

LEGITIMACY AND EXPERTISE IN GLOBAL INTERNET GOVERNANCE

OLIVIER SYLVAIN*

INTRODUCTION.....	31
II. EARLY DOMAIN NAME ADMINISTRATION	32
III. DOUBTS ABOUT ICANN’S LEGITIMACY TO GOVERN THE INTERNET	33
IV. THE NETMUNDIAL INITIATIVE	34
V. BRINGING GOVERNMENTS INTO INTERNET GOVERNANCE.....	37
VI. DEFINING THE ICANN BOARD’S DEFERENCE TO THE GAC	39
VII. GOVERNMENT REGULATION OF NETWORK MANAGEMENT: COMPARING U.S. BROADBAND POLICY	41
VIII. GOVERNMENTS, PUBLIC ACCOUNTABILITY, AND LEGITIMACY	43

INTRODUCTION

The nongovernmental multi-stakeholder organizations (MSOs) responsible for administering the Internet have been guided by several substantive engineering design principles, which we may reduce to the following three: stability, decentralization, and user empowerment.¹ These principles have ensured that the Internet is a dynamic platform for innovation and communication.

Over the course of the past decade, however, attention among policymakers and scholars has shifted gradually from substantive Internet design principles to the structure of Internet governance. Now that the Internet is one of the defining aspects of public life around the world, Internet MSOs, including in particular the Internet Corporation for Assigning Names and Numbers (ICANN), have been forced to formulate new decision making processes that account for its broad impact. At this new constitutive moment, ICANN and other nongovernmental Internet governance institutions have had to re-justify

* Olivier Sylvain, Associate Professor of Law, Fordham University School of Law. I am grateful to the editors of the Colorado Technology Law Journal and Dean Phil Weiser for the invitation to participate in the Silicon Flatirons Center’s 2014 Symposium on the Digital Broadband Migration.

1. Olivier Sylvain, *Internet Governance and Democratic Legitimacy*, 62 FED. COMM. L. J. 205, 206 (2010).

their authority to promulgate standards and regulate Internet use in the face of an array of stakeholders who are now making claims on substantive policy decisions.

ICANN and other Internet MSOs now face a new skepticism (or at least uncertainty) around the world about whether they can ever be legitimate decision makers without incorporating governmental participation. After all, global governance institutions in other substantive areas privilege nation-states above almost all other institutions. Governments generally carry the weight of legitimacy over contested geopolitical disputes in ways that few other organizations do.

ICANN has been responsible for administering the domain name and numbering system for the Internet addressing since the late 1990s. The Internet Assigned Numbers Authority (or IANA) function, as it is called, has long been the holy grail of global Internet governance. ICANN has responded to increasing doubts about its legitimacy by proposing a series of substantial reforms to its governance of the IANA function. Indeed, rather than use the expiration of its IANA contract with the U.S. government to insulate itself from any national governments, ICANN has proposed to implement a governance regime that would require more respect for national governments around the world.

These changes reflect a new era in which ICANN and other Internet policymakers can no longer view the Internet as separate or immune from geopolitics of the lived physical world. Like almost all other substantive areas, today the direction that Internet policy ought to take is hotly contested between rival nation-states—and the stakes could not be any higher. ICANN and other Internet policymakers should accordingly continue to reform existing Internet governance to accommodate these realities.

II. EARLY DOMAIN NAME ADMINISTRATION

In 1998, pursuant to an agreement with the U.S. Department of Commerce (DoC), ICANN became the administrator of the Internet's global domain name system.² This charge empowered ICANN to manage and assign unique names and numbers to users' point of contact with the network. By doing so, ICANN would ensure the reliable delivery of communications between users around the world.

This arrangement was mostly an unsurprising incident of history.³

2. ICANN, *Memorandum of Understanding Between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers* (2009), <https://www.icann.org/resources/unthemed-pages/icann-mou-1998-11-25-en>; see also *Statement of Policy, Management of Internet Names and Addresses*, 63 Fed. Reg. 31,741 (Dept. of Comm. June 5, 1998).

3. The Essay will not repeat the account that others have already exhaustively offered. See, e.g., Slavka Antonova, *Deconstructing an Experiment in Global Internet Governance: the*

The U.S. Department of Defense, in collaboration with top researchers at the University of Southern California's Information Sciences Institute and others around the country, had already developed, and was administering a system of unique Internet identifiers. To continue to grow, however, the Internet required the resources of a whole administrative regime that could be staffed by full-time technologists. In this vein, the U.S. government delegated the administration of the domain name system to ICANN, a California-based non-profit organization created for and devoted wholly to the task.

