveillance, privacy and security, network neutrality, broadband access, and Internet governance.



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This paper is the second in a series of papers on the IANA transition to be published by the Open Technology Institute in 2015. The first paper explains the nature of the challenges and the opportunities presented by the transition. Subsequent papers address in greater detail the substance of specific transition proposals now under development, and provide recommendations concerning implementation of the key components of a successful transition process.

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EXECUTIVE SUMMARY

In Part 1 of this series on Controlling Internet Infrastructure, we described the “IANA transition,” the U.S. government’s plan to relinquish its special oversight role in connection with the Internet Corporation for Assigned Names and Numbers (ICANN) by terminating the contract pursuant to which ICANN has been managing the Internet’s “domain name system” since 1999. The goal of the IANA transition is to eliminate the contractual lever through which the U.S. government has exercised regulation, oversight, and control over ICANN’s DNS management activities since ICANN was formed in 1998. No element of the transition plan is more important than the design of effective “accountability” mechanisms, and the U.S. government should not proceed with the transition unless and until it has satisfactory answers in hand.

In this paper, we employ the tools of constitutional analysis to come up with an effective accountability structure and discuss their application in practice. A constitutional solution for ICANN involves, at a minimum, the following four elements:

1. A clear and precise delineation between the powers that the corporation may, and those that it may not, exercise.
2. A division of the institution’s powers so that they are not concentrated in one set of hands.
3. Internal, institutional mechanism(s) to enforce the constraints of (1) and (2).
4. Transparency and simplicity.

We then apply these principles to ICANN’s current structure and proposed changes that will occur as a result of the IANA transition. The goal of this paper is to articulate a clear vision for the design of a new suite of checks and constraints, which we believe is a precondition to the IANA transition and the elimination of the U.S. government’s contractual oversight role in the domain name system.

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I. BACKGROUND: ICANN “ACCOUNTABILITY”

In Part 1 of this series on *Controlling Internet Infrastructure*, we described the “IANA transition,” the U.S. government’s plan to relinquish its special oversight role in connection with the Internet Corporation for Assigned Names and Numbers (ICANN) by terminating the contract pursuant to which ICANN has been managing the Internet’s “domain name system,” or “DNS,” since 1999.¹

The transition, we argued, represents an important moment in Internet history and, therefore, in the history of human communication, and the stakes involved, for the future of the Internet as a free and open communications platform, could hardly be higher. The DNS has become a significant and immensely valuable global resource. Whoever controls DNS operations and DNS policy wields considerable power - the power to control access to this critical portion of the Internet’s underlying technical infrastructure and, therefore, to the Internet itself. That power, like all power, is subject to abuse, which, in the case of the DNS, could have substantial and serious global repercussions – for global trade and commerce, for privacy, for the use of and protection for intellectual property, and for free expression around the globe.²

The goal of the IANA transition – which we endorse³ – is to eliminate the contractual lever through which the U.S. government has exercised regulation, oversight,

and control over ICANN’s DNS management activities since ICANN was formed in 1998. The transition is premised on the notion (which we also endorse) that the DNS can best be managed going forward by a global, *non*-governmental, consensus-based, “multi-stakeholder” institution.

But if the U.S. government is not going to be exercising oversight over the way in which ICANN conducts its activities post-transition, who is? How is that oversight to be exercised, and how effective is it likely to be? Once ICANN is free from direct U.S. (or other) government control and influence, what will keep it from going, FIFA-like⁴, off the rails, misusing or abusing the substantial power that it wields, with the resulting catastrophic effects on global trade and communication?

No element of the transition plan⁵ is more important than the design of effective “accountability” mechanisms that will reassure the global Internet community on these questions, and the U.S. government should not proceed with the transition unless and until it has satisfactory answers in hand. The IANA transition represents the global Internet community’s first (and possibly only) opportunity to implement meaningful reforms in an ICANN accountability scheme that has, by broad consensus, serious deficiencies.⁶ There is a great deal riding on getting it right this time around.

II. BASIC PRINCIPLES

We believe that designing effective and trustworthy accountability mechanisms for a post-transition ICANN is a problem of constitutional design, and that the tools of constitutional analysis can be usefully employed in order to come up with an effective accountability structure.⁷

Some readers may object that this somehow exalts the ordinary problems of corporate structure and governance of a private, non-profit corporation into unnecessarily complex and value-laden “constitutional” questions. But the fundamental constitutional problem is how to constrain and check power that is subject to no higher power – power that is truly “sovereign” – by “so contriving [its] *interior structure* that its constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”⁸ Contriving ICANN’s interior structure in this way – so that, free from direct government control, *it checks itself* – is a useful way to approach the central task of the accountability project.

