

Geeks and Greeks

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I. INTRODUCTION

The system of Internet domain names and addresses is at a turning point. Towards the end of 1998, the U.S. Department of Commerce recognized a new organization, the Internet Corporation for Assigned Names and Numbers (ICANN), as the appropriate body to undertake “management” of the domain name system.¹ Since that time, ICANN has been busy. Over the past two-and-a-half years, it has enforced and shaped a new market structure for domain-name registration in the generic top-level domains, in which consumers deal with competing “registrars” who in turn feed data to a monopoly “registry.” It has promulgated a Uniform Dispute Resolution Policy (UDRP) that empowers any trademark owner to hale the holder of a domain name in .com, .net or .org into an arbitration proceeding, to determine whether the domain name should be transferred to the complaining trademark owner.

It has selected, in a process that ICANN’s chairman described as like that of a venture capital firm reviewing applicants, seven firms to introduce additional generic top-level domains: .aero, .biz, .coop, .info, .museum, .name, and .pro.² And, through contractual negotiations with the

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¹ Memorandum of Understanding Between for U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers, National Telecommunications and Information Administration (Nov. 25, 1998), <<http://www.icann.org/general/icann-mou-25nov98.htm>>.

² See Brock Meeks, ICANN and the Seven Dwarves, MSNBC (Nov. 22, 2000), <<http://www.msnbc.com/news/493721.asp?cp1=1>>.

winning applicants, it has imposed a wide range of requirements on the new TLDs. The new TLD registries are required, thus, to incorporate the UDRP into their own rules. They must enact detailed “sunrise” procedures that, when the TLD is first opened for registration, allow trademark holders preferential rights to register names corresponding to their marks (a remarkably expansive carve-out, since nearly every word in the English language is a registered trademark for *something*). ICANN regulates the fees that each registry charges for its services, and sets the fees that the registry must pay to ICANN in turn. It prescribes details of the relationship between the registry, which maintains the master database for the TLD, and the registrars, which sell names to the public and request that the master database be updated accordingly. It sets rules describing the circumstances under which the registry can (or must) divulge registrants’ personal information to third parties. It imposes a variety of other restrictions on the registries’ operations.

But ICANN is still seeking a satisfactory answer to a question key to its legitimacy: Who are these guys? Why should the nineteen current members of ICANN’s board of directors, supervising three key staff members and a few outside advisors, be the persons making these important decisions about the shape of the Internet name space? Even granting that *some* body should be exercising this authority (a far from obvious point), why should it be composed of these individuals? More generally, if some body is to be exercising this sort of governance over the name space, how should the members of such a body be chosen, and by whom?

A. Some History

For many years, Dr. Jon Postel of the University of Southern California’s Information Sciences Institute (ISI) had important but limited authority over the name space. It was Postel,

ultimately, who decided whether and when a new *country-code* top level domain (such as .fr for France, or .jp for Japan) would be added to the Internet name space, and which individuals or organization would operate that domain. In carrying out that and other functions, he and others at ISI were referred to as the Internet Assigned Numbers Authority (IANA); he was able to exercise his authority by virtue of the fact that it was he who had volunteered to deal with the mechanics of Internet name and address allocation at an early stage, and by virtue of the respect in which he was held in the Internet engineering community.

But Postel's authority was much more circumscribed than ICANN's. Postel created and enforced no rules akin to the UDRP, or to ICANN's current rules designed to ensure that registries treat competing registrars fairly. He was not concerned with business models. His policy authority over any top-level domain registry was limited, with minor technical elaboration, to ensuring that the registry operator "be able to carry out the necessary responsibilities, and have the ability to do a equitable, just, honest, and competent job."³ In part, Postel was able to step back from regulation, and from policy concerns, because the registry operating the most important top-level domains – .com, .net and .org – was supervised by the U.S. National Science Foundation (NSF). Issues such as the permissible price the registry could charge for a .com registration were NSF's concern, not Postel's.

When Postel first proposed, in 1996, the addition of a large number of new "international top level domains,"⁴ it quickly became clear that all of the trust and respect he enjoyed were not

³ Jon Postel, Domain Name System Structure and Delegation [RFC 1591] (1994), <<http://www.rfc-editor.org/rfc/rfc1591.txt>>.

⁴ See Jon Postel, New Registries and the Delegation of International Top-level Domains (1996), <<http://www.newdom.com/archive/draft-postel-iana-itld-admin-01.txt>>.

enough to bring about the smooth implementation of his proposal. The idea quickly bogged down in battles within the Internet community, opposition from trademark lawyers and other outsiders, and fights over jurisdiction.⁵ Postel eventually endorsed the creation of a new, elaborate, internationally representative “Internet Ad Hoc Committee” (IAHC) to undertake a consensus-building process that would lead to creation of a much smaller number of new domains. That body, however, became the subject of sharp criticism, much of it centered on the identity of the decision-makers. Some urged that the committee, largely composed of Internet engineers, did not adequately represent businesses interested in the Internet as a vehicle for electronic commerce;⁶ some worried that it gave too much representation to organizations, including the International Telecommunications Union and the International Trademark Association, that were seen as hostile to traditional Internet values;⁷ others expressed more general concerns that the committee structure was narrow, noninclusive and secretive.⁸ Ultimately the IAHC initiative was unable to win the support of the U.S. government, and it failed.

⁵ See Jonathan Weinberg, ICANN and the Problem of Legitimacy, 50 Duke L.J. 187, 200-08 (2000); Milton Mueller, ICANN and Internet Governance: Sorting Through the Debris of “Self-Regulation,” 1 INFO 497, 501-02 (1999); Craig Simon, The Technical Construction of Globalism: Internet Governance and the DNS Crisis (Oct. 1998), <<http://www.flywheel.com/ircw/dnsdraft.html>>.

⁶ See Keith Gymer, BT Response to U.S. Government Green Paper: A Proposal to Improve Technical Management of Internet Names and Addresses, National Telecommunications and Information Administration, (Mar. 23, 1998) <<http://www.ntia.doc.gov/ntiahome/domainname/130dftmail/BT.htm>> (arguing that “representative regional and mainstream consumer and business organizations” should have the key voice in Internet governance, not “technical members of the so-called ‘internet community’”)

⁷ See Internet Domain Names, Part II: Hearings Before the House Comm. on Science, 105th Cong. 162-63 (1997)(testimony of Anthony M. Rutkowski) (objecting that the IAHC included representatives of the International Telecommunications Union); Mueller, supra note 5, at 502 (noting the criticism that the Internet was being sold out to trademark interests); Simon, supra note 5 (discussing “the impression among the IAHC’s increasingly infuriated critics that trademark interests had dominated the process”).

⁸ See, e.g., Rutkowski testimony, supra note 7, at 162-63; Ellen Rony & Peter Rony, The Domain Name Handbook 534-40 (1998); Courtney Macavinta & Margie Wylie, DomainPlan Called Power Grab, CNET NEWS (June 4, 1997), <<http://news.cnet.com/news/0-1005-200-319458.html?cnet.tkr>>.

When the U.S. government, starting in 1997, set in motion the chain of events that led to the creation of ICANN, it paid considerable attention to the makeup and structure of the body it was trying to bring into being. In its initial policy paper, the “Green Paper,” the government emphasized that the new organization and its board “must derive legitimacy from the participation of key stakeholders.”⁹ The board, therefore, was to include representatives of membership organizations relating to domain names, IP addresses, and Internet technical parameters, as well as representatives of “the direct interests of Internet users” – commercial, not-for-profit, and individual.¹⁰ The Green Paper suggested that seats on the organization’s initial board might include three directors from a membership association of regional number registries, two directors named by the Internet Architecture Board, two members designated by a not-yet-created membership association of domain name registries and registrars, and seven members designated by a not-yet-created membership association of Internet users, as well as the new corporation’s CEO.¹¹

The government’s later White Paper stepped back from the Green Paper’s detailed suggestions. It repeated, though, that the board should represent the direct interests of Internet users as well as membership organizations in the areas of names, numbers and protocols. The board, it continued, should “equitably represent” domain name registries, domain name registrars, IP number registries, the technical community, Internet service providers, and commercial, not-for-profit, and individual Internet users. Its members should be elected by means of “mechanisms that ensure

⁹ U.S. Department of Commerce, National Telecommunications and Information Administration, Improvement of Technical Management of Internet Names and Addresses, 63 Fed. Reg. 8826, 8828 (1998) [hereafter, Green Paper].

¹⁰ Id.