Specifically, through its 1998 IANA contract with the DoC, ICANN assumed the responsibility of attending to the strict technical concerns of administering domain names, number resources, and protocol parameters. ICANN was to do this by pursuing a "bottom-up, consensus-driven, multi-stakeholder" approach that reflects the genuine priorities and interests of the whole Internet user community.⁴ The DoC retained a supervisory role over the contract and would jealously hold it for the next sixteen years.

III. DOUBTS ABOUT ICANN'S LEGITIMACY TO GOVERN THE INTERNET

Many outsiders have never been at peace with this arrangement. For nation-state critics, ICANN should never displace the important role national governments play as the traditional representatives of their citizens' unique political aspirations and cultural identities. The prevailing assumption of most transnational governance regimes is that national governments legitimately embody the authentic will of their respective citizens in ways that few if any other organizations do or can.

It is in this vein that prominent nation-state critics of the U.S.-ICANN arrangement have argued for greater nation-state multilateralism in Internet governance. They point, for example, to the International Telecommunications Union (ITU), the transnational organization responsible for moderating and promulgating transmission and interconnection standards in telecommunications since the advent of telegraphy 150 years ago. As an agency of the United Nations, these ICANN critics argue, the ITU is more responsive to concerns about governmental participation and national sovereignty, or is at least accountable to a universally recognized (if sometimes maligned) multinational decision making body.

Nation-states are not alone in their discontent about the current global Internet governance regime. Many technologists, too, have argued for major reform. They, however, are adamantly opposed to enlarging

ICANN Case, 12 INT'L J. COMM. L. & POL'Y 1, 3 (2008).

4. *Welcome to ICANN!*, ICANN, <http://www.icann.org/en/about/welcome> (last visited Sept. 28, 2014).

nation-state participation. Their main recommendation is that governments, including that of the U.S., have little to no formal role in global Internet governance. These critics argue that ICANN today is not sufficiently independent from the political pressures of geopolitics. The hard work of administering the purely technical concerns that enable the Internet to operate as it does are at odds with the geopolitical questions that characterize disputes between nation-states. The latter are demonstrably animated by priorities that are orthogonal or just simply opposed to the core principles in Internet governance. They accordingly argue for ICANN's formal separation from all U.S. supervision or, more dramatically, the creation of an altogether new entity responsible for the IANA function but unobligated to any government.⁵

It is possible that transitioning the IANA function to a newly independent ICANN or other entity would cause far more administrative instability than it is worth.⁶ Consider ongoing efforts to reform ICANN from within. In 2009, in response to prodding from ICANN leaders, the DoC relinquished most of its formal oversight in an "Affirmation of Commitments" (AoC). While the U.S. retained a supervisory role over the all-important IANA function in 2009, the AoC also memorialized promises from ICANN to abide by specified frameworks for accountability and transparency that would ostensibly remove any appearances of unfair government interference. In accordance with the terms of the AoC, ICANN conducted two comprehensive reviews of its deliberations and operations to foster accountability and transparency. Among other things, these assessments have recommended reforms to the administration of the ICANN Board and to some of its advisory committees' notoriously shrouded decision making procedures.⁷

IV. THE NETMUNDIAL INITIATIVE

The argument for greater governmental participation is distinct, of

5. See, e.g., Brenden Kuerbis, *A Roadmap for Globalizing IANA*, INTERNET GOVERNANCE PROJECT (Mar. 3, 2014), <http://www.internetgovernance.org/2014/03/03/a-roadmap-for-globalizing-iana/>; see also *The 2nd At-Large Summit (ATLAS II), Final Declaration*, ICANN AT-LARGE SUMMIT II, (June 26, 2014), <http://atlas.icann.org/wp-content/uploads/2014/08/ATLAS-II-Declaration-with-appendix-RC9.pdf>; see generally ICANN AT-LARGE, <http://atlarge.icann.org/> (last visited Nov. 2, 2014).

6. See Milton Mueller, *Students School Faculty on IANA Transition: The Meissen Proposal*, INTERNET GOVERNANCE PROJECT (Aug. 4, 2014), <http://www.internetgovernance.org/2014/08/04/students-school-faculty-on-iana-transition-the-meissen-proposal/>.

