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NAMES AND NUMBERS
7

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF LOS ANGELES**

10
11 **KARL AUERBACH,**

12 **Plaintiff,**

13 **v.**

14 **INTERNET CORPORATION FOR**
ASSIGNED NAMES AND NUMBERS,

15 **Defendant.**
16
17

Case No. BS 074771

DECLARATION OF LOUIS TOUTON IN
SUPPORT OF ICANN'S MOTION FOR
SUMMARY JUDGMENT

(THE HONORABLE DZINTRA JANAVS)

Date: June 21, 2002
Time: 9:30 a.m.
Dept.: 85

1 I, Louis Touton, declare:

2 1. I am the Vice President, Secretary, and General Counsel of Defendant Internet
3 Corporation for Assigned Names and Numbers ("ICANN"). I have held those positions since
4 November 1, 1999. Prior to that date, I was an attorney for ICANN from the time of its formation
5 on September 30, 1998. Based on my experiences in those positions, I have knowledge of the
6 matters set forth in this declaration and am competent to testify to those matters.

7 **ICANN**

8 2. ICANN was incorporated on September 30, 1998, with its initial Board of
9 Directors being seated in October 1998. ICANN was formed through the efforts of a broad
10 coalition of the Internet's business, technical, academic, and user communities. ICANN has been
11 recognized by the United States and other governments as the global private-sector, consensus-
12 development entity appropriate to coordinate the technical management of the Internet's domain
13 name system, the allocation of IP address space, the assignment of protocol parameters, and the
14 management of the root server system.

15 3. With a staff of seventeen, ICANN is funded through contributions from the
16 various registries and registrars that comprise the global domain name and Internet addressing
17 systems. ICANN has a nineteen-member Board of Directors. (One of the nineteen seats on the
18 Board is currently vacant.) All of the Directors, except the Chief Executive Officer ("CEO"), are
19 volunteers and are not paid for their services. With the exception of the CEO, who serves as an
20 *ex officio* Director, the Directors are chosen by a variety of means: some (including Mr.
21 Auerbach) were chosen through an experimental on-line voting process; others have been
22 selected by each of three "Supporting Organizations" that, according to ICANN's bylaws, are
23 entitled to select directors to ICANN's Board. Roughly two-thirds of the Board members reside
24 outside of the United States. Together with the Board of Directors and its Advisory Committees,
25 ICANN carries out its work through three supporting organizations – the Domain Name, Address,
26 and Protocol Supporting Organizations – which collectively represent a broad cross-section of the
27 global Internet's business, technical, academic, non-commercial, and user communities.

28

1 **Mr. Auerbach and the Board**

2 4. Mr. Auerbach is one of five ICANN Directors who was chosen to be a member of
3 the ICANN Board of Directors through an experimental process involving various steps including
4 an on-line vote of Internet users in October 2000. Mr. Auerbach received only 1,738 votes from
5 all of the United States and Canada where (according to the reported data with which I am
6 familiar) there are over 150,000,000 Internet users. A true and correct copy of the "Campaign
7 Platform" section of Mr. Auerbach's website (as it appeared on March 29, 2002) is attached to this
8 declaration as Exhibit 1. A true and correct copy of Mr. Auerbach's ICANN At Large
9 Nomination Application is attached as Exhibit 2.

10 5. Prior to being selected as an ICANN Board member, Mr. Auerbach publicly
11 expressed his negative views about ICANN and its work. A true and correct copy of a February
12 2000 published interview with Mr. Auerbach concerning his views of ICANN before the voting
13 process began is attached to this declaration as Exhibit 3.

14 6. Once selected for the Board, Mr. Auerbach continued to make statements to the
15 media about his plans to "knock down" ICANN. A true and correct copy of a published interview
16 with Mr. Auerbach on October 16, 2000, just after his selection for the Board, is attached to this
17 declaration as Exhibit 4.

18 7. Since taking his seat on the Board in November 2000, Mr. Auerbach has been the
19 sole, or one of two, votes against the majority of the Board on a large number of matters. I have
20 prepared a tally of ICANN Board of Director votes on resolutions at its most recent meeting, held
21 March 14, 2002 in Accra, Ghana. It is attached to this declaration as Exhibit 5.

22 8. Mr. Auerbach publishes his comments about, among other things, events that
23 transpire at ICANN Board meetings in his "Decision Diary" on his website. True and correct
24 copies of two entries in which I am mentioned in Mr. Auerbach's Decision Diary are attached to
25 this declaration as Exhibits 6 and 7.

1 **Mr. Auerbach's Request to Inspect**

2 9. ICANN's Directors (whether new or continuing in office), including Mr.
3 Auerbach, received a copy of a binder titled "ICANN Guidelines for Directors" in November
4 2000. The Guidelines state that "[i]n discharging the duty of loyalty, the Director must observe
5 those policies which are established by the Board of Directors or the Officers which are intended
6 to protect the legitimate interests of the corporation. For example, policies concerning
7 confidentiality of corporate information and employee relations must be strictly observed. . . ." A
8 true and correct copy of the quoted portion of ICANN's Guidelines for Directors is attached to
9 this declaration as Exhibit 8, at page 4.

10 10. In December 2000, Mr. Auerbach made a written request to review ICANN's
11 General Ledger. A true and correct copy of Mr. Auerbach's December 3, 2000 written request for
12 records is attached to this declaration as Exhibit 9.

13 11. Mr. Auerbach's request for inspection was the first request by a member of
14 ICANN's Board of Directors to inspect corporate records raising significant issues of
15 confidentiality and ICANN had not yet developed procedures for such an inspection.

16 12. In a March 3, 2001 e-mail to Mr. Roberts and the ICANN Board e-mail list, Mr.
17 Auerbach inquired about his inspection of the corporate records. (At the time, Mr. Roberts was
18 finishing up his tenure as ICANN President; he was replaced by M. Stuart Lynn later in March
19 2001.) A true and correct copy of the March 3, 2001 e-mail is attached to this declaration as
20 Exhibit 10.

21 13. On March 4, 2001, Mr. Roberts responded to Mr. Auerbach's March 3, 2001
22 inquiry by instructing Mr. Auerbach to direct his request to me, so that I could seek guidance
23 from the Chair of the Audit Committee. A true and correct copy of this response that Mr. Roberts
24 sent to me is attached to this declaration as Exhibit 11.

25 14. On June 1, 2001, I attended a scheduled meeting of the ICANN Board's Audit
26 Committee in Stockholm. A quorum of the committee's members did not attend this meeting, so
27 no formal action could be taken, but key points for the provision of access to corporate records to
28 interested directors were discussed.

1 15. On August 21, 2001, I attended an Audit Committee meeting where the details of
2 proposed director inspection procedures were discussed. The Audit Committee voted to endorse
3 the implementation of the "ICANN Procedures Concerning Director Inspection of Corporate
4 Records and Properties." A true and correct copy of the minutes of that meeting are attached to
5 this declaration as Exhibit 12.

6 16. On September 3, 2001, Mr. Auerbach sent me an e-mail in reference to his
7 inspection request, stating "[t]hat some of this, perhaps even all of this, is confidential is
8 understood by me. In fact I embrace the thought that there is a clear statement of what such
9 concerns may be so that mistakes may be avoided." A true and correct copy of Mr. Auerbach's
10 September 3, 2001 e-mail to me is attached to this declaration as Exhibit 13.

11 17. On November 15, 2001, the Audit Committee held a meeting in Marina del Rey,
12 California. A true and correct copy of the draft minutes of that meeting are attached to this
13 declaration as Exhibit 14.

14 18. A true and correct copy of an Internet posting made in the name of Paul Alan Levy
15 of the Public Citizen Litigation Group with the date of December 5, 2001, is attached to this
16 declaration as Exhibit 15.

17 **Mr. Davidson's Inspection**

18 19. In January 2002, M. Stuart Lynn, ICANN's current President and Chief Executive
19 Officer, informed me that Mr. Davidson, another ICANN Director, had made an e-mail request to
20 inspect the same corporate records that Mr. Auerbach had requested to inspect. Dr. Lynn asked
21 me to prepare a letter on Dr. Lynn's behalf that was substantively the same as the letter Dr. Lynn
22 sent Mr. Auerbach on October 5, 2001. The proposed inspection arrangements in the January 31,
23 2002 letter to Mr. Davidson that I prepared and signed on Dr. Lynn's behalf were the same (other
24 than the date of inspection) as the proposed arrangements in Dr. Lynn's October 5, 2001 letter to
25 Mr. Auerbach. A true and correct copy of the letter I prepared and signed on behalf of Dr. Lynn
26 is attached to this declaration as Exhibit 16.

27 20. On January 31, 2002, I presented the letter with the proposed inspection
28 arrangements to Mr. Davidson.

At-Large Candidate for the ICANN Board

Karl Auerbach

Platform

Detailed Platform Points

- Overall point-of-view
- Individuals do matter
- Reform of ICANN:
 - Openness/transparency/accountability
 - Full recognition of at-large members as "members" under California law.
 - Remove discretion from "staff" and substantially reduce the discretionary powers of executive officers.
 - Voting rather than "consensus"
 - Robert's Rules of Order (modified to work in an electronic context) rather than chaos.
 - Restore the Chief Technical Officer
 - Elimination of ex-officio board seat granted to President.
 - Financial reform
 - Elimination of "Ad Hoc Addressing" group.
 - No censorship.
 - Jones-Day must go
 - Mike Roberts must go
 - Louis Touton must go
 - DNSO reform:
 - GA
 - Constituencies
 - Sunset provision
 - Get ICANN out of the clerical services business
 - Elimination of PSO
 - Make IETF pay for IANA registration services - no free ride to any group unless it is free to all groups.

- Domain Name Policy
 - Use existing laws, do not create new ones
 - UDRP reform
 - "Stability"
 - Top Level Domains
- How I will conduct myself

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Overall point-of-view:

As a general matter, I value procedure very highly - It is my belief that good procedure leads to good decisions. Now, I don't mean that a "good" decision is one that satisfies everyone. Rather, I believe that a "good" decision is one in which every person feels that he or she has had a fair chance to make their position heard, that the decision maker actually did consider all points of view without prejudice, and that those who didn't get what they wanted are willing to accept the decision.

Thus, the larger part of my platform is the reformation of ICANN and its procedures. However, I also believe that ICANN will be unable to be reformed until certain personnel changes are made.

And I do have some opinions on policy matters themselves.

To a large extent I am a firm believer that government is the proper embodiment for public debate and public policymaking - to my mind a body such as ICANN *is* Internet government no matter how many "private corporation" flags it might try to fly.

And I am not one who reacts with an instant "way to go" when someone utters the words "deregulation" or "privatization". My studies of our history have taught me that private industry and private behavior are not always for the general good, that regulation, indeed governmental regulation, must sometimes be imposed to protect the public from certain self-interested actions of the few.

On the other hand, I do believe that governmental bodies ought to keep their fingers out of things that don't need the active oversight and regulation. To a large degree I feel that the Domain Name System of the Internet needs no regulation, that economic and social forces will cause it to evolve in "the right way" without the intrusive and controlling efforts of a governance body such as ICANN.

As such you may find that my point of view is bimodal - If I find that something needs regulation, I tend to believe that it ought to be done by a governmental body, or at least a body that isn't afraid to recognize that it is like a government (and thus must operate with notions of "due process".) But if I find that something does not presently need regulation, I tend to take a rather more libertarian, hands-off approach.

My own personal politics tend towards the liberal or "green" point of view.

But when it comes to financial matters, I firmly believe in sound practices with strict controls. I have found ICANN to be lacking in financial common sense.

Oh yes, one more thing - I am willing to be convinced that a position I might espouse is ill advised and I'm willing to change my mind.

Individuals do matter:

To my mind, one of our greatest strengths is that of the individual person to have an idea. Creative thought is the province of individual human beings. I have never seen a corporation have an idea. I have never seen an association or club have an idea. The *only* thing on this planet that can have a creative thought is a living, breathing person. It is time for ICANN to open itself up so that individual people - you and I - can meaningfully participate in the development of policies that impact how we use the Internet.

Over the last hundred years we have seen corporate entities receiving more and more "rights" that were previously available only to individual people. In ICANN we see that trend reaching a point where corporate entities are now receiving more rights than do individual people. That is wrong.

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Reform of ICANN

ICANN was in need of reform before it was even created - its initial structure was the creation of a secretive process that both actively and passively excluded any but those who were insiders to the process. The Boston Working Group, which I co-founded, attempted to deal with a very limited set of these pre-creation problems. Most of our proposals were ignored by ICANN and those that were adopted have been silently removed, ignored, or emasculated. For example, ICANN is as secretive as ever.

In the 18 plus months since ICANN's formation numerous other structural and operational problems have been revealed. Not the least is the capture of ICANN by special interests - particularly pro-trademark groups and name registries and registrars.