¹¹ See id.

broad representation and participation in the election process.”¹²

The White Paper did not specify exactly how this new organization would come into being. It suggested, though, that if the new entity were formed by “private sector Internet stakeholders,” the U.S. government was prepared to recognize it.¹³ That new entity was constructed through a series of elaborate negotiations and consultations. Most important were a series of negotiations between Postel’s lawyer (a Washington, D.C. attorney named Joe Sims) and Network Solutions, Inc. (the registry that operated .com, .net and .org). In addition, there were wide-ranging consultations with the U.S. government, a variety of foreign governments, IBM’s lobbyist Roger Cochetti, and others.¹⁴ Finally, in October 1998, Postel transmitted to the Department of Commerce the articles of incorporation of the new entity, which had already been incorporated in California as the Internet Corporation for Assigned Names and Numbers, or ICANN, together with the names of the corporation’s initial directors and a set of proposed bylaws.¹⁵

The proposed bylaws specified that ICANN would have a nineteen-member board of directors. Three “supporting organizations” – one for domain names, one for IP addresses, and one for Internet protocols – would each select three directors, and ICANN’s CEO would serve as a tenth. The remaining nine seats would be filled by “at-large” directors. The bylaws, however, stated only that the at-large directors would be “selected pursuant to a process to be established by a

¹² Management of Internet Names and Addresses, 63 Fed. Reg. 31,741 (1998) [hereafter, White Paper].

¹³ Id. at 31,749.

¹⁴ See Letter from Ira C. Magaziner, Senior Advisor to the President for Policy Development, to Rep. Thomas J. Bliley, Jr., Chairman, United States House Committee on Commerce (Oct. 27, 1998).

¹⁵ See Letter from Jon Postel, Director, Internet Assigned Numbers Authority, to William Daley, Secretary of Commerce (Oct. 2, 1998), <<http://www.ntia.doc.gov/ntiahome/domainname/proposals/icann/letter.htm>>.

majority vote of . . . the Initial Board”); they included no commitment that individual members would play a role in the selection – or, indeed, that ICANN would have individual members.

The U.S. government was skeptical. The Department of Commerce (which represented the government in this process, under the supervision of senior White House advisor Ira Magaziner) wrote to the ICANN organizers expressing concern that, without members, ICANN would not operate in an adequately bottom-up and representative manner, and would not be adequately open to input from the broad community of Internet users.¹⁶ It urged ICANN to amend its plans so as to assure “greater accountability of the board of directors to the Internet community.”¹⁷ In response, after negotiations with Magaziner, the ICANN organizers (by now no longer including Postel, who had died of complications following open-heart surgery) agreed to the election of nine at-large directors by an individual membership. The revised bylaws, however, did not immediately implement an election system; rather, they called for the creation of a Membership Advisory Committee to recommend how the individual membership should be structured.

That advisory committee deliberated, and produced a report describing a system of direct election of board members by Internet users.¹⁸ In response, ICANN’s initial board briefly endorsed a plan the advisory committee had not described, under which at-large members would choose

¹⁶ See Letter from J. Beckwith Burr, Associate Administrator, National Telecommunications and Information Administration, to Herb Schorr, Executive Director, USC Information Sciences Institute (Oct. 20, 1998), <<http://www.ntia.doc.gov/ntiahome/press/icann102098.htm>>.

¹⁷ Id. For a description of Magaziner’s views, see Joe Sims, Response to Froomkin (Oct. 23, 1999), <<http://www.icann.org/commentsmail/comment-bylaws/msg00025.html>>

¹⁸ See ICANN Membership Advisory Committee Singapore Report (Mar. 3, 1999), <<http://cyber.law.harvard.edu/rcs/macsing.html>>; Membership Advisory Committee Commentary on the Principles of the At-large Membership (May 26, 1999), <<http://www.icann.org/macberlin.htm>>. The ultimate MAC consensus contemplated that ICANN membership would be open to natural persons, voting for nine directors, with the aid of five regional pools, on a one-person-one-vote basis.

members of an eighteen-person "At-Large Council" whose function would be to select the nine board members. This idea proved to be hugely unpopular,¹⁹ and the board backed down. It agreed that in the fall of 2000, individual ICANN members would elect five board members directly (the remaining four at-large seats would be held by holdover initial directors). At the same time, however, the board adopted a resolution noting that there existed "a considerable diversity of views concerning the purpose of and rationale for the At Large membership and Council, and the advisability of . . . various electoral structures and procedures," and called for a "a comprehensive study of the concept, structure, and processes relating to the At Large membership."²⁰ The board later adopted by-laws changes directing those conducting the new study to re-examine *all* "previous decisions and conclusions" regarding membership, including:

Whether the ICANN Board should include "At Large" Directors;

If so, how many such Directors there should be;

How any such "At Large" Directors should be selected, including consideration of at least the following options: selection by an "At Large" membership; appointment by the existing Board; selection or appointment by some other entity or entities; and any combination of those options;

If selection by an "At Large" membership is to be used, the processes and procedures by which that selection will take place; and

What the appropriate structure, role and functions of an "At Large" membership should be.

¹⁹ See Scribe's Notes, March 9, 2000, ICANN Public Forum, <<http://cyber.law.harvard.edu/icann/cairo/archive/scribe-icann-030900.html>>; Common Cause/Center for Democracy and Technology, ICANN's Global Elections: On the Internet, For the Internet (March 2000), <<http://www.commoncause.org/icann/icannstudy.pdf>>. Critics urged that the plan would, without good reason, distance the choice of directors from the voting membership, leaving users without meaningful voice. Some noted that it was hard to see why a responsible person would want to serve on an At-Large Council whose only function was to elect some other set of individuals to the Board. See Jonathan Weinberg, Comments on the proposed bylaws changes establishing an At-Large Council (Oct. 1999), <<http://www.law.wayne.edu/weinberg/bylaws.htm>>.

²⁰ ICANN, Preliminary Report: Meeting of the ICANN Board in Cairo (Mar. 10, 2000), <<http://www.icann.org/minutes/prelim-report-10mar00.htm>>.

As I write, ICANN has chartered an “At-Large Study Committee” (with projected expenditures of \$700,000 for 2000-02)²¹ to answer these questions.

B. Posing the Problem

The debate over ICANN’s at-large membership brings to mind familiar concerns in political philosophy: Direct election of ICANN directors brings to mind a well-understood, classically liberal model of majority rule. When ICANN’s Membership Advisory Committee concluded that election of directors by an at-large membership would “ensure that ICANN’s corporate structure operates for the benefit of the Internet community as a whole, is not captured, and continues to provide fair and proportional representation of the entire user community,”²² it was using language that resonated with traditional Western conceptions of representative democracy.

To be sure, one need not rely on a political-governance model to support an at-large membership for ICANN. One can eschew political philosophy and still conclude that in order to make substantively good decisions, ICANN must take into account the views and perspectives of the Internet community at large, and that user election of some Board members is the best way of

²¹ ICANN’s projected actual costs for the At-Large study are \$450,000 for FY 2000-01, and it has budgeted an additional \$250,000 for FY 2001-02. ICANN Proposed Fiscal Year 2001-2002 Budget, <<http://www.icann.org/financials/proposed-budget-14may01.htm#III.B>>. By contrast, ICANN funded its actual at-large elections last year out of a \$200,000 foundation grant. See “A Proposal to the Markle Foundation for Grant Support of ICANN’s At Large Membership and Election Program,” (Oct. 21, 1999), <<http://www.icann.org/committees/at-large/markle-proposal-21oct99.htm>>. Notwithstanding that ICANN’s bylaws require the Board, following the At-Large Study Committee’s report, to implement any decision to seat new at-large directors on a schedule so that the new directors are seated in Fall 2002, its FY 2001-02 budget makes zero dollars available for election preparations. ICANN Proposed Fiscal Year 2001-2002 Budget, *supra*.

²² ICANN Membership Advisory Committee Commentary on the Principles of the At-large Membership (May 26, 1999), <<http://www.icann.org/macberlin.htm>>, Principle 1.

causing it to do so.²³ But the debate over ICANN’s at-large membership is sometimes framed using the language of democracy. Common Cause and the Center for Democracy and Technology, though emphasizing ICANN’s technical mandate, see it as facing “an age-old question of governance: How can the benefits and energies of democracy be balanced with the need for reasoned and deliberative decision-making?”²⁴

On the other side of the debate, Joe Sims, who was hugely influential in ICANN’s formation, argued against user election by urging that it is “fundamentally wrongheaded” to think that ICANN should be “significantly influenced by some form of global democracy.”²⁵ “Where,” he asked, “is it written that ‘majority rules’ is the only legitimate form of governance for an organization like ICANN?”²⁶ Quite the contrary, he argued, elections could damage the paramount goal of Internet stability by propelling into positions of power members of “a determined minority” or “people who have neither the background nor the interest in understanding the consequences of various ICANN decisions.”²⁷

²³ See *id.*

²⁴ Common Cause/Center for Democracy and Technology, *supra* n. 19, at 2.

²⁵ Joe Sims, Response to Froomkin (Oct. 23, 1999), <<http://www.icann.org/comments-mail/comment-bylaws/msg00025.html>>.

²⁶ Email message from Joe Sims to Jonathan Zittrain and the [names] mailing list, Oct. 25, 1999 (on file with author).

²⁷ Email message from Joe Sims to the author and the [names] mailing list, Oct. 14, 1999 (on file with author). One officer of ICANN’s Intellectual Property Constituency colorfully expressed similar doubts about user participation in discussing the structure of the Domain Name Supporting Organization (DNSO), and whether individual domain name holders should be granted the opportunity to elect representatives on its governing body. The writer – who opposed such a step – urged that if it were taken, the DNSO must increase the number of votes allocated to the business community so as to increase the representation for “saner minds.” When individuals participate in the DNSO, he wrote, invariably “it is those with the strongest (and often the most extreme) views whose voice is heard, and these tend to be those . . . ‘without a proper day job.’” Email message from Theresa Swinehart to the nc-review mailing list (Jan. 21, 2001), <<http://www.dnsso.org/clubpublic/nc-review/Arc00/msg00107.html>> (forwarding an Oct. 10, 2000 message from Axel aus der Muhlen that in turn relayed the comments of an unidentified “IPC Officer”).

