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## ICANN: THE DEBATE OVER GOVERNING THE INTERNET

¶ 1 Since its creation, the Internet Corporation for Assigned Names and Numbers (ICANN) has been the subject of criticism and controversy. ICANN is a private non-profit corporation that operates under contract with the US Department of Commerce. It was created at the request of the government for the purpose of privatizing the Domain Name System (DNS), the addressing system on which the Internet depends. The creation of ICANN in 1998--what some have called cyberspace's own "constitutional moment"<sup>1</sup> -- represented a substantial shift in power to control the Internet from government to private industry. Today, ICANN is facing a virtual revolt. Domain name registrars outside the US are protesting bills sent by ICANN (which help finance approximately 1/3 of ICANN's \$5 million budget), claiming they want either better representation or the ability to break away from ICANN and set up their own networks.<sup>2</sup> Domestic registrars who recently applied for new top-level domain names (and who submitted non-refundable \$50,000 application fees) have threatened legal action, claiming that ICANN's process for approving new domains is unfair.<sup>3</sup> And recently, Professor Michael Froomkin of the University of Miami School of Law published a seminal law review article questioning the very legality of ICANN's relationship with the Department of Commerce.<sup>4</sup>

¶ 2 The following iBrief describes the origins and functions of ICANN, summarizes some aspects of the current debate, and examines whether ICANN is operating legally under the Constitution and other applicable law.

### Origins of ICANN<sup>5</sup>

¶ 3 The Internet relies on an underlying structure known as the DNS. This system is essentially a network of addresses that computers use to communicate with one another--to route e-mail, find web pages, etc. Each Internet address has two basic components: (1) a domain name, which is the alphanumeric text following the http:// in a web address or the @ in an e-mail address, and (2) an Internet protocol (IP) number, which is a 32-bit number that specifies a machine's address on a TCP/IP network. When an Internet user types in a domain name, the host computer "resolves," or translates, the domain name into its corresponding IP number so that messages can be sent and received.

¶ 4 Because each computer's address must be unique for the system to work, a centralized system is critical to control and assign domain names and IP numbers. The name resolution side of the DNS is controlled by the "root," which is the central component of the DNS system. The root consists of a single database maintained in parallel on thirteen different computers. This database is a master list of domain name registrations in each top-level domain (TLD).<sup>6</sup> While the US government does not own all thirteen of the computers that make up the root, it does lay claim to managing the database contained on the root system--the authoritative list of TLDs without which the Internet could not function.

¶ 5 When the Internet was smaller, the DNS root system was controlled by a group of volunteers, the National Science Foundation (NSF), and US government contractors. The US government became the *de facto* controller of the DNS (mostly because it paid the bills), but for the most part the system was administered ad hoc. In 1992, the NSF contracted with a private company, Network Solutions, Inc. to manage and maintain the .com, .org, and .net domains. At that time, Network Solutions was the sole registrar in its TLDs--that is, it was the only company able to register new domain names in .com, .org., and .net. It was also responsible for control of the root system, in consultation with another private government contractor, the Internet Assigned Numbers Authority (IANA).<sup>7</sup>

¶ 6 The explosive growth of the Internet changed all this. Assigning domain names became more difficult as attractive names, particularly in the .com group, became scarce. Network Solution's private monopoly over the assignment of names in the most popular TLDs came under fire. Disputes arose between trademark holders and "cybersquatters" who registered domain names in order to sell them for profit. Pressure mounted for the creation of new TLDs such as .biz and .web. And some foreign governments began to express concern over US control of the root. When Network Solution's contract expired in June 1997, the Department of Commerce (which had taken over from the NSF) announced its intention to get out of the DNS management business.

¶ 7 In July 1997, the Department of Commerce issued a plan, commonly known as The White Paper, for transferring the management of the DNS to a private, non-profit corporation.<sup>8</sup> The White Paper called upon the Internet community to form this non-profit corporation through a process of bottom-up consensus. An initial Board of Directors was chosen from a group of "stakeholders"--engineers, computer scientists, commercial and noncommercial users, Internet service providers, and trademark interests. In October 1998, ten representatives to this board were chosen, and ICANN was formed.