Limiting ICANN’s powers through the application of constitutional principles could be defended in the name of ensuring sensible corporate governance. 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, 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 . . . 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, [and] 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.⁹

ICANN is of course not a true “sovereign,” nobody is suggesting that the transition will somehow remove *all* governmental checks on its activities, and ordinary corporate law – and, for that matter, ordinary criminal law – will continue to apply to its activities and the activities of its officers and employees. But ordinary corporate and criminal law will leave it, post-transition, virtually unconstrained with regard to its management of the indispensable global resource under its control – the DNS – and its exercise of the coercive power over Internet users it obtains by virtue of its position within the DNS hierarchy.¹⁰ The very purpose of the transition is to give ICANN more of the characteristics of sovereign power by removing a critical set of (U.S.) governmental constraints on its activities. The constitutional question then becomes: what keeps it in line?

III. FRAMEWORK FOR ICANN'S CONSTITUTION

Describing ICANN accountability as a “constitutional” problem, of course, hardly ends the inquiry; constitutional design is as much an art as a science, and there are surely many ways to skin the constitutional accountability cat. But stripped to its essentials, we believe that a constitutional solution for ICANN involves, at a minimum, the following four elements:

1. A clear and precise delineation between the powers that the corporation may, and those that it may not, exercise.

If the goal – or, at least, one important goal – of the constitutional exercise is to ensure that the institution being constituted does not act outside its proper sphere of activity, the first task is to define that sphere as clearly as possible, either by an enabling enumeration of the activities it *may* undertake and the powers that it *may* exercise, or by a prohibitory list of the activities it may *not* undertake and the powers that it may *not* exercise – or, as in the U.S. Constitution, by adopting both strategies.

2. A division of the institution's powers so that they are not concentrated in one set of hands.

“No political truth,” as Madison put it, is “of greater intrinsic value” than that “when the legislative and executive powers are united in the same person or body, there can be no liberty”; it is the “accumulation of all powers legislative, executive, and judiciary in the same hands [that] may justly be pronounced the very definition of tyranny.”¹¹

A crucial element of ICANN's constitutional balance is to ensure that the entirety of the corporation's powers – its policy-making (*i.e.*, legislative), policy-implementing (*i.e.*, executive), and policy-interpreting (judicial) powers – are not and cannot be concentrated in any single corporate component.

3. Internal, institutional mechanism(s) to enforce the constraints of (1) and (2).

[A] mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands. . . . The next and most difficult task is to provide some practical security for each, against the invasion of the others. What this security ought to be, is the great problem to be solved.¹²

This is indeed the most difficult part – the “great problem to be solved.” The limitations on the institution's overall powers, and the manner in which its authorized powers are divided amongst institutional components, mean little if they are merely “demarcate[d] on parchment.” Constitutional documents are not self-executing;¹³ enforcing the limitations they contain requires “so contriving the interior structure of the government that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”

The great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department *the necessary constitutional means and personal motives* to resist encroachments of the others. *Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.*¹⁴

Power, in other words, has to check power (the “necessary constitutional means”), and ambition to check ambition (the “personal motives”), to keep the various components in check and in balance – “divid[ing] and arrang[ing] the several offices in such a manner so that, by opposite and rival interests, each may be a check on the other.” Each component needs

“a will of its own,” a motivation sufficient to cause it to protect “the constitutional rights of the place” – i.e., the institutional prerogatives of the office, a motivation that can be supplied by the “personal motives” of the individuals holding power within the overall scheme.

Madison’s great contribution in *The Federalist* was to show that the doctrine of “separation of powers . . . does *not* require that the legislative, executive, and judiciary departments should be *wholly* unconnected with each other”; instead, those components need to be “so far connected and blended as to give to each a constitutional control over the others.”¹⁵ That is, there must be both sufficient separation among the institutional components exercising the policy-making, policy-implementation and policy-interpretation powers to guard against a concentration of power in any one of them, with sufficient interaction among those institutional components so each can provide a check on the exercise of power by the others. It is, to put it mildly, a difficult task and a delicate balance.

4. Transparency and simplicity.

No constitutional checks on an institution’s power, no matter how clearly they may be articulated in its chartering documents, can be effective to the extent that the institution’s actions are shielded from view. And it is particularly important, in the context of a truly global multi-stakeholder institution, that its structure, and the chartering documents that implement that structure and that guide its operations, are framed as simply and transparently as possible. ICANN’s Charter and Bylaws should speak to the global Internet community whose interests the corporation seeks to advance. The more complex those chartering documents are, the less likely it is that they will be comprehensible to that community (or even to the subset of English speakers within that community).

Any set of accountability mechanisms must embody and implement these four principles. Indeed, we think there is a broad consensus among all parties working on the transition plan about that - in the abstract. But unfortunately, the IANA transition is not happening in the abstract. The devil is in the details, and the question is: what do these principles mean in the context of DNS policy, and what do they imply for ICANN’s organization and structure?

IV. ICANN ACCOUNTABILITY IN PRACTICE

A. A clear and precise delineation between the powers that the corporation may, and those that it may not, exercise, and a division of the institution's powers so that they are not concentrated in one set of hands.