This way of framing the issues invites the question whether it's worth analyzing ICANN's membership structure from a political-philosophy perspective. What is the role of "democracy" in this discussion? Should we be looking to Locke, say, or Rousseau, to figure out how to structure ICANN's governance of Internet identifiers? Or is that "fundamentally wrongheaded"? Those who favor eliminating elected directors from ICANN's structure offer a model in which the power to select ICANN's ultimate decision-makers is limited to a fairly narrow elite who are said to have the necessary expertise and level-headedness to participate in the decision-making process; that group comprises people influential in the four bodies that write Internet protocols, or in the three organizations that allocate IP addresses, or in an umbrella trade association of businesses involved with domain names or the Internet in general. That is a far cry from the prescription that Locke or Rousseau would give.

In this paper, I will offer some thoughts about ICANN's structure drawn from the work of one particular political philosopher. But I intend to focus not on Enlightenment thinkers, or modern ones, but rather on the *Politics* of Aristotle, written over two thousand years ago. I think it's useful to look to Aristotle, one of the most low-tech philosophers, for answers to this question of Internet governance. I've chosen him for two reasons.

First, in contrast to many other political philosophers, Aristotle's thinking was not rights-based. He cared little for arguments based on abstract principle. Rather, his political philosophy was essentially instrumental: what governance structures would yield the best outcomes for the community? That instrumental approach deflects one objection that might otherwise be made to considering political philosophy in this context: Political philosophy is inappropriate here, one can argue, because it exalts questions of freedom and rights that are simply inapposite in the context of

Internet governance. But Aristotle was not especially interested in abstract rights; he was interested in understanding which forms of government work best. The concern for devising systems that work, I think, is common just about everyone involved with ICANN.

More importantly, Aristotle was no raving democrat. He strongly defended slavery;²⁸ believed that the rich, the nobly born and the virtuous had legitimate claims to play a greater role in the state;²⁹ and considered public-spirited monarchy to be an appropriate form of government.³⁰ If I were to select the philosophy of a radical egalitarian as a guide to ICANN's structure, the results would be predictable. But Aristotle was not such a thinker. If even his philosophy supports the conclusion that ICANN directors should be elected by a global membership, well, perhaps that tells us something.

II. POLITICS AND ICANN

If I am to discuss Aristotle's thinking in connection with ICANN, though, I must first explain why political philosophy is an appropriate tool in that context. There is a fairly obvious argument that it is not: Political philosophy is inapposite to questions of ICANN structure, the argument runs, because ICANN does not engage in political governance. Rather, it is engaged in

²⁸ See Aristotle's *Politics* (Benjamin Jowett trans. 1943) 56-62, at iii. 1253b-1255b [hereafter, *Politics*].

²⁹ See id. at 151-52, iii. 1283a.

³⁰ See id. at 156, iii. 1284b.

mere “technical management” or “technical coordination.”³¹ Its activities, its defenders argue, do not implicate political-philosophy concerns; rather, it is simply following the tradition of Internet technical standard-setting long engaged in by the Internet Engineering Task Force (IETF) and other technical bodies.³²

Saying that ICANN is modeled on the IETF calls up a powerful image; the IETF is one of the great success stories of the Internet’s development. Historically, it has set Internet technical standards in a voluntary, decentralized, consensus-based manner.³³ Engineers, programmers, and computer scientists use IETF working groups as fora to reach rough consensus on particular solutions to Internet technical problems, and their solutions are then subject to review by other groups of engineers; ultimately, if their proposals work in practice and have consensus support, the IETF will endorse them, and they will likely attract general acceptance and legitimacy.³⁴ This system does not rely on formal representational mechanisms. As Internet pioneer Dave Clark put it: “We

³¹ ICANN has consistently so described its activities. It describes itself as “a technical coordination body for the Internet,” *ICANN Home Page*, <<http://www.icann.org>>, and its chair has described its task as “oversight of a select set of key technical administrative functions.” Letter from Esther Dyson, Interim Chairman, ICANN, to Rep. Thomas J. Bliley, Jr., Chairman, United States House Committee on Commerce (July 8, 1999), <<http://www.icann.org/correspondence/dyson-letter-08july99.htm>>. Board member Hans Kraaijenbrink put it this way (as paraphrased in the official scribe’s notes): ICANN’s mission “is the technical coordination of certain essential parameters for the Internet names and addresses, nothing more, nothing less. Anyone who says it is more is confusing the Internet community.” *Scribe’s Notes, ICANN Public Forum* (Mar. 9, 2000), <<http://cyber.law.harvard.edu/icann/cairo/archive/scribe-icann-030900.html>>.

³² See *The Debate Over Internet Governance: A Snapshot in the Year 2000*, Interview with Dave Crocker, <<http://cyber.law.harvard.edu/is99/governance/crocker.html#defconsensus>> (ICANN operates by consensus, as the IETF understands and implements that term).

³³ See Joseph P. Liu, *Legitimacy and Authority in Internet Coordination: A Domain Name Case Study*, 74 *Ind. L.J.* 587, 587-88, 595-99 (1999); Joseph Reagle, *Why the Internet is good: Community governance that works well*, <<http://cyber.law.harvard.edu/people/reagle/regulation-19990326.html>>.

³⁴ See Liu, *supra* n. 33, at 595-99; Reagle, *supra* n. 33.

reject kings, presidents and voting. We believe in rough consensus and running code.”³⁵

If ICANN is simply engaging in IETF-style technical standard-setting, then it’s unhelpful to approach its structure from a political-philosophy standpoint. First, it seems fair (if tautological) to say that purely technical decisions – that is, technical choices *without* political or value underpinnings or consequences – are not “political,” and do not implicate the concerns that political philosophy seeks to address.³⁶ Further, IETF-style consensus formation offers its own assurances of fairness and legitimacy, though it does not feature the sort of institutions most prominent in democratic theory.

A. “Technical Coordination”

Yet are ICANN’s decisions purely – or even primarily – technical? The position seems hard to defend. Little that ICANN has done requires an advanced engineering background to understand. Indeed, two of its three key staffers have no formal technical training (they’re lawyers);³⁷ the same can be said of several of its directors.³⁸ The key questions ICANN has addressed have

³⁵ Quoted in Reagle, *supra* n. 33.

³⁶ This assertion, though, should be approached with great care. As Larry Lessig and others have noted, decisions about the technical architecture of a communications environment can have important policy implications. See Larry Lessig, *Code and Other Laws of Cyberspace* (1999); Jonathan Weinberg, *Rating the Net*, 19 *Hastings Comm/Ent L.J.* 453 (1997); Lucas D. Inrona & Helen Nissenbaum, *Shaping the Web: Why the politics of search engines matters*, 16 *The Information Society* 1 (2000), <<http://www.princeton.edu/~helen/politics.pdf>>. Further, the fact that the policy consequences of a particular technical decision are not immediately apparent does not mean that they do not exist.

³⁷ See <<http://www.icann.org/biog/mclaughlin.htm>> (Chief Policy Officer Andrew McLaughlin); <<http://www.icann.org/biog/touton.htm>> (Vice-President, Secretary, and General Counsel Louis Touton). Although Touton actually holds an undergraduate degree in electrical engineering and computer science, he was a lawyer or law student for the twenty-one years between graduating from college and joining ICANN’s staff. The third key ICANN staffer is CEO M. Stuart Lynn.

³⁸ See, e.g., <<http://www.icann.org/biog/abrilabril.htm>> (Amadeu Abril i Abril, law professor); <<http://www.icann.org/biog/cohen.htm>> (Jonathan Cohen, trademark lawyer); <<http://www.icann.org/biog/fitzsimmons.htm>> (Frank Fitzsimmons, senior vice president for global marketing, with

turned not on technical considerations, but on competing values and competing claims of right.³⁹ If the name space is to be limited, how is this limited resource to be allocated?⁴⁰ Should the ability to register domain names be governed by the first-come-first-served principle, by trademark rules, or by some other means?⁴¹ Should registries be operated on nonprofit or for-profit bases?⁴² These require value choices, not technical judgments; they cannot be resolved from a pure engineering standpoint, asking which solution “works” best. In short, they are political.

To what extent should the domain name system be structured so as to privilege trademark holders, and to give them built-in administrative fora in which to assert trademark rights?⁴³ That’s a policy question, not a technical one. The promulgation of the Uniform Dispute Resolution Policy, under which each domain registrant in the generic top-level domains is subject to a mandatory administrative procedure in which an arbitrator can order the domain name transferred to a complaining trademark owner if it finds that certain conditions are met, was one of ICANN’s first

degrees in accounting and finance); <<http://www.mkatoh.net/about/longbio.html>> (Masanobu Katoh, manager of Fujitsu’s Washington, DC governmental relations office, with degrees in law); <<http://www.icann.org/biog/wilson.htm>> (Linda Wilson, educational administrator, with degrees in chemistry).