ICANN's decision at the Yokohama meeting to revisit the entire at-large structure, with even the existence of the at-large up for reconsideration, is a very clear symptom of the extent to which ICANN has become a tool of those who want the Internet to be nothing but a mindless shopping mall in which users are reduced to mere purchasers of trademarked products and restrained from having any say in how the Internet operates, what its policies might be, or even, who gets access.

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Reform of ICANN - Openness/transparency/accountability

An "open" process is one in which all interested parties can participate in a meaningful way and as equals to all other parties.

A "transparent" process is one in which the entire decision making process, from inception to closure, is revealed and recorded. To be fully transparent, a process must reveal inputs, issues, criteria, biases, misunderstandings, evolution of decision maker positions, compromises, votes taken, etc, etc.

An accountable decision maker is one who is both identifiable and can be held to account for his/her decisions. Board

members are typically made accountable by elections and recalls - assuming that the electorate can obtain enough information to evaluate how their board members have performed. Staff members must be held accountable by the board.

One could look long and hard. But one is unlikely to find an organization that spends as much effort as ICANN does actively rejecting these principles.

It is my position that ICANN must operate with absolute openness, transparency, and accountability. This means that absolutely every input, every discussion, every decision - everything - must be done in open session with a written or electronic record. All decisions must be made by recorded vote - with the position of each director clearly shown.

The only exception to this would be matters pertaining to personnel and litigation. And even a decision that a matter falls into those categories must be made in public.

In addition, actions by "staff" are the epitome of non transparent and non accountable decision making. ICANN's staff must be required to operate according to the same principles and the board must be obligated to adopt, on the record, staff actions.

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Reform of ICANN - Full recognition of at-large members as "members" under California law.

Under California law, "members" of a non-profit/public-benefit corporation, such as ICANN obtain several rights.

ICANN's staff prepared the following [list of these rights](#). (The numbers in parenthesis are the relevant section of the California Corporations Code.)

- A meeting of members must be held in each year in which directors are to be elected. (5510). Members may apply to the Attorney General to order such meeting if not timely held. (5510)
- Special meetings of members may be called by 5% of the members. (5510)
- Members are entitled to written notice of member meetings. (5511)
- Members may act by written ballot except to cumulatively vote for directors. (5513)
- Proxies are allowed unless withdrawn by bylaws or articles. Proxies may be limited by articles or bylaws. Proxies are revocable. (5613)
- Members may bring derivative actions, subject to the usual conditions. (5710) No bond shall be required if enough members bring the action. (5710)
- Most amendments to articles must be approved by Board and members (and any other persons specified in articles). (e.g. SOs). (5812)
- Board must send annual report (as defined in 6321) to members within 120 days after the end of the fiscal year. (6321)
- Membership lists and accounting books and records and minutes must be made available to members for proper purposes. (6330, 6333 and 6338)
- Members may amend the bylaws; however, the bylaws may provide that the amendment may occur only with the approval of a specified person other than the Board. (e.g. SOs). (5150) Note, however, that the Board may amend the bylaws without the approval of members unless the action would materially and adversely affect the right of members as to voting or transfer.

- Directors elected by members may be removed by members. (5222)
- The bylaws must specify a quorum requirement. (5512)
- Members can bring legal actions to determine the validity of elections. (5617)

Section 5056 of the California Corporations Code normally defines who is a "member" of ICANN: [emphasis added]

5056. (a) "Member" means **any person who, pursuant to a specific provision of a corporation's articles or bylaws, has the right to vote for the election of a director or directors** or on a disposition of all or substantially all of the assets of a corporation or on a merger or on a dissolution unless the provision granting such right to vote is only effective as a result of paragraph (2) of subdivision (a) of Section 7132. "Member" also means any person who is designated in the articles or bylaws as a member and, pursuant to a specific provision of a corporation's articles or bylaws, has the right to vote on changes to the articles or bylaws.

(b) The articles or bylaws may confer some or all of the rights of a member, set forth in this part and in Parts 2 through 5 of this division, upon any person or persons who do not have any of the voting rights referred to in subdivision (a).

(c) Where a member of a corporation is not a natural person, such member may authorize in writing one or more natural persons to vote on its behalf on any or all matters which may require a vote of the members.

(d) A person is not a member by virtue of any of the following: (1) Any rights such person has as a delegate. (2) Any rights such person has to designate or select a director or directors. (3) Any rights such person has as a director.

This makes it pretty clear that the California legislature, with the consent of the governor, have determined that it is a good idea for people who vote for board positions to also have rights to make sure that the corporation is properly run.

However, ICANN has attempted to avoid the clear meaning of this statute.

They do this through a two part bit of legerdemain:

First, they simply declare that members are not "members"! [emphasis added]

ARTICLE II: MEMBERSHIP

Section 1. GENERAL

The Corporation shall not have members as defined in the California Nonprofit Public Benefit Corporation Law ("CNPBCL"), notwithstanding the use of the term "Member" in these bylaws, in a selection plan adopted by Board resolution, or in any other action of the Board. Instead, the Corporation shall allow individuals (described in these bylaws as "Members") to participate in the activities of the Corporation as described in this Article II and in a ***selection plan adopted by Board resolution***, and only to the extent set forth in this Article II and in a ***selection plan adopted by Board resolution***.

Second they focus on the italicized words of 5056(a): "***pursuant to a specific provision of a corporation's articles or bylaws***" and "***right to vote***":

ARTICLE II: MEMBERSHIP

Section 2. Plan for Selection of Five "At Large" Directors in the Year 2000

Five persons shall be nominated and selected by no later than November 1, 2000, to become "At Large" Directors according to a *selection plan adopted by the Board*. They shall be seated at the conclusion of the Annual Meeting of the Corporation in 2000.

This so-called "selection plan adopted by Board resolution" is nothing less than the election in which we are all participating right now.

By avoiding even the use of the word "election" (and using "selection" instead) the ICANN side-show artists are attempting to claim that there isn't even any voting going on - and you will note that the California statute depends on people having a "right to vote".

One has to be pretty silly, or stupid, not to recognize that there is, in fact, an election going on. But ICANN is depending on blind acceptance of their artifice.

By placing the definition of the selection/election process into a "plan adopted by Board resolution" ICANN is trying to claim that the selection/election is not made "pursuant to a specific provision of a corporation's articles or bylaws".

This is a legal shell game that has no purpose except to evade the clear intent of the California law and to eviscerate the rights accorded to people who are in all senses of the word, "members" of ICANN.

It is a shell game that should be stopped.

There are those who say that if ICANN has members that ICANN will be subject to derivative lawsuits. I agree. I believe that ICANN should be subject to derivative lawsuits - that is simply part of the cost of being accountable. ICANN can avoid being liable to such lawsuits simply by acting properly and conforming its actions to the dictates of law.

One might also want to remember that the bulk of ICANN's expenses have been to pay legal bills - and these costs have been incurred to create precisely the kind of prejudicial rule that we've been talking about here. And since we, the Internet users, will ultimately bear ICANN's costs, we will end up paying for the costs of our own disenfranchisement.

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Reform of ICANN - Remove discretion from "staff" and substantially reduce the discretionary powers of executive officers.

Today most of the substance of ICANN's actions are determined by ICANN's "staff" - working in secret, working with unknown third parties, possibly making unknown deals.

In well run non-profit organizations, "staff" is used to carry out the will of the Board of Directors. In such organizations, "staff" has very little discretion.

In ICANN's case, the Board of Directors has essentially abrogated its duty to set policy and has relinquished decision making power. As a practical matter, ICANN's board exercises neither oversight nor independent review of "staff" actions.

This is wrong.

advocate that ICANN's "staff" be substantially reined-in, that its discretionary powers be reduced to a minimum, that 'staff' have no power to consummate any significant actions without express and explicit approval by the board.

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Reform of ICANN - Voting rather than "consensus"

Consensus based decision making requires a great deal of trust in the person who evaluates whether consensus exists. ICANN has become a cauldron of competing interests with a history of practices are, at best, questionable.

There is no trust within ICANN that is adequate to support consensus politics.

The principle of accountability requires that one be able to ascertain what board member supported what decisions. Consensus decision making makes that nearly impossible.

It is important that all bodies within ICANN - the board, the staff, the Support Organizations, the "Councils", the "Assemblies" - all of these need to abandon the adherence to soft and fuzzy - and pliable - consensus decision making and use clear voting on clearly articulated issues.

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Reform of ICANN - Robert's Rules of Order (modified to work in an electronic context) rather than chaos.

Electronic discussions often devolve into little more than disorganized chaos.

This problem has been solved in non-electronic contexts through the use of procedural rules, such as Roberts Rules of Order.

Mark Langston and others have examined Roberts Rules and have come up with modifications that are appropriate for use on e-mail forums.

ICANN, in all of its bodies - from the board to the councils, from the working groups to the assemblies - ought to abandon its vague, and pliable, "consensus" mechanisms and start using orderly processes including, when needed, counted votes on clearly stated questions.

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Reform of ICANN - Restore Chief Technology Officer

The original ICANN proposals contained a provision for a Chief Technology Officer. This was a good idea. It gives the board a source of technical knowledge upon which it might rely.

Apparently there was a secret reservation in the minds of some ICANN founders that the office of CTO would be reserved for the late Jon Postel, and only for Jon Postel. (This reservation is not written on any publicly visible ICANN document

nor was it ever publicly expressed by the proponents of ICANN. The fact that such an unwritten reservation existed raises serious questions about what other secret reservations may still be waiting to surface.)

During a recent ICANN budget cycle, there was a quiet change to ICANN's structure in which the role of CTO was eliminated citing the unavailability of Jon Postel to fill the position.

It is sad that Jon died. But his death does not diminish the need for a CTO within ICANN.

Various third parties, usually associated with the Protocol Supporting Organization (PSO), argue that the PSO fills the CTO's shoes. That would be improper because the scope of the PSO is merely disputes over protocol numbers selected by standards bodies - as such it is unlikely to be an ecumenical or impartial view of all technical issues.

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Reform of ICANN - Elimination of ex-officio board seat granted to President.

The principle of accountability requires that all members of the board of directors be subject to the will of the electorate for decisions made during their term.

That principle is violated when there is a person on the board of directors who has obtained the seat not by virtue of any election.

The President/CEO is present merely to execute the will of the board. It is wrong for the President/CEO to be given voting privileges without the balance of being held responsible for how that vote is used.

The President/CEO ought to be generally allowed by the board to be present at board meetings (except those pertaining to personnel matters concerning the President/CEO) - it will improve the clarity with which the President/CEO understands his/her duties and assignments. But it ought to be clearly known that such presence is merely a courtesy that is extended by the board and may be modified or revoked as appropriate.

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Reform of ICANN - Financial reform

Money flows through ICANN at a prodigious rate, mainly into the pockets of its expensive law firm and its overpaid President/CEO.

ICANN must adopt clear and solid business practices.

It is my intent to initiate a business process audit of ICANN to examine its financial controls and to establish such controls where there are lacking. The results of this audit must be made public.

It is my intent to have every ICANN expense subject to a "frugality" process to eliminate unnecessary travel and marginal value expenditures.

Salaries, particularly that of the President/CEO, must be brought into alignment with market rates.

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Reform of ICANN - Elimination of "Ad Hoc Addressing" group.

ICANN has an Address Supporting Organization (ASO) the job of which is to deal with IP address assignment concerns.

One of ICANN's original board members caused the creation of distinct "Ad Hoc Addressing" group that is beyond the scope of ICANN and outside of the ASO.

This group is duplicative of the ASO. This "Ad Hoc" group is not accountable nor is it open or transparent.

There is no reason for the "Ad Hoc Addressing" group to exist at all. Those who wish to discuss IP address policies should do so in the proper context - the ASO.

The "Ad Hoc Addressing" group should be terminated.

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Reform of ICANN - No censorship.

I am appalled at some of the garbage that some participants post on mailing lists. There is no excuse from behavior that is obscene or defamatory.

However, I do not believe that the response should be official censorship - as occurs when someone is blocked from posting by some arbiter of good taste or appropriate content.

Rather, I believe that shunning is more appropriate - that each of us ought to make our own decisions about who is offensive and who is not. And that each of us use the technical tools that are present in virtually all modern e-mail readers to block those who we find offensive.

Any record or archive of an ICANN related e-mail list or discussion forum ought to contain the uncensored, unedited content of the list.

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Reform of ICANN - Jones Day must go

Jones, Day, Reavis & Pogue is ICANN's law firm, and has been so since the day of ICANN's birth. Indeed Jones-Day actually performed the incorporation ceremony in its Los Angeles offices.

Jones, Day, in the person of its principle man-on-the-ICANN-scene, Joe Sims, was present for at least half a year before ICANN was born, working in the shadows, responding to unknown interests and possibly making unknown deals. About all we know about that period is that those who were not insiders to Joe Sims process were ignored and that those who objected were treated with condescension and abuse.

Over the life of ICANN, Jones, Day has been the the dominant creditor of ICANN.

Even now Jones, Day continues to receive a lion's share of every dollar that flows into ICANN.

And one of Jones, Day's partners, Louis Touton, left the firm to become ICANN's Vice-President, Secretary, and General Counsel.