¶ 8 ICANN, which operates as a contractor for the Department of Commerce, is charged with being the "global consensus entity" coordinating technical management of the DNS.<sup>9</sup> It was incorporated in California as a §501(c)(3) non-profit corporation. ICANN's Articles of Incorporation provide that ICANN shall "pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet."<sup>10</sup> It assumes responsibility to coordinate the operation of the Internet in four key areas: (1) managing the DNS; (2) allocating IP address space; (3) managing the root server system; and (4) coordinating protocol number assignment.<sup>11</sup> ICANN currently operates with a 19-member volunteer board, five of whom were recently elected from the public at large through an online voting system.<sup>12</sup>

### **Summary of the Current Debate**

¶ 9 The current debate over ICANN essentially breaks down three ways. The first part of the debate is whether ICANN really governs the DNS. Is ICANN just a "geeky technical standards group,"<sup>13</sup> or does it set policy in its particular area of expertise (roughly the same way that an administrative agency does)? The second part of the debate is how ICANN should govern the DNS. Is the way ICANN runs the DNS right for the Internet? Finally, there is the relatively new debate over ICANN's legality. Is ICANN just a stand-in for the Department of Commerce, but without the political accountability? If so, is this relationship legal?

### ***Does ICANN "Govern" the DNS?***

¶ 10 Much of the initial debate over ICANN has been about ICANN's role in governing the domain name system. The question is whether ICANN just manages technical aspects of the DNS, as it sometimes claims, or whether it sets policy. Legally, this question may be critical. If ICANN only sets technical standards, then it operates like most other government contractors, and needs no particular authority. On the other hand, if ICANN sets public policy, it is not so much a private company as it is a private form of governance.

¶ 11 ICANN claims that its mandate is "not to run the Internet."<sup>14</sup> Rather, it says its goals are to "coordinate the management of only those specific technical, managerial and policy development tasks that require central coordination."<sup>15</sup> This proposition finds support in The White Paper, which states that the new company is charged only with management of Internet names and addresses and "does not set out a system of Internet 'governance.'"<sup>16</sup> Additionally, The White Paper makes it clear that the job of managing the DNS was not intended to disturb any "existing rights."<sup>17</sup> Under this formula, ICANN's role is limited to technical management

rather than creation of policies that affect individual rights.

¶ 12 ICANN's own statements and bylaws, however, appear to contradict these assertions. ICANN's current Fact Sheet states that ICANN is "dedicated... to coordinate *policy* through private-sector, bottom-up, consensus-based means."<sup>18</sup> In addition, ICANN's bylaws are geared towards policies that affect the rights of Internet users. The bylaws provide a mandatory notice and comment procedure for "any policies... that substantially affect the operation of the Internet or third parties."<sup>19</sup> Finally, ICANN's bylaws provide for reconsideration and review of ICANN's decisions upon request by "[a]ny person affected by an action."<sup>20</sup> ICANN's Board of Directors is charged with setting up "policies and procedures" for review of Board actions,<sup>21</sup> including independent third-party review if an action is alleged to have violated ICANN's articles of incorporation or bylaws.<sup>22</sup> This all certainly seems to indicate that ICANN's role includes policymaking and governance, as well as mere technical coordination.

¶ 13 Based on ICANN's own statements and bylaws, then, ICANN's mission appears to be at best both technical *and* policymaking. The next step is to look beyond ICANN's statements to its actions. As mentioned, ICANN assumes responsibility to manage the DNS, allocate IP address space, manage the root server system, and coordinate protocol number assignment. In furtherance of these responsibilities, ICANN does four important things. It (1) approves companies to become accredited primary registrars for domain names in .com, .net, and .org.; (2) decides whether and when new TLDs are added to the root system; (3) coordinates technical parameters to maintain universal connectivity to the internet; and (4) creates and administers a Uniform Domain Name Dispute Resolution Policy (UDRP) for competing domain names.