7. See Accountability and Transparency Review Team 2, *Final Report of Recommendations*, 26–28 (Dec. 31, 2013), available at <http://mm.icann.org/pipermail/atrt2/attachments/20131231/db2a0ae7/ATRT2FinalReport-0001.pdf>; Accountability and Transparency Review Team, *Proposed Recommendations Request for Public Comment* (Oct. 20, 2010), available at <http://www.icann.org/en/about/aoc-review/atrt/proposed-recommendations-20oct10-en.pdf>.

course, from the one that ICANN and others have made for greater independence from any government participation. Critics on both sides nevertheless have aligned in their ambition to diminish the DoC's supervisory role. This is an opportunistic alignment of political convenience, of course, and not about a unified principle. After all, the two sets of critics want completely different outcomes.

To underscore the point, advocates of both sides shrewdly seized on revelations last year about the National Security Agency's surveillance techniques as an occasion to revisit the whole of global Internet governance. No less than the heads of ICANN, the Internet Engineering Taskforce (IETF, the standard-setting organization long responsible for developing the technical Internet transmission protocol), and others expressed "strong concern over the undermining of the trust and confidence of Internet users globally due to recent revelations of pervasive monitoring and surveillance" and an ambition to "accelerat[e] the globalization of ICANN and IANA functions, towards an environment to which all stakeholders, including all governments, participate on an equal footing."⁸ The President of Brazil delivered a stinging rebuke of the U.S.'s surveillance techniques during her speech to the General Assembly last September.⁹ She appended to this criticism concern about the U.S.'s supervisory control over the IANA function.

As far as most of us know, however, ICANN's governance was never at issue in the NSA's surveillance techniques. Intrepid news reporting on the matter revealed that the spy agency intercepted communications in the content and infrastructure layers of the Internet.¹⁰ It did not affect the manner by which data packets travel across the Internet to find their destination—the responsibilities to which the IANA function is addressed. The Snowden leaks nevertheless galvanized the two main sets of ICANN's critics. Nation-state and technologist critics acted on the recognition that Internet governance is as affected by geopolitical power plays as practically all other globally significant phenomena.

8. *Montevideo Statement on the Future of Internet Cooperation*, ICANN (Oct. 7, 2013), <http://www.icann.org/en/news/announcements/announcement-07oct13-en.htm>.

9. Julian Borger, *Brazilian president: US Surveillance a 'Breach of International Law'*, GUARDIAN (Sept. 24, 2013, 12:27 PM), <http://www.theguardian.com/world/2013/sep/24/brazil-president-un-speech-nsa-surveillance>.

10. See, e.g., James Ball, Julian Borger & Glenn Greenwald, *Revealed: How US and UK Spy Agencies Defeat Internet Privacy and Security*, GUARDIAN (Sept. 5, 2013), <http://www.theguardian.com/world/2013/sep/05/nsa-gchq-encryption-codes-security>; Glenn Greenwald, *XKeyscore: NSA Tool Collects 'Nearly Everything a User Does on the Internet'*, GUARDIAN (July 31, 2013), <http://www.theguardian.com/world/2013/jul/31/nsa-top-secret-program-online-data>; Spencer Ackerman & Glenn Greenwald, *How the NSA is Still Harvesting Your Online Data*, GUARDIAN (June 27, 2013), <http://www.theguardian.com/world/2013/jun/27/nsa-online-metadata-collection>.

In the months following the Snowden revelations, agitation by industry leaders, academics, civic society groups—as well as the governments of China, Russia, Iran, and several Arab and African nations—set in motion a remarkable convening in Sao Paulo, Brazil. In April 2014, this convening reevaluated the legitimacy and substance of Internet governance today. In the end, the NETmundial Initiative, as it is called, did not cause any formal material changes to ICANN governance, but it did articulate disaffection with the current state of affairs. The organizers announced an “historic” “set of principles to guide the evolution of Internet cooperation and governance” in the future.¹¹

Many politicians in the U.S. see the NETmundial Initiative as a serious threat to the Internet.¹² Some US politicians have openly tapped into xenophobic fears of a Chinese takeover of networked communications in response.¹³ Meanwhile, proponents of the status quo see the nation-state criticism as a veiled assault on the substantive design priorities that have guided ICANN policymaking to this point. Their skepticism is largely informed by the repressive policies and practices of the very countries that are most unhappy with technologies that by design subvert centralized authority. Proponents readily point to efforts by China and Iran, for example, to suppress the free flow of information among their citizens. Such practices, proponents argue, are a direct threat to the core design principles of the Internet.