ICANN's position in the DNS hierarchy gives it the power to impose its policies, via the web of contracts with and among registries, registrars, and registrants, on hundreds of millions of DNS users.¹⁶ It is *not*, however, free thereby to impose whatever policies it chooses on those third parties – even those it believes in good faith to be in the “best interest” of Internet users. Three fundamental constraints have defined, and must continue to define within any acceptable accountability plan, the appropriate limits of ICANN's powers – the “picket fence” beyond which the corporation may not act. Those powers are limited to:

- (a) coordinating the development of policies, and implementing policies, for which,
- (b) uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, and/or stability of the DNS, and which have been,
- (c) developed by consensus of the multi-stakeholder community.

There are other ways that these limitations can be (and have been) expressed, and while the specific wording may vary, any such formulation must include the following critical features:

1. Preserving the critical separation between DNS policy-making power and policy-implementation power.

The ICANN Board of Directors is not a policy-making institution; it is the Internet stakeholder community that has (and has had, since ICANN's inception) the responsibility to formulate DNS policy. Although

this separation has gotten muddier over the last 15 years, as the ICANN Board has taken on more and more of a policy-making function, we believe that it is a critical safeguard against ICANN's abuse of its power over the DNS once direct U.S. oversight over its activities is eliminated. ICANN's job is an indispensable, but narrow, one: to *organize* the activities of that stakeholder community so as to assist in the development of those community consensus policies – which it does through its various Supporting Organizations, Advisory Committees, and Constituencies¹⁷ – and to *implement* the policies that emerge from that process.

2. Limiting the corporation's powers to policies that *relate directly to operations of the DNS*, i.e., to the security, stability, and performance of the various DNS components.¹⁸

A central risk of the transition is that an unregulated and unconstrained ICANN will leverage its power over the DNS to exercise control over aspects of Internet conduct and content that are *not* related to DNS stability, security, or operation *per se* and over which it has no legitimate regulatory claim – enforcement of copyright or trademark law, for example, or laws against the transmission of pornography, or consumer protection.¹⁹ It will inevitably find itself under severe pressure to do so,²⁰ and this second pillar of a constitutional accountability solution must eliminate the likelihood that it will be in a position to yield to that pressure.

3. Re-affirming the commitment to *consensus* decision-making on the part of the stakeholder community as a constraint on the policies that ICANN can impose on third parties.

ICANN was modeled, from the outset, on the consensus-based policy-making organizations that had so effectively managed the early development and deployment of the DNS and related Internet protocols in the period prior to ICANN's formation, and the requirement for demonstrating a stakeholder

consensus is substantial protection against unwarranted or abusive action on the corporation's part. Again, the corporation has strayed from its commitment to consensus decision-making on a number of occasions,²¹ and the IANA transition presents the opportunity to re-establish and strengthen this third important check on ICANN's powers.

B. Internal, institutional mechanism[s] to enforce the above constraints.

Effective implementation of these limitations on ICANN's powers will go a long way towards reassuring the larger Internet community that ICANN will stick to its knitting – implementing policies relating directly to DNS openness, interoperability, resilience, and/or stability, arrived at by consensus among the affected communities.

But effective implementation will require far more than a “mere demarcation on parchment” of these core limitations. Even if they are clearly set forth in the corporation's Charter or Bylaws, what means or mechanisms ensure that the Board will actually adhere to them in practice once direct US government oversight has been eliminated? What will generate the necessary “push-back” should the Board exceed these limitations?

As ICANN is currently configured, there are virtually no checks or constraints – external or internal – on the Board's power to act in whatever manner *it* believes to be in the corporation's best interests, whether or not its actions are reasonably related to DNS security and stability, and whether or not they are supported by a consensus of the multi-stakeholder community.²²

External enforcement is severely restricted by virtue of a curious feature of ICANN's current structure and California corporations law. Under California law, because ICANN has been constituted as a non-profit corporation without “members,” only the state Attorney General has standing to institute a legal action to enforce the corporation's Bylaws – a truly anomalous situation for a global institution controlling a critical piece of the infrastructure for the global Internet, and the very opposite, one might say, of true “multi-stakeholderism.”²³

Internal checks are equally flimsy and ineffectual. On the one hand, the stakeholders' *only* direct influence on Board action is their role in *selecting* the members of the Board²⁴; there are no means, at present, through which any stakeholders can act, individually or collectively, to turn aside Board decisions that they believe violate ICANN's Bylaws or are otherwise inconsistent with its mission or its powers, or to remove Board members who consistently ignore those limitations.²⁵ Indeed, there are no means through which the stakeholder community *as a whole* acts, or is called upon to act, on *any* matters within ICANN's existing structure – hardly a recipe for developing that community into an effective counterweight to the Board.