¶ 14 Of these four functions, the third--coordinating interconnectivity--is arguably the only one that is purely technical. The first and second functions have already been the subject of disputes over the possible rights of Internet users. As mentioned in the introduction to this iBrief, on November 17, 2000, ICANN announced that it had approved the addition of seven new gTLDs--.info, .biz, .aero, .coop, .museum, .pro, and .name--chosen from among forty-seven competing applications. This announcement prompted a flurry of criticisms and planned lawsuits from rejected applicants. Among the complaints were that ICANN made a number of errors in its determinations, that ICANN's process was biased towards approving registrants with which ICANN had a prior relationship, and that ICANN provided no way to review its decisions, leaving affected parties no choice but to file suit.<sup>23</sup>

¶ 15 ICANN's role in selecting companies to become approved registrars has also come under fire. On June 26, 2000, ICANN was sued by Afternic.com, a New York company that ran a web site where people who owned domain names could resell them. Afternic.com had applied to become an ICANN-approved registrar, but its application was initially turned down. Because ICANN is the only organization that can give registrars the ability to register people in .com, .org, and .net, ICANN's denial meant that Afternic.com was unable to allow people to resell domain names in the most popular TLDs.<sup>24</sup> The suit was settled on July 7, 2000, but it may well be a sign of things to come.<sup>25</sup>

¶ 16 The fourth function--creating and administering the UDRP--has been perhaps the most heavily criticized. As a condition of being ICANN-approved, ICANN requires its registrars to participate in the UDRP. The UDRP requires that every domain name registrant submit to administrative proceedings whenever a third party complains that the domain name is identical or confusingly similar to complainant's trademark.<sup>26</sup> This process has been viewed as favoring the rights of trademark owners over the rights of domain name registrants.<sup>27</sup> As such, the UDRP appears to be, as Professor Froomkin and other critics argue, essentially a policy function that has little to do with technical coordination.

¶ 17 The bottom line here is that many people believe ICANN does much more than just manage technical aspects of the DNS--it sets policy. This means that ICANN, despite being a private company in form, is in function a private form of Internet governance.

### ***How Does ICANN Govern the DNS?***

¶ 18 The next major issue, then, is how ICANN governs (or should govern) the DNS. Again, this has been the subject of much debate. Although ICANN claims that its policymaking is reflective of the Internet community, there are doubts as to ICANN's openness, representativeness, and methods for making decisions.

¶ 19 ICANN has generally sought to situate itself within the Internet tradition of consensus-based standards development. As its Fact Sheet says, "ICANN is dedicated to... achieve broad representation of the global Internet community; and to coordinate policy through private-sector, bottom-up, consensus-based means."<sup>28</sup> Under the consensus model, a standard is adopted if it comes from the people who use it in practice; the ultimate test is success in the open market.<sup>29</sup> This model gives ICANN's actions a certain legitimacy outside its relationship with the government. If ICANN acts by consensus, then ICANN is simply a means to express the will of the Internet community. Its "governance" is nothing more than consolidation.

¶ 20 This proposition has been quite heavily criticized, however. Critics have attacked on two fronts, claiming that (1) this model is wrong for Internet governance (as opposed to its technical coordination), and (2) ICANN does not follow this asserted model. As Professor Jonathan Weinberg points out in his article, *ICANN and The Problem of Legitimacy*, the issues facing ICANN may not be susceptible to resolution by consensus.<sup>30</sup> ICANN deals with issues such as who can become a domain name registrar, how competing domain name registrations should be resolved, and how to allocate the resources of the DNS. These questions involve competing claims of right, and are thus not particularly well-suited to resolution by consensus. Ultimately, someone must make the hard choices.

¶ 21 The other criticism is that ICANN does not actually practice governance by consensus. The consensus model is championed by Internet users as the result of a rich, searching conversation with all involved. Frequently, ICANN has been excoriated for lack of openness, which undermines ICANN's claim to consensus.<sup>31</sup> Critics note, for example, that ICANN's initial board of directors was chosen in relative secrecy. As a result, there are serious questions as to whether ICANN's structure is really open to the public.

¶ 22 ICANN has also been accused of favoritism in its adoption of policies. One example, of course, is the UDRP. The UDRP has been deemed by ICANN to be a "consensus policy" that is applicable to all domain name registrars.<sup>32</sup> The UDRP has been widely criticized, however, for favoring the interests of trademark owners over other interests.<sup>33</sup> Such favoritism, if it exists, seems to indicate that ICANN does not govern by true consensus, but rather, by considering some interests over others.