There is in my mind a question about the appearance of propriety.

As a member of the board of directors I would have the right to rely upon the expertise of entities such as ICANN's law firm - that is unless I felt that I was not receiving the degree and quality of advice that, in my opinion, I felt would be necessary for me to properly exercise my duties. Given my interactions with Jones Day, I do not feel comfortable relying on their work.

There are many good people at Jones, Day, and I have no doubt that much, if not all, of its work is adequate. But the firm has no special credentials to offer to ICANN. And its services have been, to my mind, extremely expensive, not simply in terms of dollars but also in terms of the alienation that has been created between ICANN and the public.

Consequently, were I on the ICANN Board of Directors, I would work to replace Jones, Day, Reavis & Pogue.

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Reform of ICANN - Louis Touton must go

Louis Touton left a partnership position at Jones, Day, Reavis & Pogue to become ICANN's Vice-President, Secretary, and General Counsel.

I believe that ICANN would be better off without him for the following reasons.

First, it has been my experience that it is a bad idea, both from a legal and business perspective to have the corporate counsel involved in non-legal operations. It tends to defocus both points of view.

Second, I have found that this person continues the tradition of condescension and uncooperativeness that has been the hallmark of ICANN's officers since the outset. ICANN needs people who build relationships without first looking at the social register or statements of net worth.

Third, in my personal interactions with this person, I have found him to be evasive and unwilling to provide even the most basic of information. I do not have confidence in him.

In addition, Mr. Touton has been an architect of ICANN's efforts to remove membership rights. See the section entitled "[Full recognition of at-large members as "members" under California law.](#)" in this platform.

As a member of the board of directors I would have the right to rely upon the expertise of people such as ICANN's legal counsel - that is unless I felt that I was not receiving the degree and quality of advice that, in my opinion, I felt would be necessary for me to properly exercise my duties. Given my interactions with Louis Touton, I do not feel comfortable relying on his work.

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Reform of ICANN - Mike Roberts must go

Mike Roberts is ICANN's President and CEO, and as such he receives an automatic seat on ICANN's board. He holds a "temporary" position - one that he has held since late 1998 - nearly two years.

There is nothing positive I can say about Mike Roberts. I have never had a positive interaction with him. I have rarely heard a statement from him that I believe is not laden with hidden agendas, unstated definitions, silent reservations, and secret conditions. And I have heard him proclaim, without any showing of evidence, that there was "consensus" for some policy decision when it was clear to me, and to others, that opinion in the internet community was far from agreement.

I have observed him at the helm of ICANN's business processes and believe that if ICANN had been a for-profit entity, it would have long since turned turtle and sank in a sea of red ink.

I believe that Mike Roberts has done an outstanding job of creating ill-will towards ICANN and distrust of ICANN's actions.

Under Robert's hand, ICANN's "staff" has assumed virtual control of major policy decisions. This staff operates nearly in total secrecy and without any form of public review.

ICANN doesn't need this kind of "temporary" executive.

In addition, Mr. Roberts has been a tireless architect of ICANN's efforts to remove membership rights. See the section entitled "Full recognition of at-large members as "members" under California law." in this platform.

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DNSO Reform

The DNSO is controlled by those who make money from domain names and trademarks - there is no real means by which those who simply use the Internet or who are individual owners of domain names can participate except in token roles.

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DNSO Reform - GA

The DNSO's General Assembly is presently a useless, voiceless, powerless body. Over its lifetime the GA has served only as a posterchild that the Names Council drags out whenever it wants to fabricate some kind of public support for the GA's decisions.

That is wrong.

The General Assembly must be able to establish its own processes free from interference by the Names Council, in particular the GA should have the freedom to establish its own nominations process for the DNSO's seats on the ICANN board.

No issue should pass out of the DNSO unless it has been approved by the General Assembly.

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DNSO Reform - Constituencies

DNSO "constituencies" reflect a pre-conceived notion of who ought to be permitted to have a say in how the Internet's Domain Name System is run and who gets access to DNS.

Constituencies ought not to be the result of someone's pre-conceptions, but rather ought to reflect actual groupings of interests.

Since interests change, there ought to be no formalized "constituencies" at all. Rather, every person who wants to participate in DNSO matters ought to be able to do so and have a vote. If that person wishes to align himself/herself with others of similar mind, then that person may do so. If that person wishes to break past alliances, he/she ought to be free to do so.

The key is the principle of one-person-one-vote.

Corporations and associations ought not to get a vote - they ought to operate through people who voluntarily chose to cast their vote in accord with what the corporation or association wants.

It is unlikely that my point of view - that there ought to be no formal constituencies whatsoever - will prevail. Consequently my fallback position is this:

Every constituency in the DNSO should expire yearly and have to re-petition for recognition.

There should be new constituencies for the following groups:

- Individuals who own domain names
- Small businesses
- Educational institutions
- Religious institutions
- Political and social groups

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DNSO Reform - Sunset provisions

All policies of the DNSO ought to expire every two years. Expiration may be avoided if within the six months prior to expiration, the DNSO votes to give a two year extension.

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Reform of ICANN - Get ICANN out of the clerical services business

Have you ever considered what ICANN does with respect to "protocol parameters"?

It does two things:

First, ICANN runs a clerical service to write down numbers in a registration book.

Where does it get these numbers? From the IETF. ICANN calls this "IANA" - but its really simply a clerical service in which the IETF comes up with a number, sends it over to ICANN's IANA, and it gets written down. There's no creativity involved - technical or otherwise. Sometimes the IETF lets this clerical service give numbers to third parties, in which case the IETF typically gives some not very complicated instructions such as: "add one to the previous number and assign the result". For more complicated things, the IETF designates an "expert" to which ICANN's IANA must go to ask what to do. ICANN provides this service free of charge.

The second thing ICANN does with respect to "protocol parameters" is to have a "Protocol Supporting Organization", the role of which appears to be moderating disputes, should any arise (none ever has) between standards bodies regarding one of those numbers mentioned in the preceding paragraphs.

It strikes me that ICANN, a worldwide policy making body, the epitome of Internet Governance, ought not to be running something as mundane as a clerical registry on behalf of one standards body.

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Reform of ICANN - Elimination of PSO

The role of the Protocol Supporting Organization is to deal with disputes between standards bodies over "protocol parameters".

Since these parameters are merely numeric values there has never, in the entire 30 year history of the Internet, been a dispute between standards bodies over a protocol parameter.

Consequently, there is no need for a policy organization to deal with this issue.

ICANN should not try to use the PSO as some sort of technical advisory committee to ensure at the work of the DNSO and ASO conforms to some notion of Internet technical purity - that job should be performed with the DNSO and ASO and by the board with the assistance of an ICANN CTO.

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Reform of ICANN - Make IETF pay for IANA registration services - no free ride to any group unless it is free to all groups.

ICANN needs money to operate.

ICANN ought to receive compensation for services rendered.

ICANN has no hesitation to demand such compensation in the context of the Domain Name System or IP address allocation.

However, ICANN does not request compensation for the service of registering protocol parameters. Indeed, to the contrary, ICANN underwrites the cost of such services on behalf of the IETF.

This is not right. The IETF ought to pay ICANN for the reasonable cost of IANA protocol parameter registration services.

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Domain Name Policy

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Domain Name Policy - "Stability"

This word "stability" has been bandied about, mainly by those opposed to new Top Level Domains, as a reason to "go slow" or to "do testing" to otherwise impose impediments to the quick rollout of new TLDs.

Yet no one has bothered to define what "stability" means and who are the beneficiaries.

Let me begin by remembering that the Internet was designed to survive nuclear holocaust. The net was designed so that even if part of it was vaporized (literally) it could continue to function.

DNS has that same characteristic - DNS has massive redundancy and caching. And even if part of DNS were to fail, the rest of the system will continue to operate and provide service.

DNS as a technology is very robust, even with hundreds of thousands, and even millions of new TLDs. Live experiments and day-in-day-out operations of expanded DNS systems distinct from that operated by ICANN have demonstrated that DNS technology itself is not a source of potential "instability".

So what could be this thing called "instability".

First: Let us distinguish between stability of a DNS root from the stability of a DNS TLD.

Stability of the DNS root can be achieved in one of two ways, and these ways are not mutually exclusive, they may coexist:

- Professional grade operations - good computers, good operations, good facilities, good procedures, good connectivity, external backups, alternate sites, etc.
- Multiple systems of root servers.

(The latter has been a subject of controversy.)

The current DNS root used by just about everyone on the Internet has been operated informally for years - it has never suffered a major failure. (There have, however, been failures in TLD operations, which is a distinct thing.)

And I have never seen a failure in any of the more informally run root systems that I use (and which are used

by the computer delivering these web pages to you).

So, I think it would be an error to be in a panic about the stability of the DNS root even if we were to add hundreds of thousands or even millions of new TLDs.

Second: Let us examine "stability" of a TLD (as opposed to "stability" of the DNS root):

Who reaps the direct benefits of "Stability"? There is no duty on the part of content providers to make a web page visible at a given URL. A content provider is totally free to rename pages or to delete them entirely. Similarly, there is no obligation that e-mail addresses exist indefinitely. In fact, an entire DNS name could be released or transferred to another party, thus invalidating all references that use that name.

Users of the Internet have absolutely no guarantees that references to content will remain available from one moment to the next.

The overwhelming preponderance of failures of users to get content for which they have a correctly entered name is caused not by DNS outages but rather by the simple fact that content is volatile, it moves, it mutates, it vanishes.

The balance of failures is caused by raw connectivity failures in the Internet or by congestion. It has been estimated by some commentators that at any given instant perhaps 3% of all Internet locations are unreachable from any given point. And congestion, particularly at points where ISP's connect to one another, causes data transfers to freeze or become so slow as to be unusable.

So, we can see that making DNS TLDs more "stable" won't improve the user's experience.

And none of those who cry "instability" seem to care much about that.

What the loudest of the "stability" advocates seem to care about is that their e-stores to sell products over the Internet will always open so that they can make a sale whenever a user wishes to part with his or her money.

So it seems that to a large extent the beneficiaries of this "stability" are not network users but rather those who have something to sell over the net.

There are, of course, others that have an interest in making sure that their content is available whenever a user requests it - emergency services comes to mind. Users do benefit from this.

"Stability" is not free - there is a cost involved in running an armored computer facility with redundant everything. It seems to me that the burden of those costs ought to be born by those who obtain direct benefit.

So this is how I answer those who demand "stability": If you are a commercial interest then you foot the bill to make your TLD as "stable" as you like. If you are publishing material that benefits the public health or safety (and not doing so in a way that is essentially an advertising vehicle) then it is fair to expect the costs of "stability" to be born by the public.

In practical terms this means the following: TLD operators ought to be required to make prominent and public disclosures containing sufficient information for a potential domain name registrant to evaluate the degree of "stability" that the TLD operator is offering. A TLD operator could promote its facilities, its operations, or even its contractual relationship with other TLD operators to continue service even in the face of a business failure, etc.

TLD operators that run high-availability systems will, I expect, charge higher prices. A registrant who cares about "stability" ought to make sure that the contract between the registrant and the TLD operator gives the registrant the

contractual right to obtain the promised level of performance.

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Domain Name Policy - Use existing laws, don't invent new ones

CANN, despite its denials, has enacted de facto worldwide laws that have as their practical effect the vast expansion of trade and service mark rights.

CANN's rules supersede those of nations.

That is wrong.

ICANN should not be making law, much less should it be making supranational law.

(This lawmaking is especially egregious as it occurs without the participation of those who are most frequently the victims who lose rights and property as result.)

ICANN's UDRP is a case in point - most nations have laws that govern trade and service marks. And there are international treaties on the subject. ICANN's UDRP is an unnecessary addition to that body of law, particularly since it was created by a body, ICANN, that has no status as a legislature.

If a trademark owner believes that some domain name infringes on his/her rights in the trademark, there is an adequate body of law to determine if infringement has, in fact, occurred and, if it has, to accord relief.

Because it is duplicative of existing laws - laws that have been enacted by established legislatures - ICANN's UDRP should be eliminated entirely and absolutely.

Sure, this would cause trademark owners to sometimes have to travel to where an alleged infringer may be. And that is a burden given the worldwide visibility of domain names. However, our legal systems do evolve - the fact of evolution is built into their most basic foundations - and we ought to trust the slow, but sure, evolutionary processes of law to find a balanced result than to leap to an arbitrary law, such as the UDRP, created by a mere "private corporation" from processes that allow only one side, the trademark owners, to participate.

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Domain Name Policy - UDRP reform

The present UDRP has many flaws and needs revision.

Before getting into the revisions, I would like to mention that I do not believe that ICANN ought to impose a UDRP at all - I believe that existing law is adequate protection for those who claim to have a protectable interest in a name or trademark or service mark.

Assuming, however that the UDRP is retained, here are some ways it ought to be revised:

- The UDRP ought to be made available to protect the rights of all people or entities that have a protectable interest in a name. It is not right that the current UDRP is available as a remedy only to those who have trade or service

marks.