Nor, by general consensus, has the procedure for “independent review” of Board action, which has been a feature of ICANN's structure since its inception, proven to be an effective check on Board action. Currently, the ICANN Bylaws constitute an “Independent Review Process” (“IRP”) that is specifically charged with the task of “comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.”²⁶ Three features of the IRP, however, have caused it to become little more than yet another ICANN “advisory committee,” whose decisions are to be considered, but not necessarily acted upon, by the Board.

Three critical deficiencies in the IRP structure have deprived it of its power to function as an effective check on the Board:

(1) A Narrow Mandate.

Although the existing IRP allows “any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws” to “submit a request for independent review of that decision or action,” the scope of that review is exceedingly narrow. While the Bylaws do charge the IRP with “comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws,” they were amended by the Board in 2012²⁷ to add a reference to the “standard

of review” that the IRP “must apply” to any such case:

- (a) did the Board act without conflict of interest in taking its decision?;
- (b) did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- (c) did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?²⁸

Thus, instead of a *substantive* standard – did the Board act in compliance with the Bylaws, including the substantive restrictions on its powers? – the IRP evaluates only whether the Board’s decision-making *process* was somehow tainted by misconduct, or by a failure to exercise care or independent judgment.

(2) No Binding Decisions.

Even when the IRP had the power to “declare” Board action inconsistent with the Bylaws or *ultra vires*, it has never had the power to bind the Board to those declarations. The Advisory Committee on Independent Review, whose 1999 recommendations formed the basis for IRP processes and procedures, disclaimed any need to vest that power in the IRP:

The Committee believes that the IRP should serve as a truly independent body whose authority rests on its independence, on the prestige and professional standing of its members, and on the persuasiveness of its reasoned opinions. *The Committee does not believe that the IRP should have the authority to overrule or stay decisions of the ICANN Board; such a power would create a substantially less-accountable super-Board.* Rather, the Committee believes that the ICANN Board should retain ultimate authority over ICANN’s affairs - after all, it is the Board, not the IRP, that will be chosen by (and is directly accountable to) the membership and the supporting organizations.

The role of the IRP, then, is to consider (and investigate, where appropriate) claims that the ICANN Board has violated its own Articles of Incorporation and/or Bylaws, to reach a reasoned and persuasive decision, and to make public its conclusion and the rationale for it. Such a decision will have to be taken seriously by the Board, which retains ultimate authority to act on its conclusions.²⁹

The question of whether the Board has, in fact, “taken seriously” the decisions of the IRP over the years is open to debate; but what is not open to debate is that there is no remedy if it chooses not to do so, and that, as a consequence, “the ultimate arbiter of any dispute is the very body which is alleged to have made the incorrect or inappropriate decision in the first place.”³⁰

Asking the Board to police its own powers is not only a fool’s errand, it violates a “bedrock principle of constitutionalism”:

No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time . . . It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. . . .³¹

(3) Inadequate institutional weight and prestige.

The IRP process is, currently, built along the model of ordinary commercial arbitration; the entire function has been outsourced to a third party “international dispute resolution provider” chosen by the ICANN Board – currently, the International Center for Dispute Resolution, an institution with long-standing experience in providing arbitration and mediation services for complex international commercial

disputes – which has the responsibility for choosing the members of the IRP “Standing Panel”, designating a “Chair” of the Standing Panel, determining the size (1-person or 3-person) of the IRP members who will hear any individual dispute, and assigning individual members of the Standing Panel to serve as panelists to hear individual disputes.³²

This is a familiar arbitration mechanism that functions quite effectively for ordinary commercial disputes. But it is ill-designed for the very different purpose the IRP is meant to serve, which is to determine whether the Board has transgressed the limits on its powers set forth in its foundational documents. It is hardly reasonable to give a single arbitrator, chosen by a third-party provider, who may have little or no prior contact with or understanding of the complex world of DNS policy-making, who may never again be called upon to examine any aspect of ICANN’s operations or to consider its role in the management of DNS resources, who has no body of prior precedential decisions to use as a guide to decision-making and little or no incentive to add to the stock of well-reasoned and persuasive decisions, the power to decide (with no appeal of the decision permitted) that Board action contravened fundamental principles embodied in the corporation’s foundational documents and was therefore invalid. The Board’s reluctance, over the years, to allow *this* process to exercise *that* power is, in this sense, entirely understandable.

Like the stakeholder community, the “IRP Standing Panel” never meets as a single collective body, never speaks with a single collective voice, and has accordingly never developed the institutional weight and prestige that would enable it to function as a co-equal counterweight to the Board. The IRP’s mission is far removed from ordinary commercial arbitration, and will require a different structure, modeled more closely on the constitutional courts common in civil law countries – institutions whose task, like the IRP’s, is to determine whether the terms and limitations set forth in the relevant foundational documents have been complied with. It is unthinkable that the operation of a nation’s constitutional court would be outsourced in this manner to a third-party dispute resolution provider, and we believe it should be equally unthinkable for the IRP.