³⁹ See Liu, *supra* n. 33, at 604-12.

⁴⁰ See ICANN Yokohama Meeting Topic: Introduction of New Top-Level Domains (June 13, 2000), <<http://www.icann.org/yokohama/new-tld-topic.htm>>.

⁴¹ See, e.g., Resolutions Approved by the Board, Santiago Meeting, August 26, 1999: Uniform Dispute Resolution Policy for gTLD Registrars, <<http://www.icann.org/santiago/santiago-resolutions.htm#anchor16725>>; The State of Affairs in Working Group B (Mar. 11, 2000), <<http://www.dnso.org/dnso/notes/20000321.NCwgb-report.html>>.

⁴² See Interim Report of Working Group C (Oct. 23, 1999), <<http://www.dnso.org/dnso/notes/19991023.NCwgc-report.html>>.

⁴³ See Uniform Domain-Name Dispute-Resolution Policy, <<http://www.icann.org/udrp/udrp.htm>>.

priorities.⁴⁴ It is hard, by any stretch of the imagination, to characterize it as a “technical” issue.

ICANN has worked, in its negotiations with Verisign over that company’s simultaneous management of the .com, .net and .org registries and the dominant registrar, to maximize competition in the registrar and registry marketplaces; it has had to evaluate the relative benefits to competition of limiting vertical vs. horizontal integration of these businesses.⁴⁵ That required public-policy determinations, not engineering. ICANN, in its new registry contracts, has addressed how the new top-level domain registries should balance the interest in transparent availability of the identity and contact information of domain name registrants with the registrants’ interests in safeguarding that information.⁴⁶ That’s a policy question.

What goals should we seek to achieve when we identify top-level domains, which is to say, the semantic categories into which all Internet resources are sorted? The lengthy discussion in ICANN’s Working Group C on the addition of new generic top-level domains focused almost entirely on policy, rather than technical, issues.⁴⁷ ICANN’s Chair has explained that, in deciding whether to add additional top-level domains, ICANN will look to this year’s additions to determine whether “it is possible to introduce new top-level domains in the DNS at a time when the economic

⁴⁴ See Minutes: Meeting of the Initial Board, May 27, 1999, <<http://www.icann.org/minutes/minutes-27may99.htm#WIPORecommendations>>. This was the ICANN board’s second meeting after its initial organization.

⁴⁵ See ICANN Melbourne Meeting Topic: Proposed Revisions to VeriSign Agreements (Mar. 1, 2001), <<http://www.icann.org/melbourne/proposed-verisign-agreements-topic.htm>>.

⁴⁶ See Proposed Un-sponsored TLD Agreement: Appendix N, <<http://www.icann.org/tlds/agreements/un-sponsored/registry-agmt-appn-11may01.htm>>.

⁴⁷ See Interim Report of Working Group C (Oct. 23, 1999), <<http://www.dns0.org/dns0/notes/19991023.NCwgc-report.html>>.

importance/value of domains is very different from the time when the first gTLDs were created.”⁴⁸ While the purely technical aspects of adding new TLDs are straightforward, the constraint lies in “what it means to operate TLDs in the rapidly evolving commercial context of today's (and tomorrow's) Internet.”⁴⁹ Valuable as that inquiry may be, there is little *technical* in it. The notion that, say, addition of new Internet top-level domains should be stopped or slowed because of concerns that they will cause economic disruption, consumer confusion or increased trademark protection costs does not relate to “technical” concerns at all; it represents a nontechnical predictive and value choice.

ICANN was created because key policy – not technical – questions could not conveniently be decided in any other manner. The crucial impetus for the process that ultimately led to ICANN's creation was Jon Postel's 1996 proposal to add new top-level domains. That proposal bogged down because of policy, not technical opposition; IANA had not been the source of heavily policy-laden initiatives, and Postel on his own didn't have the political resources to make it happen. When the IAHC pushed forward with a plan to add new top-level domains, and the U.S. government endorsed the creation of new top-level domains in its Green Paper, trademark interests called for a wide-ranging restructuring of the domain-name application process so as to privilege trademark rights within the Internet naming architecture.⁵⁰ These issues had to be resolved in a policy body, because

⁴⁸ Vint Cerf Replies to (most of) Your Questions (April 19, 2001), <<http://www.icannwatch.org/article.php?sid=114>>.

⁴⁹ Id.

⁵⁰ See INTA Response to the U.S. Government Paper on the Improvement of Technical Management of Internet Names and Addresses (Mar 18, 1998), <<http://www.ntia.doc.gov/ntiahome/domainname/130dftmail/scanned/INTA.htm>>. They also urged that trademark and business user representatives should be a majority of the new corporation's board of directors. Id.

they were beyond the scope of a purely technical one.

Semantically meaningful second-level names, within the limited number of top-level names that exist in the ICANN root, are a limited resource.⁵¹ ICANN has the task of allocating the economically valuable right to register those names, and has erected a structure to decide who – in case of conflict – has the rights to the names themselves. In operating as an assignment authority for a limited resource, it cannot avoid making economic policy of some sort; that’s the difficult part of its operations. The technical part, by contrast, is easy. As Milton Mueller put it:

[W]e don't need a 19-member geographically representative Board, a 7-constituency DNSO, the GAC, a Review Board, and notice and comment procedures to make sure that .dog isn't assigned twice. It's only when you're engaged in debate over who is going to get .dog and how they will be allowed to profit from it that such a bureaucratic apparatus is required. And that's because it's a policy decision.⁵²

B. “Bottom up”

ICANN, thus, differs from the IETF in the nature of the questions it addresses. Is it nonetheless like the IETF in its bottom-up consensus procedures? In theory, under ICANN’s bottom-up structure, policies are initially developed in working groups chartered by ICANN’s three “supporting organizations” and then passed up the line. No action can be taken, the theory goes,

⁵¹ See Working Group C final report (Mar. 18, 2000), <<http://www.dnso.org/clubpublic/council/Arc03/msg00469.html>>; see also Mueller, *supra* note 5, at 516-17.

⁵² Email from Prof. Milton Mueller, Professor, School of Information Studies and Director of the Convergence Center, Syracuse University, to the author, Feb. 8, 2001 (on file with author). Vint Cerf, ICANN’s current chair, has put the matter a slightly different way: “The fact that a constellation is being built to do what one or two people did is astonishing. But then again, when the Internet started, it wasn't of commercial value. Now it is and it has attracted all parties, including the lawyers. That means it's valuable and that's good.” Quoted in Sandra Gittlen, Should they call it ICANN’T?, *Network World* (Dec. 11, 1998), <<http://www.nwfusion.com/news/1211icann.html>>.

unless it has won the consensus support of the Internet community.⁵³ ICANN's structure and rules, its first chair asserted, ensure that it is "nothing more than a vehicle or forum for the development and implementation of global consensus on various policy issues related to the DNS."⁵⁴

Yet on close examination, this argument too seems doubtful. As a general matter, the policies ICANN adopted and implemented over the past two years were not developed in a bottom-up manner. Nearly all of ICANN's work to date has been in the area of domain name policy (it has said little so far about IP address allocation, and it has no significant policymaking functions relating to protocol parameter assignment). The body within the ICANN structure charged with bottom-up policy development relating to domain names is the Domain Name Supporting Organization. Yet the DNSO has generated few policy recommendations; policy development, rather, has taken place at the ICANN staff level.

Early in ICANN's life, it delegated to the DNSO the job of developing recommendations on three big substantive issues: the desirability and nature of an administrative mechanism to transfer certain domain names from their original registrants to trademark holders; whether and how to introduce new generic top-level domains; and the desirability and nature of additional preferences for trademark holders during the initial rollout of protection in any new generic top-level domains.⁵⁵

⁵³ See ICANN Bylaws (as amended July 16, 2000), art. VI, sec. 2, <<http://www.icann.org/general/bylaws.htm#VI>> (providing that the supporting organizations have "primary responsibility for developing and recommending substantive policies"; in the normal course, the Board will not itself initiate policy recommendations).

⁵⁴ Letter from Esther Dyson, Interim Chairman, ICANN, to Rep. Thomas J. Bliley, Jr., Chairman, U.S. House Comm. on Commerce (July 8, 1999), <<http://www.icann.org/correspondence/dyson-letter-08july99.htm>>.

⁵⁵ See Minutes: Meeting of the Initial Board, May 27, 1999, <<http://www.icann.org/minutes/minutes-27may99.htm#WIPORecommendations>>; see also Results of DNSO Names Council Teleconference on June 11th, 1999, <<http://www.dnsso.org/dnsso/notes/19990612.NCtelecon.html>> (creating a working group on trademark-domain name dispute resolution, and announcing the intention to create additional working groups on new gTLDs and additional protection for famous trademarks).