- The UDRP ought to be amended to make it clear that it is inapplicable unless the accused domain name is **actually used** in a way that violates the laws of the jurisdiction in which the the accused name operates. Thus, a domain name that is simply held in a portfolio would not be subject to action under a revised UDRP. And equally, holding a domain name out for sale would not be subject to action under a revised UDRP.
- The UDRP ought to be amended to recognize that there are many rights in a name that exist beyond trademark rights. These includes rights of parody, rights of criticism, rights of free speech, rights to create names for non-commercial use, etc.
- The UDRP ought to be amended so that its maximum initial remedy is to enjoin the actual use that violates the laws of the jurisdiction in which the the accused name operates. Only if the use then continues ought the UDRP grant the remedy of transfer or cancellation of the domain name.
- The UDRP ought to be amended so that the intention of the owner of the accused domain name is not relevant to the outcome. The UDRP ought to be designed to remedy actual harm caused to the complainant, not to punish a domain name holder for bad attitude.
- The UDRP ought to be revised so that there is no built in incentive for arbitrators to favor the complainant.
- The UDRP ought to be revised to allow the defendant/respondent more realistic and fair time periods in which to respond to an complaint and to react to a judgment.

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Domain Name Policy - Top Level Domain Policy

My position has always been that there ought to be no impediment to the creation of new TLDs - but with one proviso: There is a limit out there somewhere on the number of TLDs, probably somewhere between one and several million, where DNS loses its value as a hierarchical system.

So I'd let anybody operate any TLD for any purpose they chose - the creation and imposition of charters is up to the TLD operator. (And an operator could change the charter if the contract with his/her customers doesn't prohibit it.)

I would not impose any operational requirements in the name of "stability" - I figure that is a contractual matter between the TLD operator and his/her customers. If a registrant wants stability and escrowed databases, then he/she can go to a TLD that offers that kind of service (presumably for a price.)

I'd not place any obligation on TLD operators to honor anything like a UDRP. I figure that if somebody registers a domain name and actually uses it to infringe on a trademark that there's an adequate legal foundation for the injured party to obtain a remedy - there's no need for us to need to create new and ad hoc legal system.

I'd probably require TLD operators to create and publish certain policies - privacy, availability of the zone files, statement of backup practices - just so that the customers have a way of evaluating what they are buying. But I'd allow the privacy statement to be as strong or weak as the TLD operator wanted - take a look at the CaveBear privacy policy for an example: <http://www.cavebear.com/privacypolicy.htm>

My concern about the one-to-several million number of TLDs needs to be handled by the imposition of some sort of barriers to prevent unproductive collecting. I am somewhat afraid of monetary barriers because that allows the rich to buy in. I personally like lottery systems - I kinda like some sort of plan that says:

We will introduce 1,000[*] new TLD's slots each year. Every natural person is entitled to purchase one "ticket" (perhaps for some nominal price to recover *reasonable* costs[**].) The 1000 winners will be selected in sequence - and each winner gets to select the character string they want to use for his/her TLD - there would be absolutely no examination of the name in terms of trademark or obscenity - that kind of thing ought to be up to the external legal system. (In case of duplicate character strings, priority goes to the winner that came first in that year's drawing sequence.) I'd allow the winners to sell their tickets or prizes at any time (including a winning ticket that has not yet selected the character string) for any price they can get.

[*] I picked the number 1000 because it's probably enough to cover the needs of the first year or two while the bugs are worked out of the system. After that, it could readily go to 10,000/year - that gives us 100 years before we reach the million TLD mark.

[**] I'm kind of fond of the notion that the costs should be underwritten by the current suite of TLD's - they got a big free ride, especially the NSI ones, and its time for them to return the favor.

I might be moved to consider some sort of keep-alive mechanism - for example, the TLD winner (or successor) has to say "we're still here" once a year and keep at least a reasonable number of name servers operational - a lapse of a few years would be reason to reclaim the TLD name and slot.

I figure that all that ICANN ought to be doing is selling slots in a DNS root zone file. To the greatest extent reasonable, ICANN ought to keep its nose out of what people do with those slots - any disputes can, and ought, to be resolved by the existing legal systems, even if that means that some trademark owner has to hop a plane and file a lawsuit in Estonia or Niue or somewhere. And - here's a US centric aspect - I'd respond to orders to do something to a slot only if it got past all the hurdles needed for foreign judgments to be enforced in California (or wherever.)

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How I will conduct myself

There is an active verb that goes with the term "Director" - and that is to "direct". It is my intention to not sit passively by and let "staff" run amok, as they are now doing, or to let Internet policy happen by silent acquiescence.

I'm as fallible as everyone else. So I'll do my best to be open and transparent in all my ICANN related activities so that you can catch my mistakes and give me guidance.

I'm generally available by e-mail and I'll try to maintain a web page about what I'm doing and thinking.

During board meetings I intend to take notes of my actions and have them published into the minutes. I'll try to include a statement of what information I hear, where it comes from, how credible I consider it, what the issues are, what the tradeoffs are, my evaluation, my vote, etc, etc. I anticipate that the corporate secretary will resist incorporating this in the meeting minutes to which I will respond as appropriate.

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Updated: Wednesday, September 05, 2001 07:32:00 PM

At Large Candidate Page

Karl Auerbach

Email karl@cavebear.com
Region North America

PROFESSIONAL

Employer(s)

Cisco Systems, Inc. 170 West Tasman Drive San Jose, California 95134-1706

QUALIFICATIONS

Statement addressing the candidates qualifications and experience specifically relevant to

- (a) ICANN's technical and administrative responsibilities, and*
- (b) your leadership and policy-level roles.*

I have been involved with the Internet since 1973 - before there were web browsers, a Domain Name System, TCP/IP, or even IP addresses.

I have been an active member of the Internet Engineering Task Force for many years. I am presently active in a number of IETF technical working groups.

I work in the Advanced Internet Architectures group at Cisco Systems where I do research and development for the Internet of the future.

I've also spent years "in the trenches" building and running real networks.

I am involved in the daily operation of multiple networks. I operate a number of networks for both commercial and community organizations.

More than most, I know from first-hand experience what technical management and coordination of the net is really about.

I am cognizant of the realities of business and finance - I have founded or participated in the startup and development of a number of companies based on network technologies. I have served on the Board of Directors of several of these companies.

I am an attorney. I obtained my degree of Juris Doctor (cum laude) in 1978 from Loyola Marymount University of Los Angeles. I am licensed in the State of California. I am a member of the California State Bar Section of Intellectual Property.

I have been an active participant in ICANN since before its inception and I am a co-founder of the Boston Working Group.

ICANN RELATED INTERESTS

ICANN-related interests, including:

- (a) Employment and consulting relationships*

(b) Ownership or investment interests in any ICANN-related businesses

(c) Official positions in any ICANN-related businesses or organizations

I am employed by Cisco Systems, a creditor of ICANN. I also hold publicly traded securities of Cisco System. My views and positions are my own; I do not speak for Cisco Systems.

BACKGROUND

Background information, personal statement, URL, or other information you would like posted in connection with your name on the ICANN website.

My campaign web page is: <http://www.cavebear.com/ialc/>

ICANN is Internet governance. ICANN's decisions affect all users of the Internet.

ICANN should be open to all. ICANN should be fair. ICANN should be impartial.

ICANN is few, if any, of these things.

My candidacy is one of reform - deep, substantial, and fundamental reform.

My candidacy is one that is founded on the belief that the Internet should not be controlled and dominated by those who aspire to nothing higher than mass marketing. It is my position that individual people ought to have a major voice in the governance of this revolution we call the Internet.

I am a technologist - I was there when the Internet started in the early 1970's. And I continue to help to shape the net - I work in the Advanced Internet Architectures group at Cisco Systems and I am an active member of the Internet Engineering Task Force (IETF.)

I am a businessman - I have run multiple Internet startups. I have created and defended my trademarks. I have managed employees. I have managed revenues and expenses.

I am a non-practicing attorney - I am interested in the formation of law and its fair application.

See my web page at <http://www.cavebear.com/ialc/>

OFFICIAL STATUS

Status as an official of a national government or a multinational entity established by treaty or other agreement between national governments, such as an elected official or employee of a government or multinational entity.

I am neither a government official nor am I employed by a government.

I am employed by a multinational, private corporation, Cisco Systems, Inc.

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The Debate Over Internet Governance: A Snapshot in the Year 2000

Karl Auerbach

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Please note that this transcript has been edited and redacted according to the author's request.

February 28, 2000

GOVERNANCE: Defining Governance

Q: How do you define governance?

A: Before I begin, even though it says Cisco on my business card, I don't speak for Cisco. I always make that clear; these are my own opinions. What's the question again?

Q: How would you define governance?

A: Mandatory control. Where you don't have an alternative; you really can't say no.

GOVERNANCE: Does the Internet Need Governance?

Q: Do you think governance is necessary for the internet?

A: In part. Governance can be applied by a number of mechanisms. You can have mechanical governance, a lot like ICANN, where you have a body that sits there and thinks and applies ... rules, regulations, laws, whatever you want to call them. You can also have governance in the Adam Smith style: the invisible hand.

Governance by economic forces can be just as powerful, if not more powerful in many respects, than formal governmental bodies.

One thing about governance. People are really afraid of that word. The Reagan legacy has left us with government as an anathema. But there's real good reasons to have governance. And there are parts of the internet that need it. There are certainly parts that need it much more than others. IP address assignments, which is under ICANN, is very much in need of regulation because of the relationship between the technology and the assignment of addresses. And the economic impact of IP address assignment is enormous, and most people don't even have a clue how the impact of that is going to have on the growth and development of the internet. But, as far as ... the other part, the domain name space, under ICANN, I assert that there is no need whatsoever for any regulatory body over it, other than allowing the standard forces of laws that apply over trademark infringement to apply.

GOVERNANCE: Governance vs. Technical Management

Q: What do you think of the representation that handling IP addresses is just technical management and not really governance?

A: I have a definition of what constitutes "technical" and what constitutes "governance." And my definition is: if you can make a wrong decision about the thing and that causes the internet to fail in delivering its fundamental service, then it is a technical matter. And I define the fundamental service of the internet as the delivery of IP packets from one end to the other. So if one makes a mistake about assigning addresses, it has a reasonably direct impact on the ability of the internet to carry packets from one end to the other. If one makes a mistake about assigning domain names, there's practically no impact on whether the internet has the ability to deliver packets from one end to the other. So, to me, what is technical are things that have a very immediate impact on the ability of the net to deliver its services. The governance being that, or the policy-making which is that, which is not directly related. They may both involve technical questions. Now you asked ... there was another part of your question. Can you restate the question?

Q: ... Just what is your response to the argument that IP address assignment is just technical management or plumbing?

A: ... IP addresses sort of occupy a slightly ... according to my test, they're in a fuzzy zone because if one makes a mistake with assigning IP addresses the effect is going to be not immediate, but it's cumulative. If we assign enough addresses incorrectly, the routers of the internet, the things that Cisco and Nortel and Lucent and 3Com build, will have routing tables so large that they will consume a lot of memory. The protocols that carry the routing

information around will be so burdened with carrying updates that they will simply clog the net. I don't know if you understand how internet routing works.

THE INTERNET: How It Works

Q: Yes, basically, but can you explain it for the record?

A: Basically, every packet carries a destination address and the routers get the address, they look at a big table, and they say how do I get to the destination? Or, how do I get closer to the destination? It's a lot like if you were flying from here to my house in Santa Cruz, ... you wouldn't have in your little address book actually how to get from here to my house. You would have how to get to San Francisco. Then from San Francisco you would look up, well how do you get to Santa Cruz. Then from Santa Cruz you would look up how to get to Carbenero Drive. Just sort of a progressive revelation. Well we do that with the internet; it's called address aggregation. The idea is we want to be able to take the addresses and clump them together according to the typology of the internet so we only have to send around routing information pertaining to where these clumps are. So you only have to know how to get to California, you don't have to know how to get to Carbenero Drive in California.

If addresses are not assigned in a cohesive way that is in accord with the typology of the network, then we have addresses that would be scattered everywhere and we would literally have to have a separate routing entry for every single possible destination, and that would be very much untenable. But because of the fact that we have addresses that have to be assigned in accordance to typology, we are pouring concrete around the typology of the network, and if you think about the typology of the network, it's just a small number of backbone providers, some ISP's that do local delivery, and then the little guys who deliver. Well, these little guys no longer have the option of switching to another upstream provider because their addresses are locked in. They may have to get another set of addresses and they're going to have to tell their customers to re-assign addresses, which is a big pain. So IP addresses have the technical part, which is if we do it badly, then the network will start to crumble in terms of just having too many addresses. But it has a policy part, insofar as we are imposing a structural regime on the internet relating to the big guys feeding the next tier, feeding the next tier. And we're removing the ability of end users and the intermediate providers to switch their long-distance companies without a great deal of thought and economic pain. IP version six will make that easier, but that's not here yet. So IP address assignment is not just plumbing. But it's got a strong technical component, it's got a strong non-technical component. Things like DNS have very few technical components at all.