CONCLUSION

Not surprisingly, given a fragmented stakeholder community with no means to correct improper Board action and a largely impotent IRP process, the only constraint on the Board's exercise of its powers has been provided by the U.S. government's contractual oversight, and by the fear that the "Sword of Damocles" – a decision by the U.S. government to withdraw the "IANA functions" from ICANN's purview entirely and award them to a third party – could descend if the Board stepped too far out of line.³³ Needless to say, that is precisely why the design of a new suite of checks and constraints is so critical a precondition to the IANA transition and the elimination of that contractual oversight role.

An acceptable transition accountability proposal must correct these deficiencies by generating the kind of internal "push back" that can effectively keep the Board within the prescribed limits: new processes for greater stakeholder community control over Board actions, and a reconfigured Independent Review Process that functions effectively as a third "branch" within ICANN, independent of the both the Board *and* the stakeholders, with neither a policy-making nor a policy-implementation role, which can serve as a neutral arbiter in disputes regarding compliance with the limitations on the exercise of the corporation's powers.

NOTES

1. David Post & Danielle Kehl, *Controlling Internet Infrastructure: The “IANA Transition,” and Why It Matters for the Future of the Internet, Part I*, available at <http://www.newamerica.org/oti/controlling-internet-infrastructure/>.

2. See *id.*, at 19-24. While there are many descriptions of the nature and sources of this power, Michael Froomkin’s formulation remains, perhaps, the most succinct:

[C]ontrol over the DNS confers substantial power over the Internet. Whoever controls the DNS decides what new families of “top-level” domain names can exist (e.g., new suffixes like .xxx or .union) and how names and essential routing numbers will be assigned to websites and other Internet resources. *The power to create is also the power to destroy, and the power to destroy carries in its train the power to attach conditions to the use of a domain name.* . . .

[T]he power conferred by control of the DNS could be used to enforce many kinds of regulation of the Internet [such as] content controls on the World Wide Web (WWW) . . . A more subtle, but already commonplace, use of the root authority involves putting contractual conditions on access to the root. ICANN has imposed a number of conditions on registrars and . . . registries on a take-it-or-be-delisted basis . . .

A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route around the APA*, 50 Duke L.J. 17 (2000), available at <http://personal.law.miami.edu/~froomkin/articles/icann-main.pdf> (hereinafter Froomkin, *Wrong Turn*), at 47-48 (emphasis added). See also *Con-*

trolling Internet Infrastructure, *supra* note 1, at 19-24 (“Why DNS Policy Matters”), and sources cited there.

3. See *Controlling Internet Infrastructure*, *supra* note 1, at 29-30.

4. FIFA is a trenchant illustration of how badly awry a non-governmental international organization controlling a valuable global resource with virtually no oversight can go. See, e.g., Tharoor, “How FIFA became the world’s most powerful and loathed sports organization,” available at <https://www.washingtonpost.com/news/worldviews/wp/2015/05/27/how-fifa-became-the-worlds-most-powerful-and-loathed-sports-organization/> and Pielke, “How Can FIFA Be Held Accountable?,” available at http://sciencepolicy.colorado.edu/admin/publication_files/2013.01.pdf.

5. The National Telecommunications and Information Administration (NTIA) announced its intention to undertake the IANA transition in March, 2014. See “NTIA Announces Intent to Transition Key Internet Domain Name Functions” (March 14, 2015), available at <http://www.ntia.doc.gov/press-release/2014/ntiaannounces-intent-transition-key-internet-domain-name-functions>. During the ensuing 16 months, ICANN has been managing a very complicated process, involving dozens of separate working groups and sub-groups, and advisory committees and sub-committees, panels of experts, etc. the goal of which is to submit a consensus transition proposal to the ICANN Board before the Board meets in Dublin in October, 2015 which will form the basis of the proposal which ICANN will submit to NTIA some time thereafter.

Our focus in this paper is on one small but critical component of the overall plan, the so-call “ICANN Accountability” proposal for “changes to ICANN’s accountability arrangements which must be in place, or committed to, prior to the IANA transition” on which the Cross-Community Working Group-Accountability (CCWG) has been laboring. See <https://community.icann.org/dis->

play/acctcrosscomm/CCWG+on+Enhancing+ICANN+Accountability. We recognize that many – perhaps all – of the issues that we raise below have been discussed at great length in the CCWG working sessions, and that the final accountability proposal will surely address them in one form or another. We have intentionally omitted from this paper reference to (or analysis of) the various proposals that have been circulating within the CCWG, preferring instead to articulate here the principles that we believe should govern any evaluation of the final accountability proposal, and we postpone our examination of the CCWG’s work for the next paper in this series after that various draft proposals have crystallized into more-or-less final form.

6. As Weber and Gunnarson explain succinctly:

ICANN’s corporate organization vest[s] 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.