¶ 23 Finally, it can be argued that ICANN does not have any reliable method for determining consensus, and that consequently, any claims it has to governing by consensus must be a sham.<sup>34</sup> In fact, ICANN appears to rely less on true consensus than on a representative governing structure in the form of its board of directors. This has also been criticized. When ICANN recently elected five new board members to represent the Internet community at large, the representativeness of the election process itself came under fire.<sup>35</sup> Even more recently, ICANN's decision to retain some board members past the expiration of their initial terms was deemed by some as unfair "board squatting," indicative of ICANN's lack of commitment to openness and representativeness.<sup>36</sup>

¶ 24 Alternatively, ICANN appears to have modeled its governance after that of an administrative agency. While ICANN does not concede that it is subject the Administrative

Procedures Act (APA), at least some of its policies mimic procedures required under the APA. For instance, ICANN has a notice and comment policy that resembles informal "notice and comment" rulemaking under the APA.<sup>37</sup> ICANN also promises "publication" of its rules on its website, and third party review of some of its final decisions.

¶ 25 While these policies may help protect affected parties, they do not fully match the procedures of a true administrative agency. Along with publishing all proposed rulemaking in the Federal Register, an administrative agency must submit a more formal description of the reasoning behind its decisions than ICANN currently is required to supply.<sup>38</sup> In addition, ICANN does not follow formal adjudication procedures, and has no formal provisions in place for outside judicial review, except where ICANN's own bylaws are violated (and even then, the outside review is by "third party," not necessarily by a court).

¶ 26 ICANN could probably argue that some of its policymaking actions fall under exceptions to the APA as either interpretive rules, general statements of policy, or rules of organization or procedure.<sup>39</sup> ICANN has not attempted to do so, however, because it does not claim to be subject to the requirements of the APA at all. The result is that at least some of ICANN's actions evade the more complete protections envisioned by the APA. Parties who are affected by ICANN's actions are denied the benefits of broader public notice (for example, through uniform publication of the reasoning behind proposed rules), formal procedures (including the ability to cross-examine witnesses), and review by a court.

¶ 27 In short, ICANN's governance of the DNS appears not to fit any model. Its governance by consensus falls short of the ideal. And to the extent that ICANN has adopted the administrative model (whether or not it is required to do so), it has done so only in part.

### *Is ICANN's Governance of the DNS Legal?*

¶ 28 The final critical issue is whether ICANN's governance of the DNS is legal. In his new article, *Wrong Turn in Cyberspace*, Professor Michael Fromkin argues that ICANN's relationship with the Department of Commerce is illegal, in violation of either the Constitution or federal statutes.<sup>40</sup> The argument that ICANN's relationship with the Department of Commerce is illegal goes like this. If ICANN is engaged in the sort of policymaking usually entrusted to the government, it is either doing so as a private party, which is illegal under the private non-delegation doctrine, or it is doing so on behalf the government--that is, as a stand-in for the Department of Commerce--in which case it is illegal because, as noted above, ICANN does not currently comply with the APA.

¶ 29 The Supreme Court has recognized a version of the non-delegation doctrine that forbids Congress from delegating its legislative power to private industry.<sup>41</sup> This private non-delegation doctrine comes from two pre-New Deal cases, *A.L.A. Schechter Poultry Corp. v. United States*<sup>42</sup> and *Carter v. Carter Coal Co.*<sup>43</sup>

¶ 30 This doctrine is not without its critics. For one thing, unlike its more famous cousin, the public non-delegation doctrine (which requires Congress to provide an "intelligible principle" when it delegates power to administrative agencies), the private non-delegation doctrine has been described in only a few Supreme Court cases, all of which are over sixty years old.

¶ 31 For another thing, the basis for the doctrine is not entirely clear. In *Schechter*, the doctrine appears to rely on the premise that it would be somehow improper for Congress to allow private industry to perform a legislative function. There is an implication of a separation of powers problem, but the Court doesn't spell it out. It relies instead on a simple statement that "such a delegation [to private industry]... is utterly inconsistent with the constitutional prerogatives and duties of Congress."<sup>44</sup> While this has a powerful ring, it is hardly illuminating.