GOVERNANCE: Is ICANN Governance?

Q: So is ICANN governance?

A: ICANN is governance with a vengeance. The worst form of governance. Arbitrary, capricious, imposed without any input from those who have to pay the taxes and suffer its regulations. It is an oligarchy. It is a business-run oligarchy. It is a secret society. Do I support ICANN? I support the concept. Do I support ICANN as it is? No, I think it should be dismembered, right down to the ground.

ICANN: Alternatives to ICANN

Q: And what would you put in its place?

A: I would put a distinct body to handle IP address assignments and I'd leave the DNS completely alone.

GOVERNANCE: Let the Market Regulate the DNS

Q: Why do you think the DNS has been put under ICANN's regulation, since you seem to feel strongly that that's not its place?

A: Well there's this premise – this is part of my talk [at Boston University] tomorrow [about] what is the internet and how do we understand what it is – there's this notion that people believe that the domain name system is a fundamental service of the internet. Is your telephone book a fundamental service of your telephone system? 25, 30 years ago people said, yeah, if you get from Ma Bell, you get the official statement of names and addresses. No, but today you can get a phone book from all the local phone companies, you can get it from third parties, you can get it on CD-Rom, you can go to the web and look up phone numbers. Does it matter? No, as long as you get the number you want to call. It works. And if you get the wrong number, you just don't use that service. The DNS is just a service. It's just a service through which you present a character string saying, you know [e.g.] www.cavebear.com, and you say look it up for me. It's like I take my clothes in to be drycleaned. I could have lots of drycleaners do the service. I could have lots of DNS services do it. There's no necessity in the internet for having one DNS.

Now there's some technical flaws in the design of DNS that cause ... People can build what are called zone files, and which define – like mine is on kavebear.com – and if I incorporate some data by reference over which I have no control, well if you have multiple parts of the domain name system, what I incorporate by reference may change without my having any ability to control it. Well, that's my fault for incorporating something by reference. If I know that, I can protect myself. And I've been running different route systems.

I've been running a non-ICANN route system. I've been living in dot web and all the other tLD's for about two years and I have not had any noticeable problem. ... A few years ago we switched from rotary dial to touch-tone telephones. Having touch-tone telephones allowed us to have voicemail and paging systems and all kinds of new services. Well, there's this attitude going on inside ICANN and some standards bodies that standards are restrictive, that they form a limit beyond which we cannot pass. And had we applied that concept to the rotary dial telephone, we would still have rotary dial telephones because there were people with rotary dial telephones who couldn't use the new voicemail services and paging systems. Progress leaves people behind. HTTP is coming on now, maybe. And you know people are going to have to buy new TV's. Should we say that because people are going to have to buy new TV's we shouldn't make progress? Well, that's happening with the domain name system. ... Under the flag of technology, it's being said that we must have one unified domain name system, when it's really a policy choice. And just like we can have multiple systems and providers for telephone directories, we can have multiple domain name services. If you look up www.cavebear.com and you get to my machine, no matter how you did this look up, you're happy.

Now it turns out there are reasons to have different look-up services. Parents want to filter out stuff from their kids. I hate DoubleClick, for putting up all their ads, so I actually have a thing that says whenever I utter the name DoubleClick – at least in the context of fetching webpages – it turns it into a reference to my own machine where I feed it a one pixel transparent gif so wherever I would normally have a horrid DoubleClick ad, I get a blank spot on the screen, which saves me bandwidth, it saves me harassment. Why shouldn't I be able to control my perspective of the internet? Why should I as the consumer of name-space be forced to consume what the provider gives me? It turns out that there are arguments made about the cohesiveness of the domain name system that everybody should have the same experience. If I give you a URL on the web, you should have the same experience. Well, with things like DoubleClick and this consumer profiling going on, ... if I give you a URL and I give you a URL, and you've both been doing things differently on the web, you would have different databases about who you are, and these commercial entities will feed you different content. So what you're getting is really not at all the same thing, and it's going to just get worse. So saying that we have to preserve URLs and domain names is fallacious. Besides, if I offer some content to you, nobody says I can't retract it. URLs, domain names, they're transient anyway.

The IETF and the IAB have been saying that, no we have to have stability. Why add a degree of stability to something that's not stable today? I mean you get "404: URL not found" or "e-mail address changed" all the time. I'm sure you've experienced it a lot. So the domain name system is really just a service that one can acquire that

can be subject to competitive forms of regulation. ... [D]ifferent DNS providers will be forced to provide to their customers a service that meets their expectations. So if you look up name with their service and you get the wrong address you're going to walk over with your feet and go with another provider. And providers will start adding value-added services, like filtering out things you don't want to see. They may provide services not to you, but to providers, such as geographic proximity because right now the DNS is scattered around the entire world and your queries may be going across the Atlantic Ocean. There's no reason to do that. You can actually force some geographic proximity to where you are. There's a whole new world of web caching and video caching going on whereby we actually put routers on ingress and egress points of your ISPs and we watch traffic coming in and out and we see you asking for something that's way out over there. We actually don't let you get it. We take apart the packets and say we have a copy closer, and we send you [that one].

So there's all sorts of value-added services that can come out of playing with the naming service. And I submit that these forces are adequate for regulation in the domain name space, with the proviso that you can't infringe trademarks. If somebody's got a trademark and you are infringing – and I mean infringing in the traditional way: you are using that name in commerce in a way that infringes, you know, confuses the consumers, breaks down the differentiation or identification – then fine, let the standard legal mechanisms apply. If a domain name is defamatory, you know if you say "John Doe is really a horrible person and cheats at business," fine, bring a defamation action against him. We don't need a UDRP. We don't need a cybersquatting statute. And, by the way, I do not believe in cybersquatting. I believe in speculation in domain names. Speculation in art, speculation in land, speculation in cars, speculation in stocks. It's a time-honored tradition. Morgan Stanley, a company whose whole business is speculation and capitalism, some kid beat them out to the msdonline.com. Did they do old Adam Smith method, did they pay the guy for the thing? No, they rattled the legal chains so the guy gave up. There's a place for speculation. It's got a good place in capitalistic society. It brings us office buildings, it brings us investments, a lot of which fail. Speculating in domain names ... If I have GeneralMotors.com and I'm speculating, and General Motors doesn't buy it from me, who else is? I have one customer, and if that customer says no, then I have to eat my investment. And what's even worse is that I have to keep paying my investment to keep it so that they won't get it.

So a lot of these arguments about regulation of the domain name space, when you look at it with a very libertarian point of view, in terms of economics, you don't need it. ~~But~~ admitted, there are a few technical design problems with DNS. I would suggest that since any 13 year old kid a Linux machine can set up a DNS system, that if there is indeed a real threat to the stability of DNS then it should be

repaired because it's just like a security flaw. ...

ICANN: Where ICANN Went Wrong

Q: Going back to your earlier statement, you agree with ICANN in theory.

A: Yes.

Q: But you don't agree with how it's played out so far.

A: Right.

Q: What do you agree with in theory?

A: That we need some degree of regulation over the IP address space. The other two parts of ICANN, the protocol parameters and disputes, we don't need them. It's never occurred in 30 years. There was a king of Spain some time ago who – and I wish I could find this reference – said you should not make laws about things that rarely happen. Well, if we've never had a dispute over protocol parameters in over 30 years of the internet, then why do we need an expensive, heavy body like ICANN to do it? With its own supporting organizations, as well, for just that area. And DNS, as I have just been explaining, we don't need ICANN over it. So let's just have ICANN over IP address assignments.

Q: So what went wrong?

A: What went wrong. Oh boy. Good question. Congress has asked and never got a decent answer. The history of ICANN is as opposite to the Immaculate Conception as one can get. I talked to Jon Postel a bit before he died and I don't believe he really knew what [text omitted] was [being done] behind his back. I believe it was being done behind his back. I don't know who the parties are who were involved, but I do know that Jones Day has received a windfall in terms of revenue from this. They were involved in the creation of this organization. They are receiving outrageous legal fees for services rendered. [text omitted] They've even blown attorney-client privilege by mixing their legal representation with the fact that they're doing policy in ICANN. ... They can't assert attorney-client privilege. They actually are now presumed to have broken it and would have to now re-create it. [text omitted]

Q: What is it that Joe Sims, et al. were doing prior to Postel's death?

A: Postel is not an attorney. Postel was a techie. And here's this whole complicated legal structure where words of art, corporate structures, governance structures ... It may not have been behind the back in the sense of he didn't know, but Jon was not a fully

informed client. Now Michael Krieger would have better information about this than I would. ...

Going from the very questionable formation of ICANN, which there were a lot of other proposals coming along. ICANN was developed, the IANA / Joe Sims thread was done in utter secrecy. There was a mailing list that you could send things into, but you never got any response. ... And if you ever got to talk to Joe Sims – he's the only one who would talk in his glowering way – he would say, oh it's already been settled, it's too late, we can't change it. There's an Athol Fugard play, "My Children! My Africa!" and one of the lines is that the saddest words in the English language is "it's too late." And that's his [Joe Sims'] line: it's too late to change, we've already decided it. Even though you've [Sims, IANA, ICANN] have never heard this issue before.

They had no notice, they had comment, but there was no consideration of the comments that anyone could detect. So that whole thread was going on completely with its own momentum, nobody knew why. There was this IFWP effort, which was people talking to each other. And of course when you have people talking to each other you discover just how hard it really is to form a government. And then came NPIA, an agency which so far has not clearly demonstrated any statutory authority whatsoever – I mean they're hanging their entire structure off one sentence or something off one executive order that is questionable relevance and no clear statutory references. You had to sort of be there at the time. It was like, on yeah, the IANA proposal is in, there's the other ones, but it's going to be the IANA proposal. And yes it was, it was the IANA proposal. There was no open review of the quality of the proposals. It was just like yeah, they were the chosen child.

And then ... people like Ira Magaziner, Becky Burr – mostly Ira – said yeah, we'll make sure that they're open. And then Ira went and retired. And, of course, what have we got? The first words in ICANN's bylaws are open, transparent, and whatever, accountable. It says there, shall operate in the manner most open or something like that. Have they ever had an open board meeting where you actually see the input from people coming in, see them discussing it, see them arguing about the points of view, see them counting a vote? No, what you actually see is bad theatre. And I do theatre, [I'm a theatre techie], so I spend a lot of time looking at actors on stage. These are bad actors. It's performance art. We're seeing the result of what in California under the Brown act would be completely banned. They're deciding amongst themselves, and I don't even believe they're even deciding. I think they're mostly sitting there following Mike Roberts and Sims and whoever is saying look this way, look that way. In fact, I don't think that most of them, the board members, have a very good feel of their obligations as board members, ... to whom they owe duties and what that duty involves.

But getting back to the whole history of ICANN, it's been punctuated at a very rapid rate with these indications that it is not a public body, that it rejects public input, that it is strongly biased in favor of commercial interests. I mean if you look at the domain name supporting organization, they – out of the blue – said that there shall be seven constituencies. Now if you look at them, they are like every ... Like Eskimos have a hundred words for snow, well we have a hundred words for domain name registries. We have the global domain name registry, we have the CCTLD registry, ... we have all these different variations. Where are people on the domain names allotments? Nowhere. Where are schools? They get to be a piece of a non-commercial organization. Where are churches? Where's the little guy? Nowhere. We've been trying to get an individual domain name owners organization together for a long time. Of course, we've had our problems, but ICANN is not even willing to, they didn't even recognize our petition; they actually took another petition ahead of ours for a different constituency.

They are unwilling to admit that individuals have a role. If you look at what they've said all along, they've said ICANN can have democracy as long as individuals are not involved. We cannot trust the individual. You know, if you look at the at-large, at-large has got this whole set of hoops that an individual has to jump through. ... You have to prove that who you are is who you are. Do they have to do this in the commercial area? No. If somebody walks in and says, "I'm the representative of IBM," they take him at his word. Do we verify that IBM is in fact a legitimate corporation? Do we validate that IBM though its proper corporate mechanisms has given this guy the right to represent them? Have we had this guy prove that he is in fact ... who he purports to be? No. We've given commercial groups enormous benefits of the doubt whereas individuals have to bear multiple crosses. Hence, this is why I'm saying that ICANN has just, structurally, gone completely the wrong way.

ICANN: Can ICANN be Fixed?

Q: How can you ... [improve the] structure?

A: First you have to have people who don't just say, "We're going to be open and transparent." ... Structurally, all the pieces are there. They have to have open meetings. Have they had one? No. They have to have accountability, and I mean by accountability that we have to be able to light fires under peoples' feet. What has ICANN done? It's removed the right to derivative action. Who can then bring a derivative action against ICANN? The people who are members of the councils, who get to select, not elect, but select the board members. California law allows people who elect board members to be statutory members who can bring derivative actions and a whole plethora of other rights. Those have been blocked. Nobody that's affected by ICANN's regulations has any of these rights. The only way anybody has any authority over ICANN is to go

to the attorney general of California and say, "Please, attorney general, look at this organization and do something about it." And those of who live in California definitely have a leg up over those who don't. But getting the attorney general's attention, especially on matters as arcane as this, is quite hard. And this is seriously arcane.