Weber & Gunnarson, *A Constitutional Solution for Internet Governance*, 14 Col. J. Sci & Tech. 1, 11-14 (2012), available at <http://stlr.org/download/volumes/volume14/WeberGunnarson.pdf> (hereinafter *Constitutional Solution*). ICANN has been criticized, among other things, for having a board and staff members of the organization that levy broad, unchecked power, see e.g. Milton Mueller et al., “Comments of the Internet Governance Project on the ICANN transition,” available at <http://www.internetgovernance.org/wordpress/wp-content/uploads/IGP-June09NTIAcomment.pdf>. “There is no clear, well-established division of responsibility between the bottom up policy making organs (the Supporting Organizations and Advisory Committees) and the Board. The Board is all-powerful and too far removed from what should be its membership. The

bottom up process is little more than a chaotic, slow and reversible attempt to compete for the attention of the Board,” and “With so many issues and people bearing down on them, the Board relies increasingly on its professional staff to manage its information flow – which gives the policy staff enormous discretionary, unaccountable power over the outcome of policy and process disputes”; Rolf H. Weber, “Accountability in Internet Governance,” *International Journal of Communications Law & Policy* (2009), http://ijclp.net/files/ijclp_web-doc_8-13-2009.pdf. (“Due to the weak structuring of the “organization”, the staff members’ independency is relatively large... the staff does not have incentives to spend scarce time and resources on developing means of downward accountability to the netizens.”); for its lack of judicial review and appeals mechanism, see “Enhancing Legitimacy in the Internet Corporation for Assigned Names and Numbers,” Markle Foundation (2002), <http://www.markle.org/past-initiatives/enhancing-legitimacy-internet-corporation-assigned-names-and-numbers-icann> (“ICANN has been criticized for the fact that, while it actively seeks input from outside sources, it is under no obligation to listen to them. There is no process of appeal – no independent body can review, and if necessary, overturn decisions of ICANN”); for failing to adhere to any reasonable definition of “consensus” as justification for its action, see Dan Hunter, “ICANN and the Concept of Democratic Deficit,” 36 Loy. L.A. L. Rev. 1149 (2003), <http://digitalcommons.lmu.edu/cgi/view-content.cgi?article=2372&context=llr> (ICANN “adheres to ‘consensus’ as the basis of its legitimacy and as justification for the actions it undertakes [but] this idea is never very well articulated, and many times it is simply ignored... ICANN professes [consensus] as the basis of its actions but rarely consults and has few if any mechanisms to gauge consensus.”).

7. We are by no means the first to approach ICANN accountability problem from this direction. Weber & Gunnarson’s *Constitutional Solution for Internet Governance*, *supra* note 6, contains a thoughtful and comprehensive argument for the constitutional approach to ICANN’s governance dilemmas, and we have gratefully borrowed much from their work in what follows. Early drafts of the CCWG accountability proposals likewise speak of providing a “constitutional core for ICANN against which the Board and staff can be held to account,” and uses a “state analogy”

as one of the “core building blocks” of the accountability project. See CCWG 2nd Draft Report (August 2015), at 20-23, available at <https://www.icann.org/public-comments/ccwg-accountability-2015-08-03-en>. See also Post, “Cyberspace’s Constitutional Moment,” *American Lawyer* Nov. 1998, available at <http://www.temple.edu/lawschool/dpost/DNSGovernance.htm>; Kaplan, “A Kind of Constitutional Convention for the Internet,” available at <http://partners.nytimes.com/library/tech/98/10/cyber/cyberlaw/23law.html>.

This approach also draws much from the broad vision of constitutionalism found in the work of Lon Fuller – most notably, in *The Morality of Law* (1960), where he articulates and defends his position that:

. . . drafting and administering rules
 . . . governing the internal affairs
 of clubs, churches, schools, labor
 unions, trade associations, agricul-
 tural fairs, and a hundred and one
 other forms of human association . .
 . involves *constitutional* law, in that
 it involves the allocation among the
 various institutions of our society of
 legal power - that is, *the authority to
 enact rules and to reach decisions that
 will be regarded as properly binding
 on those affected by them.*

Fuller, *The Morality of Law* (1960) at 124-5 (emphasis added).

8. Madison, *The Federalist* No. 51.

9. Weber & Gunnarson, *Constitutional Solution*, *supra* note 6, at 5 (emphasis added). See also *id.* at 62-4:

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. Each of these events raised essentially the same question of enforceable limits on sovereign power.

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, reverse its anti-trust policy without explanation, and charge exorbitant application fees for the privilege of operating a top level domain.

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. 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.*

10. ICANN is incorporated as a non-profit corporation in California. Whether it will continue to be so, or will move its corporate situs elsewhere, is one of the more controversial and complex issues surrounding the entire IANA transition, and we do not intend to enter that jurisdictional thicket here. It is highly likely that it will remain in its current status, the result of which is that it is subject to the full panoply of U.S. and California law criminal and civil, applicable to ordinary corporate behavior. Termination of the IANA Functions Contract will not alter that in any way; in the performance of its ordinary corporate functions – hiring and firing employees, entering into contracts with suppliers and customers, promulgating internal policies regarding workplace conduct – ICANN will continue to be held “accountable” for its actions under U.S. law.