On none of these did ICANN's ultimate decisions owe much to the DNSO process. The Names Council (the governing body of the DNSO) did approve an administrative trademark-domain name dispute resolution proposal generated by a DNSO working group. But the ICANN Board set that proposal aside in favor of a different one drafted by a group of registrars, with the caveat that the new plan would be modified further by ICANN's general counsel after consulting with industry and public-interest representatives chosen by ICANN staff. The final plan drew little from the proposal that emerged from the DNSO.

When it came to the addition of new generic top-level domains, after lengthy deliberations by a working group, the Names Council was able to produce a general statement favoring the measured and careful introduction of new top-level domains. That statement said nothing, though, about most of the policy issues raised by the deployment of new top-level domains, such as whether registries should be non-profit or for-profit, whether registry and registrar functions ought to be separated so as to foster competition in the registrar marketplace, and how the names of the new domains should be chosen. All of these were issues on which the working group had failed to reach consensus.

ICANN staff responded by preparing a discussion document that requested public comment on 74 policy and technical questions that would have to be addressed prior to an actual rollout; these questions, in turn, were just a subset of those that staff might have chosen to ask.⁵⁶ On some issues, the ICANN policy paper made its choices without calling for public discussion. For example, the policy paper assumed, without calling for discussion, that most registries should be for-profit, in

⁵⁶ ICANN Yokohama Meeting Topic: Introduction of New Top-Level Domains (June 13, 2000), <<http://www.icann.org/yokohama/new-tld-topic.htm>>.

contrast to the IAHC model; a contrary decision on this question would likely have radically changed the nature of the new name space. The DNSO contribution left ICANN staff almost entirely free to craft its own proposal to the Board regarding the introduction of new gTLDs, and that is what staff did.

On protection for famous trademarks during the rollout of new generic top-level domains, the DNSO was unable to generate any coherent recommendations, and the Names Council's statement again had little content. The Names Council approved some undefined "protection for intellectual property during the startup phase of new top-level domains," but its statement stopped there. The DNSO did not speak to the nature of that protection, how strong it should be, or how it should be achieved. The actual plans for privileging trademark owners in the startup phases of the new gTLDs were negotiated between ICANN staff and the various applicants, without public input.

It is notable that the vehicle for essentially all of ICANN's regulation of the old and new top-level domain registries has been contractual language negotiated by ICANN staff, behind closed doors, with registry representatives. This became the subject of public controversy in connection with ICANN's recent renegotiation of its contract with Verisign covering the .com, .net and .org registries. The new contracts, among other things, abandoned a requirement that Verisign divest its registrar business (or else face early termination of all of its registry contracts), and gave the combined registry-registrar entity the "presumptive" right to continue as the .com registry indefinitely (in return for Verisign's divesting .org to a new nonprofit organization and having to face competing applications for .net). ICANN's general counsel insisted, in correspondence with

the Names Council, that the new contract involved no policy changes.⁵⁷ The Names Council responded that the new contract “represents a substantive policy change and involves a fundamental shift in the structure of competition,” and should not be on the table absent compliance with bottom-up processes.⁵⁸

After the ICANN Board, the following day, indicated that it would welcome comments from “all members of the Internet community” before it was scheduled to vote on the provisions in slightly less than three weeks (a vote it declined to delay), the DNSO’s rank-and-file General Assembly voted to oppose the contract,⁵⁹ as did a majority of the DNSO’s seven official “constituencies.”⁶⁰ The Names Council voted to reject the contract as written, while indicating that it would support the contract if specified changes were made.⁶¹ The ICANN Board then overwhelmingly voted to accept the contract, modified to include some – but not all – of the

⁵⁷ See email message from Louis Touton to the DNSO Names Council, March 1, 2001, <<http://www.dnso.org/clubpublic/council/Arc04/msg00894.html>>.

⁵⁸ See DNSO Names Council - Scribe's Notes (March 11, 2001), <<http://cyber.law.harvard.edu/icann/melbourne/archive/scribe-icann-031101-nc.html>>.

⁵⁹ See GA position on Verisign contract (Mar. 25, 2001), <<http://www.dnso.org/clubpublic/council/Arc05/msg00041.html>>.

⁶⁰ See NC resolution on the proposed Verisign agreement (Mar. 30, 2001), <<http://www.dnso.org/clubpublic/council/Arc05/msg00100.html>>. The “Business & Commercial” constituency noted six concerns with the new agreement and concluded that “if there is a bald choice . . . the BC favours the old agreement.” The ISP constituency concluded that it found “no compelling reason to abandon the existing Agreements between ICANN and VeriSign and adopt the new proposal.” The registrars constituency opposed the new contract in a strongly worded statement, urging that “these proposed modifications will make a contract that was already bad for the industry, even worse.” The non-commercial domain name holders constituency proposed three changes “that would allow [it] to support the contract.” The Intellectual Property Constituency did not support or oppose the new contract, although it “recommend[ed] that the ICANN Board obtain appropriate specific assurances from Verisign regarding cross-registry Whois services” before approving the new contract. The ccTLD constituency indicated that it had not had adequate time for consultation; the members that had submitted views to it were divided. The gTLD constituency (whose sole member was Verisign, which had negotiated the new contract) strongly urged its adoption. *Id.*

⁶¹ See *id.*

changes the Names Council had sought. Ultimately, the U.S. government required further changes before it would give its own assent (including one change that had been requested by the Names Council but rejected by the Board), after input from the antitrust division of the Justice Department⁶² – thus convincingly establishing, if further proof was needed, that the battleground here was competition policy rather than computer-science arcana.

In connection with the Verisign contract matter, Joe Sims shed some light on his view of the role of bottom-up processes in the ICANN system. “Contracts,” he wrote,

are private agreements negotiated between two parties. The contracts must obviously be consistent with established policy, and if you or anyone else thinks the ICANN policies are wrong or should be changed for any reason, you should initiate a consensus policy process to accomplish that change. But it is nonsense to say . . . that any contract or contract term that you or someone else thinks is important is a "policy" that must be [developed in a bottom-up manner].⁶³

This is a somewhat different notion of bottom-up processes than is reflected in most ICANN statements. Bear in mind that contracts are the vehicles, and the implementation devices, for essentially all ICANN decisions except those pertaining to its own internal organization. Sims is explaining that these decisions may not be *inconsistent* with any “established policy” – so that, if formal bottom-up processes generate a consensus that ICANN must be barred from doing such-and-such a thing, ICANN must respect that result. But where bottom-up processes have not generated such a consensus (and, in practice, DNSO processes have generated precious little consensus on anything), the ICANN staff and board have a free hand to achieve the best outcomes as they see them. Whatever the merits or demerits of this view, it is a far cry from the position that

⁶² See Commerce Dept. approves VeriSign Web domain deal (May 18, 2001), <<http://www.siliconvalley.com/docs/news/svfront/029812.htm>>.

⁶³ Email from Joe Sims to Milton Mueller and the DNSO Names Council, Mar. 2, 2001, <<http://www.dns.org/clubpublic/council/Arc04/msg00905.html>>.

“by definition,” the policies embodied in ICANN contracts cannot extend beyond “a reflection of community consensus.”⁶⁴

In practice, thus, ICANN’s policy-development process doesn’t look much like the IETF’s. All but the most general policy decisions have been initiated by ICANN staff; put out for a shorter or longer period of public comment,⁶⁵ and then been made the subject of a final decision by the Board.⁶⁶ This decision is then dubbed “consensus” (even when it seems to lack visible support outside of ICANN’s own corridors, as with, for example, the 1999 decision to structure at-large representation indirectly through an At Large Council).⁶⁷ If one subtracts the “consensus” designation, this is reminiscent of nothing so much as the notice-and-comment process for U.S. administrative agency rulemaking.⁶⁸ While ICANN staff solicit and presumably read public

⁶⁴ See Letter from Esther Dyson, *supra* note 54.

⁶⁵ Opportunity for public comment is more meaningful in some cases than others. With respect to the contracts with the new gTLDs, for example, ICANN made the text of the contracts available to the public a mere two weeks before the Board meeting at which they would be approved, and minus nearly all of the appendices that contained the substantive contract terms. See Bret Fauset, “New TLD Registry Agreements Posted” (Feb. 27, 2001), <<http://www.lextext.com/icann/february2001.html>>. Further, ICANN appears to expect people to learn of its proposals by consulting its website on a daily basis; although it maintains an <icann-announce> mailing list, it has only rarely used that list to alert subscribers to its proposed actions.

⁶⁶ Notable in this regard is the document recently posted at ICANN’s web site, to be presented at the Stockholm ICANN meeting, titled “Discussion Draft: A Unique, Authoritative Root for the DNS,” <<http://www.icann.org/stockholm/unique-root-draft.htm>>. In early May 2001, the Names Council initiated a process for developing policy on how ICANN should react to the establishment of alternate root server clusters containing TLDs not in the ICANN root. See Minutes, DNSO Names Council Teleconference 9th May 2001, <<http://www.dnso.org/dnso/notes/20010509.NCtelecon-minutes.html>>. On May 28, rather than awaiting the DNSO process, ICANN presented a top-level document (initially unsigned, more recently under the signature of Stuart Lynn, ICANN’s CEO) asserting that, under “established policy” that cannot be changed absent community consensus, ICANN must do nothing that encourages alternative roots. A few days later, the Names Council voted to abandon its own process. DNSO Names Council -- Scribe’s Notes June 2, 2001, <<http://cyber.law.harvard.edu/icann/stockholm/archive/scribe-nc-060201.html>>. Whatever this is, it isn’t bottom-up.