GOVERNANCE: Structuring Global Internet Governance

Q: Do you think that any kind of internet governance structure might be better envisioned on the model of the world treaty organization, rather than as a creature of U.S. law?

A: Probably, in the long term I think it's going to have to be that way for things like IP addresses. I mean, government has a place. ... Government is the place where regulation, as opposed to economic regulation, where explicit regulation should come from. It is where we have spent so much time working, trying to come out with the tensions that go in opposing directions, to give accountability and review in all the pieces. I'm not afraid of having an international organization do it. It couldn't do a worse job.

ICANN: Limits on ICANN's Authority

Q: What do you think of ICANN's [argument] that their only authority is reflected by people's willingness to subscribe to their policies and they have no inherent power to force people to do so?

A: But they do have it. As long as people accept the fact that there is one legacy root of the DNS – and as a practical matter that is the case, I mean everybody points to the same root and the IFWP had a chapter saying there shall be one root so as a practical matter there is only one root – they are the ones who can tell NTI what top level domains can go in the root and which top level domains can't. And they also regulate the business models of the registries. So there's no options. This is mandatory control. The premise of your question to me doesn't exist.

Q: You don't think that there are technical means of getting around it?

A: Well, for DNS you can start another root. But it's like, am I willing to go out and write another operating system for PC's? Am I willing to gamble everything on there being another Linux. Maybe, maybe not.

CONSENSUS: Defining Consensus

Q: Tell us how you define consensus.

A: Oh boy. I don't like consensus ... because you can't define it.

When you are getting to hard decisions, I think people have to stand up and be counted because the consensus-taker – the person who is counting or measuring consensus – can become a tyrant. And we have seen this in the DNSO. We had the nominations ... The DNSO has this structured Names Council which comes from the seven constituencies, and there's this general assembly, a powerless group which I resigned from because of censorship. There structure is that board seats have to be nominated by the general assembly but the actual selection occurs by the Names Council. The Names Council members can be in the general assembly, so they can put their own nominations in. So the net result is that the general assembly has no voice whatsoever and the Names Council can do anything. When this happened, there were some various names put in and it turned into a ... because there is no re-election, the seconding process became a stand-in for an election. And Ni Quaynor and I both got far more seconds than anybody else, by a huge gap, considering that there were only a couple hundred people involved. Neither Ni nor I got any votes whatsoever. He may have gotten one. When I got a vote, apparently it was considered a technical flaw and they had to stop the counting for three days.

Q: Why was that?

A: I don't know. Somebody said, "Oh I didn't really vote for Karl." Mike Roberts had better know that when I come in there, I am going to exercise every power given to a director under California law to review every single document that ICANN has and every process. California law gives directors very strong authority to direct a corporation. In fact they're obligated to direct the corporation, and I suspect that we will find things that could very well trigger things like the IRS intermediate sanctions for 501(c)'s. That's a big hammer against a corporation and its board members.

CONSENSUS: Alternatives to Consensus

Q: So what's a good alternative?

A: Votes. Clear votes. Clearly articulated issues with clearly counted votes by a clearly enumerated electorate.

Q: And who should be included in the electorate?

A: The electorate should be ultimately anyone who is affected by the decision. We have the problems of cost and we have the problems of identifying people. But to me that's better than this fuzzy consensus thing.

Q: So if we have votes, would you want to use a majority standard?

A: It depends. Majority voting can be a bad thing. Staggering

board seats is a classic way for keeping the minority from getting a pro rata share of the board seats on a corporation. Cumulative voting, multiple seats at the same time, cumulative or STV voting are techniques that tend to cause representation of the board or whatever that roughly approximates the interest distribution. And you can see here that we're not in a situation where we have two groups who are just trying to adjust little details. We've got diametrically opposed points of views on a lot of these things. So if you look at the at-large, again, you can see that the elections have been staggered, that there's majority voting – I think there's majority voting – but there's only usually one seat available so it doesn't matter whether there's cumulative or STV voting since there's only one seat ... That means majority rules everything. And you have all these elections and the majority wins and the majority wins and you end up with a board that's entirely majority selected or the decisions are entirely majority selected and the minority, even if it's 49.99%, never gets anything ever.

GOVERNANCE: Policy Questions vs. Technical Questions

Q: I want to loop back to something you explained earlier about the distinction between policy questions and technical questions and how there's not necessarily a clear line. In a kind of system where you're having a determinate vote with an at-large membership however it's defined, can you talk about the kind of technical questions that are appropriate for at-large voting and the kinds of things that should be determined by the standing body? What's the distinction? What kind of questions come to the fore?

A: I think ultimately the entire group should have the authority to look at any matter. And that doesn't mean that they can't at some point say that, somebody should put together a proposal that says, there are certain classes of matter which we believe ... we can put certain limitations on the exercise of discretion about those, that we are willing to hand off to an executive staff or circumscribe the board in some way. Like for example in the Boston Working Group, when we put together our submission to NTIA parallel to the IANA one, we actually had a thing that said that ICANN has these fundamental assets – you'll notice I like the word fundamental – and they consist of the – I can't remember the exact language – basically the rights that they're being granted by the government to control these assets. And these are rights to the root zone, IP addresses. We said ICANN can do the following things with them, but it cannot alienate them, it cannot regulate, it cannot license their use for more than a period of so many years. We drew a line around it. That's the sort of thing that an elected body can do. It can pass a motion that says, we will give you the board, or you the executive board, the ability to make these decisions as circumscribed. And that's classical management by delegation. Draw the borders around what somebody can do, but within it they have discretion.

Q: Can you give some examples of, if you were to draw those borders, what would fall on either side of the line?

A: Well, so far since the general public has not had a chance to deal with any of these matters, I would take them all out of ICANN's hands. I would want everything that is decided to be reviewed and decided on de novo.

GOVERNANCE: How Would You Govern the Internet?

Q: Assuming you get past that point where you've put together an institution that's open, then can you give us a sense of the issues that you would delegate and that you would keep.

A: So if I were the emperor of the universe? ... Well, first of all I would take DNS out of ICANN because as I've said I think there are other forces that can handle that. But with respect to IP address assignment, I would delegate to the three existing regional registries the ability to continue registering addresses within those zones. However, I would also appoint another group that would look to make sure that these three regional groups – ARIN, RIPE, and APNIC, are you familiar with that? They're the Asian, European, and U.S. or American address assignment registries. They roughly correspond to the big land masses on the planet. They also correspond to the clumps of interconnectivity on the internet. There is basically lots of interconnectivity within them, and sort of thin connectivity between them. Which is real nice for doing your address allocation system. Now, if suddenly Africa should become a big, solid, thick clump of connectivity with sort of a few links to Europe, it would make sense at that point to split the European registry to an African and European registry. So currently, I would say RIPE, you're doing a great job, but I reserve the right to split you. Or aggregate you.

ICANN: The Worst ICANN Can Do (Part I)

Q: What's the worse thing ICANN can do? In terms of impact or specific action?

A: It's setting a model for internet governance, for other areas that will arise. And it's building the cookie-cutter of the future. And it's quite an undemocratic cookie-cutter. Yet people are quite willing to copy it. That's what scares me the most. DNS, when you get down to it, is kind of boring. I'm probably going to be able to keep auerbach.com although people have threatened to take it away from me. But, it grows. If the area it covers grows, and ICANN itself is threatening to grow in other areas. Hans Kraaijenbrink – I cannot pronounce his last name – has completely ignored the address supporting organization and has created this ad hoc group on addresses which appears to have no purpose other than to deal with

address issues in a much broader context than IP addresses. It's looking to IP addresses and telephone numbers, and that kind of expansion in a similarly undemocratic sense – in fact in a worse undemocratic because at least ICANN's current structure says that the board shall delegate to the supporting organizations, even though it doesn't do it – here's the case where it's creating a structure where it doesn't even delegate to the supporting organizations. So what I'm afraid of is it [ICANN] growing.

THE FUTURE: ICANN In 10 Years

Q: Look into the crystal ball, ten years from now, what is ICANN's scope of authority? What functions does it serve?

A: Well, I think DNS is going to return to what it should be in the first place, which is a system that hands out handles that map into IP addresses and IP telephone numbers and mail exchangers, you know because DNS covers a whole number of things, not just web access. And these names will rarely be seen by humans. Most of the time when you, as a human, deal with the internet you will deal with some intermediary that knows how you want to deal with the network. When I say "Chris" I mean my wife Chris. If you say "Chris," you mean someone else. But your access tools to the net will know your context. And when you're looking for something, it will know your preferences and things will be tuned to who you are, and you will not be typing domain names except in very rare circumstances. About as often as you type in IP addresses now. And to that end, I'm hoping that DNS will submerge to become just the internal gear, just like a piston in your car: you know its there and you hope it works, but you don't see it and you don't really care what color it is or if it's domed or if it's dished or whatever. It just does its job. And therefore all this heat and smoke and stuff will become irrelevant, at least to the DNS. And IP addresses are so arcane anyway that you won't see them in a few years. That's going to become so specialized that it's going to have its own, like the people surrounding telephone exchange, there's a whole legal profession built around how telephone companies exchange traffic with each other. That will become, I think an arcane little niche and ICANN will fall into that and be that.

THE INTERNET: Commercial Interests

Q: I want to go back to something you said earlier ... In your opinion how has the growing financial stake in all of these questions affected the debate about internet governance?

A: The DNS space is quite overt. The trademark lobbyists have been quite strongly interested in protecting their rights. And they've shown that they are very efficient in organizing and lobbying and what have you. The economic stakes on the IP address side, most

people don't realize it. Some companies realize it. Cisco realizes it. When Hans came out with that ad hoc group, the IETF, the three RIRS, and Cisco systems all sent in highly negative comments about this. Comments that were ignored. So the economic interests of those who in DNS, have the DNS trademark interests have clearly floated to the top and are very visible. The economic interests of those who would use domain names for other purposes are quite diffuse. I mean, what is my real economic interest in having my own last name as a domain name? It's hard to put a number value on it. ... So cumulatively – I may have a smaller personal stake – but cumulatively it adds up to a possibly much larger interest – I don't know how we'll measure it – than the trademark interests.

So the focused economic interests have floated to the top and have made themselves clear in the domain name space. The registries are clearly trying to exercise power because there's money to be made. Everybody's looking at NSI and saying look at all that money, I want that and do that too. But in the IP address space, it's just such an arcane issue. From the point of view of Cisco, we build routers, that's our life. It's how do you handle IP addresses, that's critical to our business that they don't break – the fundamental attributes of how we have packets that move around the net. So yeah, economic interests are making themselves known, but there are not a lot of people who know they have an interest to articulate it. That may be a better way of answering your question. Not everybody knows that they have an interest.

ICANN: The Worst ICANN Can Do (Part II)

Q: Right. That seems to be the big danger of what ICANN is doing. People don't realize that ICANN is making decisions that will affect them for a long time.

A: And a lot of times since you didn't know any better – you don't know that the grass is greener on the other side since that's the way you've always lived. If you always lived in a coal mining town in South Wales, you may not realize that you don't have to live with black lungs.

THE INTERNET: What is the Internet's Greatest Promise?

Q: I guess one other big picture question – it's the one we usually start off with: what's the internet's greatest promise.

A: If I want to say it in new age, then empowering individuals. I don't know where it's going to go. I just think it's a great ride. It gives me the ability to find people who I've never dealt with before. It let me find my missing half-brother. To me, that's like incredible. I mean he disappeared when he was only three or four years old and

I never saw him, even when he could speak. And I got an e-mail one day from a person looking for my grandmother. He mentioned that it was his grandmother; we're half-brothers. It's that kind of thing that the internet is enabling. It's incredibly valuable in an unmeasurable way. It really helps. Computers are really good at doing things by rote. People are really good at doing arbitrary things, leaping to conclusions, creating new things. The internet is really a great tool for getting two people, who have each the half of an idea, together so that they can create something new.

Now that's its real promise. How it does that, we don't know, but we shouldn't stop the innovation. And by regulating the internet, when you put a regulation around something, you actually stop its innovation. And by stopping innovation of domain name space, we are stopping innovation of how you name things. How you name things is quite a strong tool in how two people will find each other. I mean, my half-brother found me because I had auerbach.com. If I hadn't had that, he would never have found me and I would never have met him, possibly. So that's the value of the internet. What was the power of the book? Guttenberg didn't know.

...

GOVERNANCE: Approach

Q: Do you know them [Mike Roberts, Joe Sims] on a personal level?