U.S. administration officials did not say much in the months leading to the April convening, expressing only an interest in listening to criticisms and concerns.¹⁴ This equanimity, however, soon changed to

11. *The Brazilian Model for Internet Governance Presented at NETmundial Initial Scoping Meeting*, EU BRAZIL CLOUD CONNECT (Aug. 28, 2014), <http://www.eubrazilcloudconnect.eu/content/brazilian-model-internet-governance-presented-netmundial-initial-scoping-meeting>; See generally NETmundial, *NETmundial Multistakeholder Statement* (Apr. 24, 2014), <http://netmundial.br/wp-content/uploads/2014/04/NETmundial-Multistakeholder-Document.pdf>; see also Milton Mueller & Brenden Kuerbis, *Roadmap for Globalizing IANA: Four Principles and a Proposal for Reform*, (Aug. 27, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2408226.

12. See, e.g., Brian Fung, *What House Lawmakers Still Don't Get About Control of the Internet*, WASH. POST: THE SWITCH (Apr. 3, 2014), <http://www.washingtonpost.com/blogs/the-switch/wp/2014/04/03/what-house-lawmakers-still-dont-get-about-control-of-the-internet/>; Brendan Sasso, *House Votes to Halt Obama's Plan to Give Up Internet Authority*, NAT'L J. (May 22, 2014), <http://www.nationaljournal.com/tech/house-votes-to-halt-obama-s-plan-to-give-up-internet-authority-20140522>.

13. See Alina Selyukh, *ICANN chief: Russia, China, Will Not Hijack Internet Oversight*, REUTERS (Apr. 2, 2014, 5:20 PM), <http://www.reuters.com/article/2014/04/02/us-usa-internet-domainnames-idUSBREA311SE20140402>.

14. David McAuley, *Officials Knock Multi-Stakeholder Critics, Call NSA 'Issues' Feint for Internet Charges*, BLOOMBERG BNA ELEC. COM. & LAW REP., Nov. 7, 2013, 18 ECLR 2924 (Issue No. 44, Nov. 13, 2013).

acceptance. In March, just before the NETmundial meeting in Sao Paolo, the DoC announced its intention to relinquish its formal supervisory role over the IANA function by September 2015, when the IANA functions contract expires.¹⁵

As with their overblown concern about an imminent Chinese or Russian takeover of the Internet, some in the U.S. see the expiration of the DoC-ICANN relationship as nearly apocalyptic—or at least an unnecessary capitulation of monumental proportions.¹⁶ This formal transition of authority, however, does not mean that the U.S. government would have a diminished role in governance. According to the DoC, the decision to relinquish its oversight role is fully consistent with the U.S. government's announcement at the time of ICANN's creation to transition to a regime of privatized DNS administration.¹⁷ The U.S. will remain an active leader in Internet governance irrespective of the legal formalism through which it has supervised ICANN's authority since the late 1990s.

V. BRINGING GOVERNMENTS INTO INTERNET GOVERNANCE

After the DoC's announcement, ICANN almost immediately established a formal transition process in May 2014 and, only a few months later, solicited public comment on its plans for—specifically those for structuring ICANN's future stewardship of the IANA function, free from DoC oversight.¹⁸ The notice announces that the IANA function will transition “to the Internet community,” in collaboration with the major MSOs and other governance stakeholders. ICANN has assumed a leadership role and has been cultivating alliances and coalitions of stakeholders through the NETmundial Initiative.¹⁹ ICANN also has coupled the transition of the IANA function with efforts already under way to enhance transparency and accountability at the organization.²⁰

As skeptical as proponents have been of the nation-state critique, ICANN has also sought to honor, and even enlarge, nation-state participation. ICANN's bylaws require the creation of a Governmental

15. See Press Release, Nat'l Telecomm. Info. Admin., NTIA Announces Intent to Transition Key Internet Domain Name Functions (Mar. 14, 2014), available at <http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>.

16. Fung, *supra* note 12; Sasso, *supra* note 12.

17. *Id.*

18. ICG *Charter Open for Public Comments*, ICANN (Aug. 8, 2014), <https://www.icann.org/news/announcement-2014-08-08-en>.