¶ 32 In *Carter*, the doctrine instead relies on a due process argument--that allowing private industry to set standards amounts to depriving parties of protected rights without due process of law. The Supreme Court in *Carter* held that a delegation of power to an industry group consisting of the majority of producers and miners of coal was invalid. The coal producers group was entrusted by statute to fix maximum hours of labor for the coal industry. The Court found this delegation objectionable on due process grounds, because Congress put an interested subgroup in charge of making laws affecting the property and liberty interests of the whole group. The Court stated:

This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. \*\*\* The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.<sup>45</sup>

¶ 33 Here, the problem was that the private industry group could make any determination it liked, without regard for the affected parties' right to a disinterested decisionmaker. Placing lawmaking power in the hands of interested members of the coal industry thus threatened

protected interests--life, liberty, or property--without due process of law.

¶ 34 So, how does ICANN fare under the private non-delegation doctrine? Assuming such a doctrine is still valid (although *Schechter* and *Carter* are old cases, they have not been overturned), Professor Froomkin's argument that ICANN's relationship with the Department of Commerce is either unconstitutional or in violation of federal statutes is fairly convincing. Certainly, ICANN is, at least in principle, a private party. It is not owned, nor technically controlled, by the government. As such, this looks like a situation where the Department of Commerce has delegated its policymaking powers to private industry. Under the *Schechter* version of the private non-delegation doctrine, such a delegation would be "utterly inconsistent with the constitutional prerogatives and duties of Congress."

¶ 35 One problem with this argument is that, since *Schechter* was decided in 1935, times have changed. Congress now delegates policymaking functions to all kinds of private parties, mainly through contracts with various administrative agencies. What's wrong with Congress getting a little help from private industry? *Schechter* itself recognizes this possibility, noting that Congress may avail itself of "assistance" from private groups as long as it does not rise to the level of delegating legislative functions.

¶ 36 The other constitutional argument, which Professor Froomkin recognizes is probably the better of the two, is the due process argument. ICANN, like the industry group in *Carter*, can be seen to have a personal stake in developing the Internet.<sup>46</sup> The powers ICANN has over other members of the Internet community thus may affect their property and/or liberty interests (for example, their ability to conduct business in a root gTLD or their right to lay claim to a particular domain name) without providing ordinary due process protections.

¶ 37 One major problem with the due process argument is that it is not clear that these are the sorts of rights protected by due process. While the ability to pursue one's profession is considered part of "liberty," being able to conduct business in a particular gTLD may, or may not, be part of that protected right. Similarly, while intellectual property rights such as trademarks are certainly "property," being able to register a particular trademarked domain name may, or may not, be part of that protected right. Finally, ICANN could argue that its "notice and comment" procedures, described *supra*, are adequate to protect the due process rights of affected individuals, even if such procedures are insufficient for full compliance with the APA.

¶ 38 The upshot is that, while Professor Froomkin's argument that ICANN's contract with the Department of Commerce is illegal is convincing, it is not foolproof. And even if ICANN is

illegal, what then?

### **Conclusion and Outlook**

¶ 39 This iBrief has attempted to describe some of the vigorous debate over the functions and legality of ICANN. Because government involvement in making choices that affect the Internet is relatively new, many people feel that, one way or another, the government must be doing it wrong. On one hand, Internet purists resent government intrusion into an area that was previously run by consensus. On the other hand, people who make their living off the Internet want to protect their rights (or at least their perceived rights), and therefore demand at least some government involvement. With ICANN, the Department of Commerce attempted to find a compromise between these two positions by creating a government-supervised private company. Naturally, no one is happy.

¶ 40 But does this mean that ICANN is inherently a bad thing? Certainly there have been problems with many of ICANN's choices and methods. The decision process that ICANN uses appears to lack representativeness, openness, and accountability to the public. Formalizing ICANN's position--for example, by turning it into a full-fledged administrative agency--may address some of these problems. This solution, however, creates evident problems of its own. A government agency necessarily operates at a slower pace, and in the rapidly changing world of the Internet, this could be a fatal flaw.