A: No. I know many other people, but I don't know Mike Roberts. ... Actually, I hear people say really good things about him, but not in this context. He had to be a real personable person to sway Jon Postel. Jon was not a dummy. So when I said things were done beyond his back and Jon wasn't necessarily particularly knowledgeable, Jon is smart at learning, but he is definitely a techie. And one problem we techies have is that we tend not to be educated well in disputes and soft issues. We're not very good at it. In fact, I'm afraid of them. I can argue with someone about a technical issue until we're both red in the face, and nobody feels the worse for it. A knock-down, drag out technical fight, because there's a good, clear answer. But in this soft stuff, most of the technical people, first they don't like it because it's hard to come up with clear answers. But everybody takes it too personal. There's not enough of a sense of humor in all this. ... There needs to be more people laughing ... This really isn't all that important. Nobody is going to die over this. People are starving. This is not on that type of scale. Let's all relax, take a break, come back, shake hands, and start all over with things.

PERSONAL BACKGROUND IN INTERNET ISSUES

Q: Can you say a little bit about your background and how you got involved in the debate, that kind of thing?

A: Well ... my family has a history of radicalism. Being arrested for various protests is a mark of honor in my family. Unfortunately, I do not have this mark of honor. I have never been arrested for a protest. I've been beaten up by the police. So, the long history of being troublemakers, and asking questions, questioning authorities, has been ingrained from day one. ... Background? Normal, Van Nuys, California. I went to Van Nuys High just like Jon Postel and Vint Cerf. ... They were there a few years before me. Although I met Vint Cerf in 1974, he was a consultant to my group. And had normal educational experiences. Went to UCLA and studied physics and what have you. And I discovered I have no mathematical talent whatsoever, which is a bad thing for a physics major. At this time there was no such thing as computer science, although computers fascinated me. So I took the easiest major I could find Geology, which I took all engineering classes. So I somehow developed this split in my brain between technology and soft stuff. And I've had that ever since, which is why I spent half my life doing things like theatre, and then I go do technology. I have not an ear for foreign languages. I'm the only person in my family who can't speak a dozen languages, so I couldn't get out of UCLA, so I transferred to Berkeley, which didn't have a foreign language requirement. Graduated from there. Then did the obligatory getting tear gassed a couple of times in People's Park. ...

Moved back down to L.A. and got a job with an aerospace company with security clearances and all that sort of nonsense. Then one night, got pulled over by the L.A.P.D. or the L.A. Sheriff's and my car got searched, and I got searched and my girlfriend got searched. Everything got searched. And I said, there's something wrong here. I want to know more. So someone I knew threw a law school catalog at me. I applied to exactly one law school, took the LSAT, got accepted. I was this long haired, furry techie person. I did reasonably well in school, graduated like third or fourth in my class - this is Loyola Law School. And never practiced. I went back into technology and looked for a worked for a long time on Unix types of things. Started my own start-up companies. First one was extremely successful. Unfortunately, I gave it away in a divorce settlement. Second one a total disaster, so I now know the feeling of a business is going south in a hurry. The third one I started, it got acquired by Cisco, so I now know the feeling of one that's very successful. ...

I've always been interested in law and social issues. Always reading, watching, but I've never really done much with it. But for the last 30 years I've been building the internet and when IETF started drifting into policy issues, of course I got involved because this was naturally a magnet for me. So I got involved in the IETF policy group, trying to figure out how the IETF should run itself. Got involved in the so-called IAHC; I don't remember the initials, something ad hoc committee to do the first things with domain name stuff, although I wasn't on the committee at the time it was doing this stuff. I've just

been following this whole internet governance thing since several years. You know, when ICANN got started, not started but when the discussions got going, there was this IFWP, hopped on this flight and went to Reston, had a great time, met a lot of great people, got a lot of great ideas. And as the IFWP process went along, it turned out that I had bought tickets to come here [Boston] for the IFWP meeting and the meeting got cancelled. There were a dozen of us who had tickets, so we said let's go to Boston anyway. And that's how the Boston Working Group got formed. Diane [Cabell] was our scribe. And we wrote up our own counter-proposals, which are somewhat worth reading because it was a lot of good stuff. We took the IANA proposal and we said ... it's the locomotive, it's going, it's not going to be derailed, so let's see what adjustments we can make. We proposed some good adjustments, they were virtually all ignored. ...

When ICANN got formed and I saw the initial board I was actually very pleased. So I said let's give it a try. Then disappointment, disappointment, disappointment, disappointment, to the point where I'm now just downright angry that it continues to exist. I think it's done a great job of creating the 1954 government of Bulgaria. It's a true Soviet, responsive to itself and no one else. That's how I got where I am.

You know I have an entirely different life. I'm in the CTO's office at Cisco, and I'm working on where the internet is supposed to be from an infrastructure point of view. I spent five years building systems to move broadcast quality and better video around the net. So my perspective of the net is very different from most people. I don't see the net as web, the world wide web. I see the net as where we move packets around for multi-media or all kinds of other new things and a lot higher data rates than we're seeing. So I see technology which some of it will never see the light of day, and which most of us will be seeing in five, ten years. So my perspective on ICANN is quit regulating that, and let's deal with the future and the present, but my present is most people's future. At least, I hope it's in their future.

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ICANN-oclast

Get ready for a shake-up: Radical Karl Auerbach just got elected to the Internet's top governing body.

By **Damien Cave**

Oct. 16, 2000 | For the past two years, Karl Auerbach has made a hobby of criticizing ICANN, the Internet Corporation for Assigned Names and Numbers. He has called the Net's controlling authority over domain names everything from inept to "an organ of the trademark lobby." But on Tuesday the 50-year-old "wild-eyed radical," as he often calls himself, became part of that which he loathes: one of five new members of ICANN's board of directors.

Can the ultimate outsider transform an organization from the inside? Not even Auerbach is sure. "I'm nervous," he says. "I feel like I just signed up to replace Sisyphus, so that he can go to Hawaii while I undertake to roll the boulder up the mountain every day just to have it roll back down every evening."

Auerbach is willing to push anyway. He's confident that the voters who put him in -- everyday Net users who registered through a convoluted online process at ICANN -- made the correct decision. He might be right. The cheerful, bearded 50-year-old has activism in his blood. ("My grandparents worked to promote labor unions, and my father worked to redress imbalances of power in the California TV repair industry," he says.) His own life reflects an eclectic, uniquely Californian mix of technology, law and protest.

This strange brew first appeared during Auerbach's teenage years. Growing up in Van Nuys, Calif., during the 1960s, he developed a love for math, attended the same high school as Internet pioneer Vinton Cerf and began to question what were then the early stages of the Vietnam War. In 1966, he joined an antiwar congressional campaign; in 1970, while studying physics at UCLA, Auerbach found himself running from the Los Angeles Police Department during a riot sparked by the news of the Kent State killings.

Soon after that, computer science struck his gray matter's fancy, and after meeting up with Cerf -- whom he didn't know in high school -- Auerbach began working on the beginnings of TCP/IP. This led him to software, and throughout the '80s and '90s, Auerbach spent most of his time founding or helping to start small infrastructure companies that helped networks work more efficiently. These firms typically ended up being acquired by larger corporations: Epilogue Technology Corp., which Auerbach founded in 1986, is now part of Wind River Networking Products; Precept Software was acquired by Cisco in 1998, which is where Auerbach now works as a researcher.

Through it all, Auerbach maintained his passion for political protest. He says he earned a law degree "because I had been subjected to what I thought was an illegal search by the L.A. sheriff's department and I was curious whether it was, in illegal." (It was.) And when ICANN formed in 1998, under dubious circumstances, Auerbach took up the cause, arguing for a more democratic, less corporate structure. He even formed the Boston Working Group in September of the same year, drawing 1,000 people to the online policy think tank to discuss "the management of Internet names and addresses."

But it's one thing to be a critic and quite another to try to effect change. We spoke to Auerbach about his plan for reform, how he hopes to implement it and what he'd like to see ICANN become.

You've condemned ICANN repeatedly, but in your ideal world, what would it look like? How would you like to see

ICANN changed?

We're talking about a California remodeling job, where you knock down the whole house but for one wall and build a new house around it, then tear down the remaining wall. Essentially that's what ICANN needs. It needs a fundamental, ground-up restructuring. I'm talking about a restructuring to the point where the supporting organizations -- such as its law firm -- need to be redefined, if not eliminated; where the board members come exclusively from the at-large membership votes; where everything that ICANN has done so far is subject to a very short sunset provision and has to be reenacted lest it expire. I'm talking about a major overhaul.

How on earth do you go about changing this -- you're one man on a board of 19.

Yeah, well, I'm going to lose a lot. However, there are other things that a member of a board of directors has. The first thing can be seen in the word "direct" -- a director directs. That's an action word. A director must act, a director must direct, must make well-informed decisions. To do that, a director has the right to inquire about and examine all the records, documents and procedures of a corporation. Very little is hidden from a director's eyes.

This gives a director an enormous power to know what's going on in the corporation and to expose improper activity.

Also, by my behavior, I intend to exemplify "open, transparent and accountable." I intend to be a standard by which other board members will be measured.

What else do you bring to the table?

Well, ICANN is moving into a realm where knowledge of technology is actually going to make a difference. And I know the technology. For example, all this business about top-level domains and how many the Net can support -- there's been no technical discussion of how many it can actually support. And most people don't understand the issues of content management, which is very definitely changing domain names from being globally meaningful to locally meaningful.

A lot of people think "domain name" uttered anywhere means the same thing. They think a name is just a name is just a name. Yet it costs a lot of money to move content around the network, both in terms of bandwidth and in terms of time. Users get really tired of waiting for stuff to get dragged across the Net. The idea is -- and Akamai and other companies are doing this -- you move content, you spread it around so it's replicated, so when somebody asks for it, you intercept the domain-name query and you look at it and say: "Where is this user coming from? Where is the closest place he can get the content?" And your DNS [domain name system] answers, then points the user to the place that's closest. Therefore, we've got geographically sensitive domain names.

And there's this strong financial pressure by data providers and ISPs to manage the content so it can get to the users more efficiently, in terms of not generating so much bandwidth consumption. This is big bucks -- we're talking billions of dollars here. ICANN doesn't understand this. It's assuming that domain names are this globally unique name space, when in fact they are evolving to become more of a personal domain space.

So unless one understands the technology and the implications of it, when one enacts rules regulating it, you essentially pour concrete around the technology. You inhibit, if not prevent, innovation. By creating all of these laws about rights to names and structures and DNS, we don't know what innovation we're impeding.

Do you remember the Hushaphone decision back in 1956?

No. I'm much too young to remember anything that happened in 1956.

Ah, it's a very interesting case. In the 1950s, AT&T was The Phone Company, this huge monolith, and it and the Federal

Communications Commission -- which was pretty much subject to AT&T's whim -- had an iron fist of control over the telephone system in the United States. But there was a little company called Hushaphone, which built a plastic and aluminum widget that clamped onto the mouthpiece of the telephone. As with when you put your hand around the mouthpiece, it cut out exterior sound and helped focus your voice into the microphone. It was a totally passive piece of equipment. AT&T went ballistic. It said, "You can't sell that product; it will damage and destroy the telephone network."

And the FCC said AT&T was right. "We can't have linemen blown off the telephone poles from a high-voltage shock because someone's using a Hushaphone" -- that sort of thing. It actually took something like 20 or 30 years to get to court, but the U.S. District Court took a look at this thing and said, "AT&T, you're full of it. This little widget cannot possibly harm the telephone network. Plain common sense tells us that."

So the District Court enacted a standard that said any action that is privately beneficial is permissible on the telephone network, as long as it's not publicly detrimental. That's an important standard; that was the crack that broke AT&T apart. Hushaphone was the start.

We need to revisit that rule. We need to realize that large technical entities sometimes don't tell us the truth. We have to realize when we're being subjected to a snow job. It takes some technical savvy to look at something and say, "This emperor has no clothes."

Where does your relationship with Cisco fit into this?

I don't speak for Cisco and I never will. Cisco is not like the old companies where the president gives an order and everyone marches off wherever he says. We are more of the cats. And most of us are financially independent, so we don't have to follow orders anyway.

Are you going to have enough time to do for ICANN what you would like to do?

Yeah, I think so. It will of course interfere with my work, but it's been interfering with my work for a couple of years. I'll probably continue about the same kind of schedule, which is work, then say "Hi" to my wife in the evening, then go do ICANN stuff. She doesn't like that.

Aren't you also doing DARPA [Defense Advanced Research Projects Agency] research?

I'm not sure how much of what I'm doing is yet open for public release, so I'll be a bit vague. But I'm doing research with folks at UC-Berkeley on means to build what I like to call "autopilots" for the Net. The idea is to add intelligent control systems and make use of process control principles to exercise that control and keep the Net operating within limits established by the network administration. This kind of thing will become increasingly important as the Internet moves toward providing "lifeline" services and time-sensitive applications, such as I.P. telephony.

OK, let's get into some of your more specific gripes about ICANN. What do you think is ICANN's biggest flaw?