19. Fadi Chehadé, *Transition from U.S. Government has Four Work Tracks*, ICANN BLOG (May 20, 2014), <http://blog.icann.org/2014/05/transition-from-u-s-government-has-four-work-tracks/>.

20. See, e.g., *Enhancing ICANN Accountability: Process and Next Steps*, ICANN (Aug. 14, 2014), <https://www.icann.org/resources/pages/process-next-steps-2014-08-14-en>.

Advisory Committee (GAC), which, today, is composed of over 140 governments (nation-states and others), as well as over two dozen transnational organizations that act as GAC observers.²¹ The GAC's role is to "consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues."²² The GAC meets as regularly as ICANN itself convenes, and serves as a general sounding board for geopolitical disputes that are of special importance to governments. However, it may not be particularly important to the technical administration of the IANA function. Rather than acting in a direct legislative fashion, the Committee instead may act by presenting "to the Board directly," or by "recommending action or new policy development or revision to existing policy."²³ The Board, in turn, can reject the GAC's advice on any matter with a simple majority vote of its own members.²⁴

ICANN's recent resolution of high-profile disputes around two different applications for new generic top level domain names, or gTLDs, illustrate how the GAC's advice generally works. Several non-European registries recently applied to operate the .vin and .wine gTLDs. Several European governments interposed a request that ICANN impose additional safeguards for those gTLDs for fear that, without protections, the geographic identification would be diluted or negatively affected.²⁵ In response to the requests the GAC held its own proceedings, and advised the ICANN Board that no consensus exists, in international law or elsewhere, on whether geographically significant names like Bordeaux or Champagne should be given special protection during the evaluation of the gTLD applications.²⁶ The ICANN Board (really, the ICANN Board's New gTLD Program Committee) adopted the GAC's advice, relying also on independent legal analysis of a French international law expert. The Board determined that there was no international consensus on the issue, and that it could not impose a new rule in the absence of one.²⁷

21. See generally ICANN Bylaws, Art. XI, Sec. 2, Part 1(b), Feb. 7, 2014, available at <https://www.icann.org/resources/pages/bylaws-2012-02-25-en#XI>.

22. *Id.* at Art. XI, Sec. 2, Part 1(a).

23. *Id.* at Art. XI, Sec. 2, Part 1(i).

24. *Id.* at Art. XI, Sec. 2, Part 1(j) & (k).

25. See generally Letter from Fadi Chehadé, Pres. and CEO of ICANN, to Anna Eshoo, H. Rep. (Aug. 11, 2014), available at <https://www.icann.org/en/system/files/correspondence/chehade-to-eshoo-11aug14-en.pdf>.

26. It also recommended that the Board seek independent research to verify the position. See generally Annex 1 to Resolution 2014.06.06.NG02, ICANN, June 6, 2014, available at <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-06jun14-en.pdf>.

27. Letter from Fadi Chehadé, Pres. and CEO of ICANN, to Anna Eshoo, H. Rep. (Aug. 11, 2014), *supra* note 25. (The European Commission, as well as France and other Western European governments and organizations asked ICANN's Board to reconsider this preliminary

The other TLD dispute concerns Amazon's bid for the ".amazon" generic top level domain name.²⁸ The GAC voted in summer 2013 to support the strong opposition to the application of representatives from Brazil, Peru, and Argentina. They argued that the "amazon" name, notwithstanding the existence of the online retail behemoth's trademark, has a long and rich history associated with the South American region. The Committee decided not to allow the Amazon application to proceed. After letting several months pass so that GAC and Amazon could negotiate a settlement, the Board finally announced that the GAC advice was entitled to a strong presumption against awarding the TLD to Amazon. The Board relied, moreover, on outside legal analysis that concluded that there is no international law that obligates the rejection or acceptance of the ".amazon" application.²⁹ On these grounds, the Board could not generate a consensus that would allow the application to proceed.