But ICANN’s accountability deficit concerns precisely the performance of its *extra*-ordinary functions - its management of DNS policy formation, and its exercise of the coercive power to bind Internet users to uniform rules arising from its control of critical Internet resources – that falls outside the purview of ordinary corporate and commercial law. See Weber & Gunnar-

son, *Constitutional Solution*, *supra* note 6, at 48-49:

[O]ne might still object that treating a private corporation like ICANN as a government for purposes of its structure and powers flies in the face of how private corporations are ordinarily viewed. [But] 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*, 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.

11. Madison, *The Federalist*, No. 47.

12. *Id.*, No. 48.

13. There are, unfortunately, many historical examples – from the constitutions of the various states within the former Soviet Union to the many tyrannical authoritarian regimes that subscribe to the International Declaration of Human Rights – of the principle that the words used in constitutional documents are not self-executing, and that the loftiest statements of constitutional ideals are worth, as the saying goes, no more than the paper they are printed on if they are not accompanied by sufficiently powerful enforcement tools.

14 Madison, *The Federalist*, No. 51 (emphasis added). Madison goes on:

It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were

angels, no government would be necessary. . . . In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. . . . (*Id.*)

15. *Id.*, No. 48.

16. See *Controlling Internet Infrastructure*, *supra* note 1, at 22-26.

17. ICANN's structure is Byzantine in its complexity. The "stakeholder community" is organized into three Supporting Organizations: the Generic Names Supporting Organization (GNSO), comprising a number of sub-groups representing the various interests (registries, registrars, intellectual property holders, commercial and non-commercial users) involved in DNS policy; the Country Code Names Supporting Organization (ccNSO), comprising the registry operators for the various country code top-level domains (.uk, .jp, .br, etc.); and the Address Supporting Organization, comprising the main entities involved in allocated Internet Protocol Addresses (known collectively as the Regional Internet Registries, or RIRs). In addition, the Bylaws provide for four Advisory Committees: 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 ICANN Bylaws, available at <https://www.icann.org/resources/pages/governance/bylaws-en>; See also <https://www.icann.org/resources/pages/chart-2012-02-11-en>; <https://www.icann.org/en/system/files/files/management-org-o8sep15-en.pdf>; <http://gnso.icann.org/en/about>.

Each of the Supporting Organizations and Advisory Committees has a role in selecting members of the Board of Directors; *see infra*, note 24.

18. See Weber and Gunnarson, *supra* note 6, at 64-5, describing the “consistent” view that ICANN’s mission is a “technical and limited” one, and arguing that “the narrow mission for which ICANN was created marks the outer boundary of its legitimate authority.”

19. See *Controlling Internet Infrastructure*, *supra* note 1, at 19-24.

20. See “Internet Governance: What if the Sky Really is Falling?,” available at <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/04/internet-governance-what-if-the-sky-really-is-falling/>; “ICANN, Copyright Infringement, and the Public Interest,” available at <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/09/icann-copyright-infringement-and-the-public-interest/>; Post, “Internet Infrastructure and IP Censorship,” available at <http://www.ipjustice.org/digital-rights/internet-infrastructure-and-ip-censorship-by-david-post/>.

21. There are many examples of actions taken by the ICANN Board and/or ICANN staff that not based on any clear stakeholder consensus, and this has been a familiar theme in much of the writing and commentary from both within and without the ICANN community for many years. See generally Mueller, *Networks and States: The Global Politics of Internet Governance* (2010); Gunnarson, “A Fresh Start for ICANN,” available at http://techpolicyinstitute.org/files/gunnarson_icann%20white%20paper.pdf; Kruger, “Internet Governance and the Domain Name System: Issues for Congress,” available at <http://fas.org/sgp/crs/misc/R42351.pdf>; Weber & Gunnarson, *Constitutional Solution*, *supra* note 6; Laura DeNardis, *Internet Points of Control as Global Governance*, available at https://www.cigionline.org/sites/default/files/no2_3.pdf.

22. See Gunnarson, “A Fresh Start for ICANN,” available at http://techpolicyinstitute.org/files/gunnarson_icann%20white%20paper.pdf:

At the heart of that structure is the Board of Directors, which holds unreviewable power to act for ICANN. The Board has complete control over ICANN’s policies, finances, and even the president—over whom the Board has the power to appoint and

dismiss. Not even the Government Advisory Committee, composed of governmental representatives, has authority to slow or reverse a mistaken course of action by the Board. Neither a request for reconsideration nor an Independent Review Panel can reverse a Board decision: they can only produce recommendations that the board is free to reject. These powers mean that ICANN’s efforts at accountability and transparency go only as far as its board allows. . . . [T]he Board answers to no one. Consequently, ICANN answers to no one.