⁶⁷ Other examples are easy to find. See, e.g., David Post et al., *Elusive Consensus* (July 21, 1999), <http://www.icannwatch.org/archive/elusive_consensus.htm>.

⁶⁸ See Weinberg, *supra* note 5, at 225-35.

comments, both policy initiation and policy authority are in the hands of a small group of directors and full-time employees.

ICANN's first CEO noted a conflict between "effective private-sector technical coordination" and the provision of "the maximum access to ICANN consensus processes for the maximum number of people;" it was difficult, he stated, to reconcile the two.⁶⁹ This indicates that, at best, the circles within which ICANN seeks consensus are more limited than the set of Internet actors interested in and affected by its policies. Yet once ICANN so limits its catalog of players, it cannot be said to be engaging in true consensus-building.

ICANN's first chair described its process of consensus generation as one in which "proposed policies are generated from public input and published to the world at large, comments are received and publicly discussed, and an attempt is made, from the entirety of that process, to articulate the consensus position as best it can be perceived."⁷⁰ This is a departure from the conventional, IETF-style description of consensus; it seems much more akin to the administrative agency model. But even this does not really describe ICANN's process. Close observation of ICANN yields no reason to believe that its proposals are "generated from public input" before they are published, at least under the conventional understanding of the word "public." Further, the Board (understandably enough) seems to seek to adopt policies based on their merit, rather than on the degree of consensus supporting them.

That ICANN does not seek IETF-style consensus, finally, should not be surprising. The

⁶⁹ Letter from Mike Roberts to Jere Glover, Chief Counsel for Advocacy, U.S. Small Business Administration (May 15, 2000), <<http://www.icann.org/correspondence/sba-15may00.htm>>.

⁷⁰ See letter from Esther Dyson, *supra* note 54.

IETF process can work as well as it does for two reasons: First, the community of Internet engineers and system administrators is relatively small and homogeneous, bound together by shared values and professional norms. Second, the issues addressed in the consensus process are technical, and the question whether a proposed solution works is typically capable of resolution via a (relatively) neutral performance metric. But those factors are not present in the domain name context. The universe of ICANN stakeholders is large and remarkably diverse. The interested parties don't share common values or professional norms, and they have strong economic interests in particular outcomes. The questions to be decided, resting on competing values and claims of right, can't be resolved from a pure engineering standpoint. There is no reason to believe that any genuine consensus can be formed around these issues, any more than it can be formed in the U.S. Congress around the issues debated there.

C. Conclusion

In sum: ICANN makes public-policy choices affecting Net users worldwide, and it does so in a top-down manner. That raises questions that go beyond the scope of this paper; it's not clear how (or whether) such an organization can demonstrate that it carries out its functions legitimately.⁷¹ There is a strong argument that ICANN should be rethought and rechartered, with its powers and mission sharply restricted. In particular, if a large number of new TLDs were to be added to the name space in a manner allowing for little regulatory discretion, then market forces would substitute

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See Weinberg, *supra* note 5.

for much of the regulatory policy ICANN now sees as its charge.⁷² It may be fundamentally misguided to worry about how to structure an organization doing what ICANN does, when the real challenge lies in the fact that ICANN should not be doing those things at all. But for purposes of this paper, I will consider the question of structuring *this* ICANN, an organization looking essentially like the ICANN we know today. This organization primarily makes public-policy choices affecting and constraining a global public, so it's appropriate to look to political-philosophy perspectives in thinking about how it would best be run.

III. WHAT WOULD ARISTOTLE DO?

So what does Aristotle, of all people, have to tell us about how ICANN should be structured? I will attempt here to lay out some of his thinking in oversimplified form, so that we can see what bearing it might have on the questions addressed in this paper. A starting point for Aristotle was the importance of virtue. The state, he wrote, does not exist merely to prevent crime and enable commerce; rather, its goal is the attainment of the good, happy and honorable life.⁷³ Those who are greatest in political virtue, who could contribute most to such a society, would in an ideal state have the greatest claim to rule.⁷⁴ In the perfect state, all persons sharing in the

⁷² See A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 *Duke L. J.* 17, 177-82 (2000).

⁷³ *Politics*, *supra* note 28, at 143-44, iii 1280b-1281a.

⁷⁴ *Id.* at 144, iii 1281a; see also *id.* at 190, iv 1295a (“the happy life is the life according to virtue lived without impediment”).

government would be virtuous.⁷⁵ Indeed, in an ideal true aristocracy, the so-called “government of the best,” laborers and craftsmen would be excluded from citizenship, for their lives do not permit them to practice virtue.⁷⁶ Rather, those greatest in virtue would rule on behalf of all. Best equipped to govern, they would shape the just and virtuous state.

I start with this point because it seems to me that something analogous to this notion of virtue has a powerful tug in the Internet governance context. Aristotle posed the question that still concerns us: Who is to be a citizen (i.e., one who participates in the governance, as opposed to just being one of the governed)? He presented a vision in which – rather than involving all adults in the decision-making process – a smaller group of “citizens” would engage in political decision-making to realize the common good of the entire community. His definition of citizen excluded those who lacked the capacity to meaningfully deliberate, or whose participation would be divisive or disruptive.⁷⁷ The wise, in short, were to pursue the good on behalf of the many.⁷⁸

An analogous vision inspires many who are skeptical of ICANN’s at-large membership. The common good is best advanced, they argue, when decisions as to Internet identifiers are left to those who can best decide them – a small community not of the virtuous, but of the technically expert. The technically expert, in this sense, are the DNS counterpart of Aristotle’s aristocracy. Rather than spreading the base of governance widely, to include “people who have neither the background nor

⁷⁵ Id. at 135, iii 1278a; 305, vii 1332a.

⁷⁶ Id. at 134-35, iii 1277b-1278a. Aristotle sometimes refers to this as aristocracy, and sometimes as “government of the best” to distinguish it from other forms of government also termed “aristocracy.” See id. at 184, iv 1293b.

⁷⁷ See Joellen Lind, *The Many or the Wise? An Essay on Communitarianism and Majority Rule* (paper to be presented June 29, 2001, SASE Conference Amsterdam).

⁷⁸ Id.

the interest in understanding the consequences of various ICANN decisions,”⁷⁹ we are told, ICANN should enable public-spirited decision-making by the technical elite and others in the DNS inner circle. Here too, it is best for the wise to pursue the good on behalf of the many.

Yet if one reads further in Aristotle’s *Politics*, it becomes plain that this answer to organizing Internet governance is insufficient. For Aristotle was concerned about the degeneration of elite structures; the central underpinning of the *Politics* is that the ideal form of aristocracy is not attainable in the world of practical governance. It is crucial to any good government, Aristotle emphasized, that the rulers be public-spirited, not self-interested;⁸⁰ but it is the natural tendency of rulers to look, intentionally or unintentionally, to their own interests rather than clearsightedly to the common good. In theory, public-spirited government may take the form either of monarchy, aristocracy, or of “constitutional government” (in which the citizenry is broadly based, and the populace at large governs in the common interest).⁸¹ But in the practical world, the forms are different.

In the practical world, Aristotle wrote, monarchy is perverted by self-interest into tyranny. Aristocracy, where the virtuous pursue the common good, is perverted into oligarchy, in which the wealthy rule in their own interest.⁸² It is easy for the wealthy to claim that their wealth should be

⁷⁹ See supra note 27 & accompanying text.

⁸⁰ *Politics*, supra note 28, at 137-38, iii 1278b-1279a.

⁸¹ Id. at 138-39, iii 1279a-1279b.

⁸² Id.

treated as a proxy for virtue.⁸³ Yet without sufficient virtue the wealthy will seek to advance their own interests. Constitutional government, in which the many seek the good of all, is perverted into democracy, in which the numerous poor look only to their own good.⁸⁴

Aristotle's concerns are reflected in ICANN's structure. Taking at face value, for present purposes, the equation of virtue with technical expertise, ICANN demonstrates Aristotle's fear of the degeneration of aristocracy into oligarchy.⁸⁵ I have described a vision in which ICANN's policy-making is left in the hands of an elite of the technically expert and public-spirited. Yet the DNSO Names Council, which at least in theory is supposed to originate all domain name policy, is not so populated. The Names Council members are elected by various industry groupings, to convey and represent the economic interests of their various industry sectors.⁸⁶ And for the most part, they are

⁸³ The wealthy "may with good reason claim office," for wealth and land-holding are necessary elements of the state. *Id.* at 151, iii 1283a. Further, the wealthy are more likely to be well-born, *id.* at 185, iv 1293b], and "those who sprang from better ancestors are likely to be better men," *id.* at 152, iii 1283a. Yet wealth is far more common than virtue. "In what city shall we find a hundred persons of good birth and virtue? Whereas the rich everywhere abound." *Id.* at 211, v 1302a.

⁸⁴ *Id.* at 138-39, iii 1279a-1279b.