VI. DEFINING THE ICANN BOARD'S DEFERENCE TO THE GAC

The transition of the IANA function to a fully independent transnational body marks a defining moment in the evolution of global Internet governance. To be sure, it is still early; the details of the administration of the system of unique domain names and numbers after the DoC-ICANN IANA contract expires in September 2015 remain unclear. Various groups, including national governments and major industry stakeholders, are still contesting the composition of the committee responsible for the transition,³⁰ and the legitimacy of the process that will produce the final plan.³¹ However, there is now a growing consensus that whatever emerges next, institutional decision making mechanisms ought to do more to accommodate nation-states in decision making than the current approach requires. Until recently,

conclusion. They argued for stronger protections for "geographic indication" in the administration of those gTLDs, including protection for the second level domain name (e.g., *bordeaux.wine*)).

28. Paul Sloan, *Amazon.com's Domain Power Play: We Want to Control Them All*, CNET (June 21, 2012, 4:00 AM), <http://www.cnet.com/news/amazon-coms-domain-power-play-we-want-to-control-them-all/>.

29. Letter from Stephen D. Crocker, Chair of Bd. of Dirs. of ICANN, to Heather Dryden (Apr. 7, 2014), <https://www.icann.org/en/system/files/correspondence/crocker-to-dryden-07apr14-en.pdf>.

30. See David McAuley, *Three Co-Chairman for IANA Planning Group, But Secretariat Details Remain Murky*, 19 ELECTRONIC COM. & L. REP. 928, 928 (2014); see also David McAuley, *ICANN Bends to Community Pushback, Takes More Neutral IANA Transition Role*, 19 ELECTRONIC COM. & L. REP. 779, 779 (2014).

31. See David McAuley, *ICANN Should Defer to Community More in Draft IANA Transition-Process, Groups Say*, 19 ELECTRONIC COM. & L. REP. 619, 619-20 (2014); see also David McAuley, *Two Seats or Five for GAC? ICANN Asks IANA Planning Group to Decide*, 19 ELECTRONIC COM. & L. REP. 900, 900 (2014).

existing ICANN bylaws required nearly all stakeholders and constituencies—including nation-state governments—to be treated as equals. The now-emerging consensus seems to be that governments have an important claim to political legitimacy and consequently ought to have a far more privileged role in substantive Internet policymaking than the current state of affairs requires.

The GAC's role at ICANN is the main focus of this reform. As I explain above, under the existing ICANN bylaws the GAC is to provide "advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's activities or policies and laws or international agreements."³² This will likely remain the guiding mandate in the future. The question, however, will be how far ICANN—really, the ICANN Board, which is comprised of sixteen members, eight of whom are elected and eight others who are *ex officio*—should go to incorporate nation-state involvement.

Late in summer 2014, ICANN proposed for public comment a reform of its bylaws that would "incorporate a higher voting threshold for the Board to determine not to follow the advice of the Governmental Advisory Committee."³³ The current rule requires the Board either to accept the advice by a simple majority of its members or otherwise negotiate a solution with the GAC. The new rule would require that two-thirds of the Board's members vote to take action that is inconsistent with GAC advice.³⁴

This reform refines ICANN decision-making processes to better account for geopolitical realities that are orthogonal to the institution's technical responsibilities under the IANA contract. The Board will likely be unable generate a two-thirds majority on disputes that overwhelmingly affect national policies and laws or international treaties. To be sure, the proposal does not detail which kinds of issues on which the Board ought to defer to GAC advice, but, as the recent disputes involving .vin and .amazon indicate, the Board will account for regional or national geopolitical concerns depending on the permutation of problems that arise in each case. These will be cases for which there is no objectively correct technological answer. However, there will be other times when technological concerns—as compared, for example, to stability concerns—will trump geopolitical considerations, and the Board

32. ICANN Bylaws, Art. XI, Sec. 2, Part 1(a), *available at* <https://www.icann.org/resources/pages/bylaws-2012-02-25-en>.

33. *Proposed Bylaws Changes Regarding Consideration of GAC Advice*, ICANN, <https://www.icann.org/public-comments/bylaws-amend-gac-advice-2014-08-15-en> (last visited Oct. 6, 2014).

34. *See id.* These reforms had been under consideration for well over year, even before the NETmundial Initiative started.

will be able to muster a two-thirds majority.³⁵ In any event, those decisions will be made by members who in the aggregate will be moved one way or another by the advice they receive from the GAC.

The two-thirds vote threshold is not completely arbitrary. It appears throughout the Bylaws in connection with other features of ICANN administration, including, for example, for the removal of officers or Board committee members.³⁶ More pertinently, the two-thirds vote threshold for Board disapproval also currently exists in regards to recommendations from the Generic Names Supporting Organization (GNSO) to the ICANN Board. The GNSO is one of three major “supporting organizations” within ICANN.