23. On the original decision by ICANN’s founders not to have statutory “members,” see Weber & Gunnarson, *Constitutional Solution*, *supra* note 6, at 12-13. On California law, see the memo from ICANN’s counsel (Jones, Day), available at <https://mm.icann.org/pipermail/accountability-cross-community/attachments/20150208/ed62a5b3/AccountabilityQuestionsforCCWG-fromJonesDay-0001.pdf>. (Explaining that the only “legal mechanism available to the community to seek redress if the community believes that the Board is acting contrary to its purpose or the Bylaws . . . is to contact the California Attorney General, which has jurisdiction over ICANN as a California nonprofit public benefit corporation”).

24. A “complex representational calculus,” Weber & Gunnarson, *Constitutional Limitations*, *supra* note 6, at 24-25, is used for selecting members of the Board of Directors. The Board consists of 15 voting and 6 non-voting members. Eight of the voting members (a majority) are selected by a Nominating Committee; the Nominating Committee’s 17 members are selected by the At-Large Advisory Committee, the Generic Names Supporting Organization, the Country Code Names Supporting Organization, a representative of “academic and similar organizations,” the Internet Engineering Task Force, and the ICANN Technical Liaison Group. Each of the three Supporting Organizations (see *supra* note 17) – the Address Supporting Organization (“ASO”), the ccNSO, and the GNSO – selects two voting members of the Board. One nonvoting liaison each is selected by the Government Advisory Committee (“GAC”), the Root Server System Advisory Com-

mittee (“RRSAC”), the Security and Stability Advisory Committee (SAC), the Technical Liaison Group, ALAC, and IETF. Directors hold office during staggered terms of three years each, and may be removed by a ¾ vote of the Board. See ICANN Bylaws, *supra* note 17, Art. IV.

25. Furthermore, the content of the Bylaws is entirely within the Board’s control. See ICANN Bylaws, *supra* note 17, Art. XIX (giving a 2/3 majority of the Board to power to “alter[], amend[], or repeal[]” any provision of the Bylaws). Thus, even if an adequate set of limitations on the Board’s powers were to be clearly set forth in the Bylaws, the stakeholders would be entirely powerless if the Board chose to expand or eliminate those limitations.

26. ICANN Bylaws, *supra* note 17, at Article IV, Sec. 3.

27. See *supra* note 25.

28. ICANN Bylaws, *supra* note 17, at Article IV, Sec. 3(4). See *Controlling Internet Infrastructure*, *supra* note 1, at 14, n. 43 for an explanation of the circumstances leading up to this change in the Bylaws:

After receiving an adverse Independent Review Panel (“IRP”) decision in 2008 regarding its handling of the application for a new .xxx TLD, ICANN initiated a process leading to a change in the provision in its By-Laws dealing with independent review. The original provision, which charged the IRP with “comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws,” was changed to a substitute provision, adopted in 2012, with a much more limited scope; the IRP would henceforth only consider whether the Board “act[ed] without conflict of interest... exercised due diligence and care, [and] exercise[d] independent judgment” in making any particular decision.

See also Independent Review Bylaws Revisions,

available at <https://www.icann.org/en/system/files/files/proposed-bylaw-revision-irp-26oct12-en.pdf>; Weber & Gunnarson, Constitutional Solution, *supra* note 6 at 69 (the current IRP process is a “paradigm of procedural unfairness”; the fact that “ICANN has no effective appeal mechanism is troubling, given ICANN’s origins and its repeated written agreements with the United States”); Maher, “Accountability and Redress,” available at http://www.circleid.com/posts/20140829_accountability_and_redress/ (describing ICANN’s “manipulation of its By-Laws” as imposing a “severe limitation” on the IRP’s powers, and suggesting that ICANN “decided that a change in the ground rules was needed in order to avoid further and similar embarrassments” after the .xxx debacle).

29. Final Report of the Advisory Committee on Independent Review, Comment 21, available at <https://archive.icann.org/en/meetings/santiago/irac-final-report.htm>.

30. Gunnarson, “A Fresh Start for ICANN,” available at http://techpolicyinstitute.org/files/gunnarson_icann%20white%20paper.pdf.

31. Madison, The Federalist, No. 10. As the U.S. Supreme Court put it in the early (1798) case of *Calder v. Bull*, 3 U.S. 386, 388, “a law that makes a man a Judge in his own cause” is an act “contrary to the great first principles of the social compact.” For the history of this principle of “Nemo iudex in causa sua,” see D.E.C. Yale, *Iudex in Propria Causa: An Historical Excursus*, 33 CAMBRIDGE L.J. 80 (1974).

32. See “Reconsideration and Independent Review,” available at <https://www.icann.org/resources/pages/reconsideration-and-independent-review-icann-by-laws-article-iv-accountability-and-review>.

33. See *Controlling Internet Infrastructure*, *supra* note 1, at 17-18.