¶ 41 As the current debate demonstrates, determining the best future for ICANN is not susceptible to easy answers. Nonetheless, it is encouraging that this debate is taking place. As more and more members of the public are affected by the existence of the Internet, ICANN's regulation of the DNS will continue to have enormous implications.

***By: Kathleen E. Fuller***

### **Footnotes**

1. Carl S. Kaplan, *A Kind of Constitutional Convention for the Internet*, N.Y. TIMES, Oct. 23, 1998, available at <http://www.nytimes.com/library/tech/98/10/cyber/cyberlaw/23law.html> (last visited Feb. 6, 2001); see also David Post, *Cyberspace's Constitutional Moment*, at <http://www.temple.edu/lawschool/dpost/DNSGovernance.htm> (last modified January 12, 2001).

2. See Mark Ward, *Name Row Threatens the Net*, BBC News Online, at [http://news.bbc.co.uk/1/hi/english/sci/tech/newsid\\_1043000/1043509.stm](http://news.bbc.co.uk/1/hi/english/sci/tech/newsid_1043000/1043509.stm) (Nov. 28, 2000).
3. See Ben Charny, *ICANN Losers Ask for Reconsideration*, ZDNet, at <http://cma.zdnet.com/texis/techinfobase/techinfobase/+TD9ecPiwxzmwwwhqF.../display.htm> (Dec. 20, 2000). The newly approved TLDs are .info, .biz, .aero, .coop, .museum, .pro, and .name.
4. See A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17 (Oct. 2000), available at <http://www.law.duke.edu/journals/dlj/> (last visited Fe. 6, 2001).
5. This history is greatly condensed. For more comprehensive versions, see Froomkin, *supra* note 4, Judge Katzmann's opinion in *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 576-79 (2nd Cir. 2000), or the 1997 White Paper, *infra* note 8.
6. A TLD is the last part of a domain name, such as .com or .edu. Currently there are 252 registered TLDs, seven of which are the commonly used generic TLDs (gTLDs) such as .com or .org. The rest are country code TLDs (ccTLDs), such as .uk or .us. While there is no technical obstacle to creating a TLD outside the root, such a TLD can only be resolved into an IP number if the user's system knows where to find it. Finding a TLD located outside of the root requires changing a computer's settings, making the use of alternative TLDs impractical for most Internet users.
7. However, Network Solutions and the IANA were specifically not authorized to make changes to the root. See *Name.Space*, 202 F.3d at 577-78.
8. See US Dept. of Commerce (NTIA) Statement of Policy, *Management of Internet Names and Addresses*, 63 FR 8826-01 (1998), 1998 WL 66457, available at [http://www.ntia.doc.gov/ntiahome/domainname/6\\_5\\_98dns.htm](http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm) (last visited Feb. 6, 2001) [hereinafter *The White Paper*].
9. *ICANN Fact Sheet*, at <http://www.icann.org/general/fact-sheet.htm> (last visited Feb. 6, 2001).
10. *ICANN Articles of Incorporation*, ■ 3, at <http://www.icann.org/articles-pr23nov98.html> (last visited Feb. 6, 2001).

11. *See id.*

12. *See* Susan Stellin, *ICANN Holds Public Election*, N.Y. TIMES, Oct. 12, 2000, available at <http://www.nytimes.com/2000/10/12/technology/12ICAN.html> (last visited Feb. 6, 2001).

13. Kaplan, *supra* note 1.

14. *ICANN Fact Sheet*, *supra* note 9.

15. *Id.*

16. *The White Paper*, *supra* note 8.

17. *Id.*

18. *ICANN Fact Sheet*, *supra* note 9.

19. *Bylaws for Internet Corp. for Assigned Names and Numbers*, Art. III §3(b), at <http://www.icann.org/bylaws-09apr99.html> (last modified May 27, 1999) [hereinafter *Bylaws*]. This notice and comment procedure consists of publication of any proposed policy on ICANN's website, opportunity for parties to comment and respond to comments of others, and a public forum at which the policy is discussed. *See Bylaws* Art. III §3(b)(i)-(iii).

20. *Bylaws* Art. III §4(a).

21. *Id.*

22. *See Bylaws* Art. III §4(b).