⁸⁵ It would not be historically accurate to describe ICANN as departing from an initial perfect aristocracy. As I describe later in this paper, the U.S. government intended ICANN to be a mixed system. In the government's vision, ICANN was to be a forum in which key stakeholders could coordinate among themselves. See the White Paper, <http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm>. The outsize role of economically important actors was present from the start, just as the U.S. government's approach of self-regulation by the (entire) Internet community led it to insist that individual users would be formally represented within the ICANN structure. But ICANN's driving rhetoric since its inception has been the claim that there is nothing going on here but technical coordination undertaken by the technically expert. It is that rhetoric that underlies much of the argument for the elimination of the at-large membership. And that rhetoric is fatally flawed, for it blinks the extent to which ICANN's work is the negotiation of economic agendas by business representatives.

⁸⁶ See Email from Harald Alvestrand, Alternate Chair, DNSO General Assembly (currently chair, IETF) to the ga@dnso.org mailing list (Aug. 30, 2000), <<http://www.dnso.org/clubpublic/ga/Arc05/msg00398.html>> (constituency structure has led to "polarization, as those who are in the DNSO to represent a constituency feel obliged to serve that constituency's interests whether that makes sense in a global context or not").

not engineers; indeed, at least four of the current Names Council members are lawyers.⁸⁷ The current chair has a day job as Manager, Marketing and Branding at the European Brands Association; his training is in economics.⁸⁸

It is not surprising, therefore, that at the most recent Names Council meeting, when some members suggested that the Names Council take up the issue of how ICANN should respond to alternative roots, others responded that – as nontechnical people – they would need to receive education from “people who actually understand the technology” in order to proceed intelligently. One member wondered if ICANN chair Vint Cerf could “give us a 101 on this issue so that we can be educated”; another emphasized that the members shouldn’t “pretend we’re all engineers.” The Names Council chair agreed that he would investigate the possibility of technical briefings.⁸⁹

It should be clear, thus, that ICANN does not select people for positions in its policymaking structure based on their technical expertise. The Names Council members are there because they represent economically important industry members – money, not virtue or technical merit, is the source of their influence.⁹⁰ Nor is the ICANN Board itself different. It has its own share of members whose primary backgrounds are in law, marketing or government relations.⁹¹ And it is no secret that economic influence carries great weight in the halls of ICANN. As Mike Roberts,

⁸⁷ See <<http://cct.georgetown.edu/events/people/Swinehart.cfm>> (Theresa Swinehart); <http://ipc.songbird.com/Nominees_Acceptances.html> (Caroline Chicoine, Axel Aus der Muhlen, Guillermo Carey).

⁸⁸ See <<http://cyber.law.harvard.edu/icann/workshops/la/cv.html>> (C.V. of Philip Sheppard).

⁸⁹ All quotes are from Bret Fausett’s mp3 audio recording of the May 9, 2001 Names Council meeting. The recording can be found at <<http://www.lextext.com/nc05092001.html>>.

⁹⁰ The exceptions are the representatives of the singular Noncommercial Domain Name Holders’ Constituency, which was admitted to the DNSO after the other six.

⁹¹ See supra note 38.

ICANN's former CEO, put it:

Railing away at ICANN because it doesn't meet some ideal model of democracy is likely to be about as effective as complaining that the US Congress is too dominated by the money of those who finance political campaigns. Everyone knows that, the question is how do you work from within the system to balance competing interests, many of which possess economic power.⁹²

At a recent hearing of a National Academy of Sciences body studying the domain name system, Roberts was asked whether ICANN might, at some time in the future, seek regulation making use of the ICANN root zone compulsory. He is reported to have answered that any decision would rest on the input ICANN received from the entities it considered the four or five major stakeholders in the Internet arena.⁹³

It is not my goal – not here, anyway – to argue that the influence of powerful economic actors in ICANN decision-making is inappropriate. Arguably, it simply reflects reality: ICANN would be ill-advised to antagonize too many economically powerful actors too badly. ICANN does not want trademark interests, or any other prominent source of lobbying dollars, to mobilize in the U.S. Congress to override its actions; nor does it want the U.S. Department of Commerce to withhold needed support. It would prefer to remain on good terms with major ISPs.

The upshot, though, is that one cannot defend a structure in which domain-name policy is set by the ICANN Board, nominally at the instigation of the Names Council, as a “government of the [technical] best” devoid of economic agendas. To be sure, a majority of ICANN's board members are now technically expert (something that was not true of the initial board). Yet the job

⁹² *Comments on the Civil Society Statement*, Computer Professionals for Social Responsibility, at http://www.cpsr.org/internetdemocracy/Statement_July-13_Comments.html (July 30, 2000)

⁹³ Confidential email to the author (Apr. 9, 2001); see also Michael Froomkin, *What Really Happened at the NAS Committee's First Meeting?* (Apr. 23, 2001), <<http://www.icannwatch.org/article.php?sid=120>>.

of the ICANN staff, in drafting domain name proposals for the Board to enact, is to “work within the system to balance competing interests, many of which possess economic power.”⁹⁴ In the words of Paul Mockapetris, the ICANN process has failed at keeping the “technology folks . . . two steps ahead of the bureaucrats and the lawyers.”⁹⁵ Nor, Aristotle tells us, should this be surprising. Apolitical governments of the best do not persist in the real world; aristocracy degenerates into oligarchy. We need to search for other solutions.

So what is to be done? Aristotle begins with the position that the virtuous, the wealthy and the nobly born all have special claims to hold office.⁹⁶ He cautions that granting unrestricted power to those “who are not rich and have no personal merit” is undesirable, for “their folly will lead them into error, and their dishonesty into crime.”⁹⁷ Yet faced with the instability of aristocratic rule, and the failures of narrow oligarchies, he reaches the conclusion that representation nonetheless is best spread broadly, beyond the narrow circles of the elite. The compromises possible between competing groups in a broadly-based system, he suggests, will allow a government that is more balanced and more stable. Excluding most of the governed from the decisions that govern them, he

⁹⁴ See supra text accompanying note 92. There is reason to believe, further, that policy proposals are in the hands of staff up until the point, shortly before public meetings, when they are presented to the Board of Directors to be approved. One board member has complained that he has been able to learn the details of ICANN initiatives only by reading its public website and following the trade press. See Prepared Statement of Karl Auerbach before the Senate Commerce, Science and Transportation Committee, Communications Subcommittee (Feb. 14, 2001), <http://www.cavebear.com/cavebear/growl/issue_6.htm>: “As a member of the ICANN board I have been surprised at how often I learn of ICANN actions from outside third parties. And I have perceived a very strong resistance on the part of ICANN’s staff to opening its activities, even to members of ICANN’s Board of Directors.”

⁹⁵ Quoted in Jenn Shreve, Paul Mockapetris: Cut to the Chase, *The Industry Standard* (Mar. 15, 2000), <<http://www.thestandard.com/article/0,1902,12958,00.html>>.

⁹⁶ *Politics*, supra note 28, at 151-52, iii 1281a-1282b.

⁹⁷ *Id.* at 146, iii 1281b.

warns, engenders resentment against the state, lessens its support, and shortens its life.⁹⁸

Aristotle therefore notes with approval the agricultural democracies in which the people as a whole elect officeholders and call them to account, and themselves sit in the law-courts (although some offices can only be occupied by persons of particular qualification or ability). The mass of the people, being poor, cannot attend the assembly and personally participate in government, but they can nonetheless elect their governors. The citizens “are sure to be governed well,” he concludes, for they will be willing to elect the best leaders; at the same time, the officeholders will rule justly, for the people can call them to account. And because the qualifications for certain offices are restrictive, the good and the notables will not rebel on the ground that they are governed by their inferiors.⁹⁹

Yet why should the people elect the best leaders? Aristotle’s answer here is vital: Broader representation, and participation in government, will *increase* the quality of decision-making. To be sure, the people are not expert. “[E]ach individual, left to himself, forms an imperfect judgement,” so that ordinary individuals are worse judges than “those who have special knowledge.”¹⁰⁰ Yet, Aristotle stresses, that is not so when individuals are joined into a larger body. As a collectivity, Aristotle emphasizes, the mass of people are as good or better judges as the experts, for the collectivity can draw from the understanding of all.¹⁰¹ Further, the larger body brings to the table crucial perspectives that a governing elite lacks. “[T]he knowledge of the house is not limited to the builder only; the user . . . of the house will be even a better judge than the builder, just as . . . the

⁹⁸ Id. at 146-47, iii 1281b-1282a.

⁹⁹ Id. at 263-65, vi 1318b-1319a; see also id. at 147, iii 1281b.

¹⁰⁰ Id. at 147-48, iii 1281b-1282a.

¹⁰¹ Id. at 146-48, iii 1281b-1282a; see also id. at 160, iii 1286a.

guest will judge better of a feast than the cook.”¹⁰² Each individual is uniquely situated to evaluate the effects of a proposed policy on himself, and as a group the people can bring to bear more such knowledge in evaluating policy alternatives than can any elite.