The GNSO’s jurisdiction is gTLD policymaking and, as such, it makes strictly technical recommendations.³⁷ It has generally followed the “bottom-up, consensus-driven, multistakeholder” model that has defined domain name governance since the late 1990s and, as such, is celebrated among the strongest proponents of a fully independent ICANN.³⁸ Interestingly, the two-thirds vote reform proposal for Board disapproval of GAC advice creates a new mechanism that will force the Board’s voting members to explicitly and deliberately balance the technical administration of the domain system against far more geopolitical concerns that are ostensibly outside of the formal expertise of the GNSO.

VII. GOVERNMENT REGULATION OF NETWORK MANAGEMENT: COMPARING U.S. BROADBAND POLICY

The problems today in global Internet governance are challenging, but they are not altogether unfamiliar to observers of Internet governance and policymaking in the U.S. Here, not unlike the administration of the system of domain names and numbers, policymakers over the past decade and a half have had to confront questions about the authority of federal, state, and local governments to regulate broadband network management. At least as to federal regulation, the D.C. Circuit in its *Verizon v. FCC* opinion determined for the first time that the Federal Communications Commission (FCC) has the proper authority to regulate Internet service providers’ administration of Internet transmissions to

35. See Vinton G. Cerf, Patrick S. Ryan, & Max Senges, *Internet Governance Is Our Shred Responsibility*, 10 ISJLP 1, 16 (2014).

36. See ICANN Bylaws, Art. XII, Sec. 1, available at <https://www.icann.org/resources/pages/bylaws-2012-02-25-en>; see also ICANN Bylaws XIII, Sec. 3, available at <https://www.icann.org/resources/pages/bylaws-2012-02-25-en>.

37. See generally *GNSO Council*, ICANN | GNSO (Aug. 18, 2014), <http://gns0.icann.org/en/about/gns0-council.htm>.

38. See, e.g., Brendan Kuerbis, *Solving the GAC-GNSO Participation Problem*, INTERNET GOVERNANCE PROJECT (Aug. 1, 2014), <http://www.internetgovernance.org/2014/08/01/solving-the-gac-gns0-participation-problem/>.

their subscribers.³⁹

In the late 1990s and first half of the 2000s, the U.S. implemented a policy of regulatory forbearance on Internet transmission generally, and on broadband network management in particular. Federal regulators essentially ceded the duty of regulating the manner in which backbone network operators and local service providers transmit Internet communications to nongovernmental standard setting organizations. In its 2008 adjudication of a dispute about Comcast's notorious practice of throttling users' connections, the FCC explicitly relied on the transmission standards promulgated by IETF as authority for whether Comcast was acting unlawfully.⁴⁰ The Court of Appeals for the District of Columbia overturned the FCC's order a couple years later, explaining that the agency did not have any regulatory authority to adjudicate disputes about network management.⁴¹ The court rejected the claim that existing language in the Communications Act was sufficient to give the agency positive regulatory authority over Internet transmission practices by local service providers.

Importantly, the D.C. Circuit never reviewed (or felt it had to review) the substantive decision that the FCC had reached about Comcast's practice of degrading subscribers' services.⁴² It focused solely on the threshold jurisdictional question, concluding that the enforcement action against Comcast was not "reasonably ancillary" to the Commission's statutorily mandated responsibilities.⁴³

By the time the D.C. Circuit published its opinion on the Comcast adjudication, the agency already had initiated a rulemaking proceeding on how best to preserve and promote an "Open Internet."⁴⁴ After nearly two years of public comment and deliberation, the FCC published a report and order that recast those principles into three rules.⁴⁵ The

39. *Verizon v. Fed. Commc'ns Comm'n*, 740 F.3d 623 (D.C. Cir. 2014).

40. Formal Complaint of Free Press & Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, *Memorandum Opinion and Order*, 23 F.C.C.R. 13028 (2008), available at https://www.publicknowledge.org/pdf/fp_pk_comcast_complaint.pdf. (The agency also relied to a lesser extent on broad purposive policy language in the Communications Act as well as an Internet Policy Statement that the agency had published in 2005, even as the latter in particular did not have the force of law.); see Sylvain, *supra* note 1.

41. *Comcast Corp. v. Fed. Commc'ns Comm'n*, 600 F.3d 642, 644 (D.C. Cir. 2010).