23. *See* Charny, *supra* note 3. Nor is this the first time that the process for selecting new TLD's has been in dispute. ICANN's predecessor, Network Solutions, was sued by Name.Space, a company that accepted registrations in 530 new TLDs, such as .forpresident and .microsoft.free.zone, on the grounds that Network Solution's refusal to add new TLDs was monopolistic and violated free speech. Although the Second Circuit held Network Solutions was not liable, it was uncontested that Name.Space's business was adversely affected by Network Solution's failure to add new TLDs to the root. *See Name.Space*, 202 F.3d at 578.

24. See Jeri Clausing, *Internet's Domain Administrator is Sued*, N.Y. TIMES, June 26, 2000, available at <http://www.nytimes.com/library/tech/00/06/biztech/articles/26doma.html> (last visited Feb. 6, 2001). The suit was dismissed without prejudice on July 7, 2001. See *Afternic.com Dismissal Order*, at <http://www.icann.org/registrars/afternic-dismissal-07jul00.htm> (July 7, 2000).

25. Indeed, in late October, 2000, RegLand, Inc. filed suit against ICANN in Texas, alleging that ICANN's policies were an "abuse of power" that unlawfully interfered with RegLand's business of pre-registering domain names. See *ICANN Sued by Internet Company*, at <http://www.regland.com/Lawsuit/PressRelease.asp?crypt=%7C%AA%87%8E%7C%80%7Ds%94%8E%9Az> (last visited Feb. 6, 2001).

26. See *Uniform Domain-Name Dispute-Resolution Policy*, at <http://www.icann.com/udrp/udrp.htm> (last visited Feb. 6, 2001).

27. See Froomkin, *supra* note 4, at 96. Professor David Post also argues that the UDRP effectively creates a new body of trademark law. See David G. Post, *Why Juries Should Play a Role in The Institutions That Govern Cyberspace - Part I*, FindLaw's Writ, at [http://writ.news.findlaw.com/commentary/20001027\\_post.html](http://writ.news.findlaw.com/commentary/20001027_post.html) (Oct. 27, 2000).

28. *ICANN Fact Sheet*, *supra* note 9.

29. See Jonathan Weinberg, *ICANN and The Problem of Legitimacy*, 50 DUKE L.J. 187, 246 (Oct. 2000), available at <http://www.law.duke.edu/journals/dlj/> (last visited Feb. 6, 2001).

30. See *id.* at 247.

31. See Stellin, *supra* note 12.

32. See *Uniform Domain-Name Dispute-Resolution Policy*, *supra* note 26.

33. See Froomkin, *supra* note 4, at 97-98.

34. See Weinberg, *supra* note 29, at 248-49.

35. See Stellin, *supra* note 12.

36. See A. Michael Froomkin, *Beware the ICANN Board Squatters*, at <http://personal.law.miami.edu/~froomkin/boardsquat.htm> (last modified Oct. 27, 2000).

37. See *Bylaws*, *supra* note 19, Art. III §3.

38. See Administrative Procedures Act, 5 U.S.C. §553(c) (2000) (requiring a concise general statement of the basis and purpose for informal agency rulemaking).

39. See 5 U.S.C. §553(d). See also *American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1044-48 (D.C. Cir. 1987) (describing these three exceptions to informal rulemaking procedures).

40. See Froomkin, *supra* note 4, at 94.

41. It is important to note that where Congress delegates its power to a public group, such as an administrative agency, the non-delegation doctrine has a different meaning. Public non-delegation means that Congress must supply the agency in question with an "intelligible principle" to guide its decisionmaking. See *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971); accord *Industrial Union Department, AFL-CIO v. American Petroleum Institute (the Benzene Case)*, 448 U.S. 607 (1980).

42. 295 U.S. 495 (1935).

43. 298 U.S. 238 (1936).

44. *Schechter*, 295 U.S. at 537.

45. *Carter*, 298 U.S. at 311.

46. This argument was recently made in the context of ICANN's review of applications for new gTLDs. Nearly one third of the applications were linked to Afilias, a group whose dominant member is ICANN's primary registrar, Network Solutions. See Brock N. Meeks, *Dirt in the Domain Name Game*, MSNBC.com, at <http://www.msnbc.com/news/480700.asp> (Oct. 24, 2000)