In the real world, Aristotle concludes, mixed systems of government are best. In order to approximate the noble form of “constitutional government,” in which a broadly-based government rules in the common interest, the best practical approach is to *combine* elements of oligarchy and democracy.¹⁰³ Pure democracy is insufficient because it disregards the genuine inequalities among persons and allows a tyranny of the majority; it is unstable because it excites the notables to rise up against it.¹⁰⁴ Yet oligarchy allows the wealthy to claim too much, thinking that because they are superior in one respect, they are superior in all. It allows the tyranny of the few, and it is doubly unstable: it presents both the danger that the oligarchs will fall out among themselves, and the danger that the people will rise up against them.¹⁰⁵ Though democracy is safer than oligarchy, it is better still to rely on a mixed system with elements of each.¹⁰⁶

The applicability of all this to ICANN’s at-large membership is straightforward. It’s easy to imagine that Ira Magaziner was an Aristotelian: Drawing ICANN’s board of directors one-half from the Supporting Organizations, representing technical expertise and business influence, and one-half

¹⁰² Id. at 148, iii 1282a.

¹⁰³ See id. at 195, iv 1297a (“the more perfect the admixture of the political elements, the more lasting will be the constitution”); id. at 211-212, v 1302a; see also id. at 192, iv 1296a; id. at 196-201, iv 1297b-1299a; id. at 262, vi 1318a. Indeed, he suggests, it is better still to build a government as an admixture of all three grounds on which persons can legitimately claim a share in governance: freedom (i.e. democracy), wealth, and virtue. Id. at 186, iv 1294a.

¹⁰⁴ Id. at 209-10, v 1301a-1301b; id. at 262,vi 1318a; id. at 266, vi 1319b.

¹⁰⁵ Id. at 209-12, v 1301a-1302a; id at 262, vi 1318a.

¹⁰⁶ Id. at 211-12, v 1302a.

from an at-large membership, representing a broad democratic base, is just the sort of mixed government that the *Politics* champions. It ensures the acceptability of the decisions to influential business players, and provides a check on at-large voters, by giving elite interests (including the business players themselves) at least half of the board. But at the same time, it substantively improves the quality of ICANN decisions, because it brings a broader range of interests and experience into the decision-making process, allowing both the “builder” and the “user” to contribute their own perspectives as to how the house should be built. And it increases the acceptability of ICANN decisions within the larger Internet community by securing representatives of that community a role in ultimate decision-making.

The argument from Aristotle, to be sure, would not be convincing if all of ICANN’s decisions were purely technical. A technical decision is not more legitimate because the decision-making base included people not qualified to contribute, nor do such people have much to add to the technical discussion. Yet I have stressed in this paper that the bulk of the questions before ICANN today are nontechnical policy matters. The larger public is as qualified to take up these issues as is the technical and business elite, and can bring to bear on them a rather broader range of experience and views.

Are there other ways of addressing Aristotle’s concerns? Might we achieve Aristotle’s desiderata simply by allowing the community at large to participate in discussions led by the technical and business elite? Community members could present their own views, and those views would receive such consideration as the elite deemed appropriate in their own determination of whether “consensus” has been achieved. Under this approach, there would be no need for the at-large membership actually to share in ultimate decision-making authority.

The flaw in that approach, though, I think, is that it assumes for ICANN a “government of the best,” impartially and clear-sightedly seeking to discern consensus and the common-good through bottom-up processes. That system works only so long as the elite manage the discussion without bias, self-dealing or insularity; that is, it works only so long as it avoids the degradation that Aristotle feared. Yet it was Aristotle’s insight that this “government of the best” is not actually found in nature. And, as I argued earlier in this paper, it is not found in ICANN. The expedient way to ensure that the voice of a cohort of the community is heard in the community’s governance is to give it a share of that governance. That is precisely why Aristotle argued that mixed systems – systems of shared power -- work best in the real world.

There remains one key issue to consider in evaluating what lessons Aristotle has for ICANN’s processes. Any at-large membership system for ICANN will almost surely be imperfect. Last year’s at-large membership was self-selected, and was vastly smaller than the community on whose behalf the members were voting. In such a context, voter organization and turnout may be crucial, and elections may be subject to capture.¹⁰⁷ Further, any Internet-based voting system presents issues of authentication and security.¹⁰⁸ More generally, claims to “representation” in a vote of a global ICANN membership are incomplete at best. Looking back to last year’s elections, one cannot say that the five directors elected last year perfectly represent the “Internet community” in each of the regions they were elected to serve. There is no way to make such a judgment, for we have no rigorous way to define the relevant Internet communities in the first place. Given those

¹⁰⁷ For a criticism of the election process in one region, see Report: "ICANN At Large Membership Election Campaign in Japan," <<http://www.civilsocietyinternetforum.org/election-report.html>>.

¹⁰⁸ See Caltech/MIT Voting Technology Project, Voting: What Is, What Could Be, <http://web.mit.edu/newsoffice/nr/2001/VTP_report_all.pdf>.

shortcomings, one might question whether the advantages Aristotle saw in mixed systems would be reflected in the real-life implementation of an ICANN at-large membership.

Yet the argument from Aristotle for an ICANN at-large membership does not rely on the hypothesis that ICANN membership elections are perfectly representative. Aristotle suggests that a broad-based polity is conducive to good decision-making, so long as “the people are not utterly degraded,”¹⁰⁹ because its many participants can make a broader range of contributions, each contributing unique perspectives and knowledge (including user perspectives), all forming a part of the larger whole. That advantage will be realized to the greatest degree if the voting system brings forward the public’s perspectives faithfully and without distortion. But the condition that a mixed system must meet in order to be superior to pure elite rule is less stringent: It is sufficient that the democratic elements introduce new, user-oriented perspectives, different from those predominating in elite circles (although still well-grounded and not loony). An ICANN governance structure featuring an at-large membership, in particular, presents an improvement over pure elite rule so long as the at-large membership yields Board members who contribute different, although well-supported, perspectives and values. And in last year’s elections, the at-large membership appears to have done just that.¹¹⁰

Similarly, the presence of directors elected at large will enhance ICANN’s acceptability to the larger community, without regard to whether those directors are a perfect reflection of that community, so long as they are *more* nearly in tune with its concerns than are the remaining directors,

¹⁰⁹ Politics, *supra* note 28, at 148, iii 1282a.

¹¹⁰ Indeed, notwithstanding Joe Sims’s fears, the directors elected from the at-large membership in 2000 were, as a group, substantially more technically expert than was ICANN’s initial board.

and cause the Board's decision-making better to reflect those concerns. And that condition seems easily met. They can hardly help it; the Supporting Organizations have been designed to reflect elite technical and business concerns, not those of the global user community. The at-large membership process, for all its flaws, seems much more likely to produce board members who bring forward the concerns and policy directions of the Internet public.¹¹¹ Even if it is not perfect (and it almost surely will not be), it represents a practical improvement over the alternative.

Aristotle is not often brought forward to justify modern democratic structures. On the other hand, the structure I am defending in this paper – in which half of ICANN's board is given over to a technical and business elite, and the other half elected by a global membership – is not especially democratic. The at-large membership is by no means a panacea. Indeed, as I noted earlier, there are strong arguments that ICANN should be radically rethought and its powers and mission sharply restricted.¹¹² Aristotle suggests, though, that if we are to retain the ICANN we know today, we would do well to retain the at-large membership as originally conceived. It does not take radical democratic theories to reach that result.

CONCLUSION

¹¹¹ I associate with Aristotle an additional argument that I do not endorse: that the election of at-large directors is desirable because it will enhance ICANN's legitimacy without regard to any effect on actual ICANN decision-making. For Aristotle, a structural device that increased the popular legitimacy (and thus the stability) of a government, so that the people were more likely in controversial matters to give their governors the benefit of the doubt, was desirable without more. I am doubtful, though, that we should prize a device that increases public acceptance of ICANN decisions *unless* that device does so by changing the nature and content of ICANN's decision-making. It is good to have at-large representatives on the ICANN board if the contributions of those representatives drive ICANN to make decisions that are more sensible and more in tune with the views and needs of the larger community. Those decisions will, incidentally, buoy ICANN's public legitimacy. I don't see value, though, in having at-large representatives on the ICANN Board if those representatives have no impact on decision-making, and bolster ICANN's legitimacy only through a process of mystification. That would simply retard more meaningful reform.

¹¹² See *supra* text at note 72.

In this paper, I have examined ICANN's structure through the lens of Aristotle's philosophy. Aristotle was not a democrat in the modern sense. He listed public-spirited monarchy among his ideal forms of government, defended slavery, and believed that the rich, the nobly born and the virtuous had special claims to rule. At the same time, though, he was acutely aware of the dangers of self-interested governance even by deserving elites, and therefore commended mixed, more broadly-based, systems of government.

Aristotle's thought has plain lessons for ICANN's at-large membership. It's easy to imagine that Ira Magaziner was an Aristotelian: Drawing ICANN's board of directors one-half from the Supporting Organizations, representing technical expertise and business influence, and one-half from an at-large membership, representing a broad democratic base, is just the sort of mixed government that the *Politics* champions. Aristotle believed in the virtues of elites. Yet even he saw representative structures as an important check on elite and economic power, and as a source of valuable competing perspectives. That is advice ICANN would do well to heed.