42. *Id.* at 645 ("We begin—and end—with Comcast's jurisdictional challenge.")

43. *Id.* at 646–47 (The panel relied on a two-part test announced in *American Libraries* that the FCC may exercise ancillary jurisdiction when the "(1) the Commission's general jurisdictional grant under Title I of the Communications Act covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities.") (quoting *American Library Ass'n v. Fed. Commc'ns Comm'n*, 406 F.3d 689, 691–92 (D.C. Cir. 2005)).

44. Preserving the Open Internet, Broadband Industry Practices, 24 FCC Rcd. 13064, 13067–68, para. 10, 16 (2009).

45. See *id.* at para. 5 The first required service providers to be transparent about their

Commission again relied on a variety of provisions in the amended Communications Act to assert jurisdictional authority over network management practices.⁴⁶ This time, the agency did not really rely on the IETF standards or nongovernmental transmission norms to substantiate the obligations it imposed on service providers. Rather, the agency described the state of competition in the market for Internet applications and content, service providers' incentives, and the relative costs and benefits of intervention. The FCC attempted to do what administrative law doctrine requires: explain the bases and purposes of their action in order to show that it was neither arbitrary nor capricious. In doing so, the agency conveyed a new appreciation for the fact that neither the Internet nor its regulation is immune from the legitimating processes required under public law.

Verizon and other service providers challenged the FCC's Open Internet Rules in the D.C. Circuit on several jurisdictional and substantive grounds. The panel this time struck down the rules on substantive grounds, but not before it unequivocally determined that the FCC had jurisdiction over service providers' network transmission practices.⁴⁷ The Rules failed as a substantive matter because, the D.C. Circuit explained, the Communications Act explicitly forbids the kind of rules that the agency promulgated—that is, irrespective of whether it had proper jurisdiction, the statute explicitly bars the FCC from imposing common carrier regulations or anything resembling them on “information service” providers.⁴⁸ The agency has since begun reformulating the rules to respond to the D.C. Circuit's opinion.⁴⁹

VIII. GOVERNMENTS, PUBLIC ACCOUNTABILITY, AND LEGITIMACY

The broadband network management litigation illustrates that the public law that governs the Internet has evolved in the United States as the technology has matured. Forbearance may have been appropriate during the decade or so after its first commercialization in the early

network management practices. The second forbade fixed—as opposed to mobile—broadband service providers from blocking content, applications, services, and devices. The third forbade fixed service providers from unreasonably discriminating against lawful network traffic. The agency promulgated a more flexible rule for mobile broadband service providers, forbidding them only from blocking websites or competitors' voice applications. *See also id.*, para. 109 (mobile providers are not barred from unreasonably discriminating against network traffic.)

46. *Id.* at para. 5 n. 1 (discussing 47 U.S.C. §§ 230, 254, and 1302(a)).

47. *Verizon v. Fed. Commc'ns Comm'n*, 740 F.3d 623, 649 (D.C. Cir. 2014) (“the Commission has offered a rational connection between the facts found and the choice made”) (internal quotations omitted) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)).

48. 47 U.S.C. § 153(51) (2010)

49. *See Protecting and Promoting the Open Internet*, 79 Fed. Reg. 37448–01 (2014).

1990s, but that regulatory approach is no longer appropriate.⁵⁰ That is, Internet transmission practices are now subject to the same public lawmaking processes to which other important industries are. To be sure, policymakers may disagree about what policy ought to require of service providers, but there is little question now that policymaking in this area has entered a new phase. Today, policymakers must abide by the formal public lawmaking processes already in place in order to retain legitimacy.

In this new period, we can no longer defer to technological expertise alone. At a minimum, we no longer assume that Internet policy may be promulgated by nongovernmental bodies in the first instance. Most other industries are subject to scrutiny by governments because of their relative impact on public life. The same should be true for the Internet and all networked communications today, over twenty years since its commercialization.

This observation lends itself quite easily to discussions about nation-state participation in global Internet governance and ICANN independence from governmental oversight generally. The recent effort by the ICANN Board to enlarge GAC participation in Internet policy governance underscores its recognition that governmental participation is important to its ongoing legitimacy, and portends good things for the ongoing legitimacy of whatever governance regime emerges in the coming years.

50. *Cf.* Sylvain, *supra* note 1.