First of all, ICANN is not a legislature, yet it is enacting what amounts to a law that is above all other nations on the planet. The Uniform Dispute Resolution Policy [for domain names] supersedes U.S. trademark law or any other trademark regime in any other country. ICANN will claim that it is merely private and contractual, but the 55-mile-an-hour speed limit was not imposed by federal law directly. It was imposed by the federal government saying to the states, "We will withhold money unless you -- the states -- enact a 55-mph speed limit." So just because it's done by contract doesn't mean ICANN is not enacting what amounts to a worldwide law.

And ICANN doesn't have the structures associated with classical government: a full-participation review, a tension between various opposing forces -- a separation of powers. It doesn't even have a notion of due process. It essentially is an

oligarchy that operates on the same principles that Louis XIV did. So it's an inappropriate body to enact what amounts to worldwide legislation.

Look at most of the UDRP cases. We have the Brazilian soccer team taking away Corinthians from someone in the U.S., for example. I'm just waiting for the second shoe to drop, which is when the city of Corinth in Greece goes after the soccer team in Brazil.

But if your vision of pure democracy is realized, won't ICANN be crippled -- even slower than ever? After all, not even the Founding Fathers decided that pure democracy would work.

Sure, it's chaotic, but we only had 3,000 people from North America vote in this election. And we're talking about a group that has communications possibilities well in excess of anything that was imaginable to people in the 1780s.

And what's wrong with moving slowly? We're in a whole new environment.

How do you think ICANN should handle the addition of new top-level domains, which may be the first piece of policy you have a hand in?

ICANN should be in the business of giving away top-level domain slots -- not names, but slots. A slot is a chance to put the name of your choosing into the root zone. ICANN should not look at the semantics of that name whatsoever. ICANN should be absolutely blind to the meaning of that word in any given language. All ICANN should do is check to make sure that the name is not being used already.

Secondly, ICANN should keep its hands absolutely out of the way the top-level domain is operated. It should allow them to go out of business. It should allow them to impose their own charters at their own choosing. If someone gets a slot and wants to call it "foo" and only include Web sites about "foo" birds, that's the business of foo's top-level domain. ICANN should not try to be a policeman of charters or anything else.

How many names should there be?

We can easily handle 10,000 top-level domains per year. By actual experiment, I've determined that the domain-name system can technically hold at least 1 million top-level domains with no problems whatsoever, probably many times that.

Should companies get any protections from ICANN?

No. There are existing trademark laws that they can use. What the trademark people want is fast recourse. They don't want to have to go to Brazil, which happens to have a domain they want; and they've gotten this and more. But why should we give trademark people this speedy access to supernational jurisdiction? I'd rather let the law evolve along the lines that it evolved over the past 2,000 years, which is by trial and error, finding out what works a case at a time.

The legal system has these techniques. And of course, there will be injustices along the way, but we already have plenty of injustices with the UDRP. And what's more frightening is that the whole ICANN legal system doesn't have the same checks and balances that the true legal system does. The true legal system is very much aware that it makes mistakes: It has notions of review, of overturning prior judgments. It's all built into the system. But ICANN doesn't have any of that.

Sounds like a libertarian stance -- are you in fact a libertarian?

Not really. I'm very much in favor of strong government regulatory regimes when there is a need for them. I've read a fair amount of history -- particularly the history of the U.S. since the Civil War -- and it is clear to me that the development of the regulatory state was a good thing and well justified by the abuses. I don't see that those abuses have waned, and thus

here are still good reasons for strong regulatory bodies.

That said, I do recognize that there is value in recognizing that there are areas in which nongovernmental coercive forces -- such as Adam Smith's "invisible hand" -- are still a valid, and even preferable, alternative to a governmental regulatory body.

In the DNS space, it's my feeling that ICANN should limit itself to handing out lots and lots of slots in the root zone and let the operators of those slots run them as they please. It's my feeling that this is an area in which we can allow nongovernmental and nonregulatory forces to work (in conjunction with the preexisting legal framework that penalizes things like defamation and trademark infringement).

In the I.P. address allocation area, I take the reverse point of view -- that a strong regulatory body, and ICANN, are indeed needed. I don't think in the I.P. address area that economic forces will produce a solution that is good in terms of being open to new entrants or future flexibility of the Net.

And as for ICANN's third role -- protocol parameters -- that's simply a useless appendage to ICANN. It reminds me of something that Dickens came up with -- the Circumlocution Office -- a governmental entity with no positive function but that took it upon itself to make sure that no other governmental entity could do its job. I tend to feel that ICANN ought to chop off its useless "protocol parameter" appendage. I wouldn't call that "libertarian"; I'd call that rational.

Ultimately, do you really think you fight the system while working within it?

Of course. If I didn't believe that, I'd be fighting ICANN's systems tooth and nail. But I'm afraid of the vacuum that would result if ICANN were to disappear completely.

Where do you see the organization going?

I believe ICANN was given two distinct and contradictory roles, one of which was to establish itself, the other of which was to try to come up with policies regarding domain names. ICANN is a new experiment in international government. There's no source of authority for that. The only place it's going to come from is historical acceptance, and the only way it's going to get that is by doing things that are right, so that over time, people say, "You know, ICANN's doing the right thing." They'll just come to accept it, and ICANN will grow to power by that means. To do that, you have to get people to accept the decisions and to accept that they've had a meaningful participation. So to me, ICANN's race to put policy into place without creating the structural integrity and trust was a complete error. And it's suffering from it now. No one trusts ICANN anymore, and it may not be recoverable. I'm going to try to recover it. It also means maybe we have to throw out a lot of what's been done and start all over again, with everybody involved this time. It's a brave new world.

About the writer

Damien Cave is a staff writer for Salon Technology.

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Exhibit 5
Director Votes on Resolutions – 14 March 2002

Director Name	ALSC (02.17-02.19)	Evol. and Reform (02.20-02.26)	Security Comm. (02.27)	LACNIC (02.28-02.29)	Response to Annan (02.30-02.32)	Thanks to Organizers (02.33)	Thanks to Twomey (02.34)	Thanks to Translators (02.35)	.org Reassignment (02.36-02.39)	.pro Agreement (02.40-02.41)	ICNG (02.42-02.44)	Redemption Grace Period (02.45)	Independent Review (02.46-02.47)	Auditors (02.48-02.49)	
Amadeu Abril i Abril	Y	Y	Y	Y	Y	Y	By Acclamation	By Acclamation	Y	Y	A	Y	Y	Y	
Karl Auerbach	N	Y	N	A	Y	Y			Y	A	N	Y	N	N	
Robert Blokzijl	Y	Y	Y	Y	Y	Y			Y	Y	Y	Y	NV	Y	
Ivan Moura Campos	Y	Y	Y	A	Y	Y			Y	Y	Y	Y	Y	Y	
Vinton G. Cerf	Y	Y	Y	Y	Y	Y			Y	Y	Y	Y	Y	Y	
Jonathan Cohen	Y	Y	Y	Y	Y	Y			Y	Y	Y	Y	Y	Y	
Philip Davidson	Y	Y	Y	Y	Y	Y			Y	Y	Y	Y	Y	Y	
Masanobu Katoh	Y	Y	Y	Y	Y	Y			Y	Y	Y	Y	Y	Y	
Hans Kraaijenbrink	Y	Y	Y	Y	Y	Y			Y	Y	Y	Y	Y	Y	
Sang-Hyon Kyong	A	Y	Y	Y	Y	Y			Y	Y	Y	Y	Y	Y	
M. Stuart Lynn	Y	Y	Y	Y	Y	Y			Y	Y	Y	Y	Y	A	
Andy Mueller-Maguhn	A	A	Y	Y	Y	Y			Y	Y	Y	A	Y	A	A
Jun Murai	Y	Y	Y	Y	Y	Y			Y	Y	Y	Y	Y	Y	Y
Alejandro Pisanty	Y	Y	Y	A	Y	Y			Y	Y	Y	Y	Y	Y	Y
Nii Quaynor	Y	Y	Y	Y	Y	Y			Y	Y	Y	Y	Y	Y	Y
Helmut Schink	Y	Y	Y	Y	Y	Y			Y	Y	Y	Y	Y	A	Y
Linda S. Wilson	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y		

Not present:
 Lyman Chapin
 Frank Fitzsimmons

Legend:
 Y – Voted yes
 N – Voted no
 A- Abstained
 NV – Not voting

At-Large Representative for Canada and the United States on the
ICANN Board of Directors

Karl Auerbach

Diary - June 4, 2001 (Stockholm)

This entry is being written on June 17, 2001 and is being revised and extended over a few subsequent days.

The ICANN Board met in Stockholm at a public meeting on June 4, 2001.

The Board also met informally, in private, the evening before the public meeting. Matters were discussed. This entry of my Decision Diary encompasses the meeting of that evening as well as the public meeting the next day.

With regard to that informal meeting - I do not believe that ICANN's board should hold any private meetings. I grudgingly recognize that they occur as a unfortunate relic from ICANN's past. I do not believe that such meetings are consistent with ICANN's obligation, as expressed in Article III of its by-laws to "*operate to the maximum extent feasible in an open and transparent manner*". However, until ICANN changes its procedures, I feel constrained to discuss only my own actions during that meeting.

Article III of ICANN's by-laws adds yet another obligation: that ICANN operate in a way that is "*consistent with procedures designed to ensure fairness.*"

Every one of these private Board gatherings, whether they be face-to-face or on the telephone, is attended by people who are not members of ICANN's Board of Directors. These outsiders often participate in discussions and in board debates as if they were full Board members; the only thing they do not do is vote. I am quite willing to accept the quiet attendance of certain executive officers of the corporation, most particularly the corporation's General Counsel. However, I am not willing accept that certain people should have this highly privileged access while the public can not even quietly observe. I consider this special privilege to be flatly contrary to ICANN's obligations to ensure fairness.

Given that I have mentioned ICANN's General Counsel - I am very pleased to find his interactions with me are very professional. Although I may not always agree with him, I have come to appreciate his imaginative and constructive attitude and his willingness to work incredibly long hours.

In the days before the June 4 meeting, I had written two proposed resolutions:

- Proposed Resolution Regarding the At-Large
- Proposed Resolution Regarding a DNSO Constituency for Individuals Who Own Domain Names

However due to the rush of events (a rush that was exacerbated by the effects of jet lag) I was unable to complete the text of these resolutions in time so that they could be published on ICANN's web site for at least 48 hours. Consequently these proposals, although they were informally discussed, were not placed on the agenda for the public meeting. I agree with this - no item (even those I propose) should be considered until it has been available to the public for a reasonable period of time.

The preliminary report of the June 4 meeting may be found at <http://www.icann.org/minutes/prelim-report-04jun01.htm>

Prior Meeting Minutes

At the start of the June 4 meeting the Board was asked to approve the prior minutes.

Wow, did I blow that one - Yes, I voted for it. And yes, I hadn't realized that there were no prior minutes.

All I can do is kick myself and repeat the mantra that I shall not vote in favor of anything until I review it, find it to be within the proper scope of ICANN role, and find it meritorious.

Approval of 2001-2002 Budget

I voted against the proposed budget.

I had several reasons to do so.

First of all, ICANN is growing far too big; the sum-of-the-parts of the budget reflects an entity that is bulging out of its seams. A staff of 21 plus more than half a million dollars for additional professional services is simply too many people for the limited role that ICANN should be playing.

One must remember that under ICANN's structure, the SO's are to have major roles. My observation is that ICANN is adding staff that is duplicative of the work that the SO's are supposed to do. ICANN should not add staff to do work that is properly the job of the Supporting Organizations.

Second, I do not believe that ICANN is paying enough attention to economizing. I have noted that ICANN's previous President is jetting around the world on ICANN business. That strikes me as odd - and expensive. Similarly, ICANN's senior staff does seem to show up, sometimes by two's and threes, at a lot of meetings around the world, even if only to give a short presentation. And I have heard quiet, but persistent, rumbles that some of these the presentations were not particularly well technically grounded. It seems that ICANN would be better served by fewer trips by fewer people.

Lest my comments reflect poorly on those who do not deserve it, let me add this: I have yet to meet a member of ICANN's non-executive staff who is not a dedicated professional. ICANN's Presidents, past and present, have done an excellent job hiring really good people.

Third, I will not vote for any funds to be paid for services rendered by people who lack the appropriate work permits or licenses. Such payments, in my opinion, might endanger ICANN's tax exempt status under US Federal law and might also potentially result in the imposition of financial sanctions on Board members. My inquiries indicate that ICANN's budgets, past and present, possibly include money for such unlicensed services. I have asked that an independent expert be consulted to render advice, but I have seen no action in that regard.

Revision of Registrar Application and Accreditation Fees

I voted yes. This was not something that I felt strongly for or against, but it seemed to be a sensible change at the time.

I realize now that once again this was a situation in which a proposed resolution was not been available long enough for me to read, digest, and to go to "the community" and ask whether it is a good resolution or a bad resolution. I am beginning to realize that the *exact* text of a proposed resolution needs to be available at least three weeks prior to the board meeting. (Two weeks would probably be sufficient were it not for the fact that the travel involved going to ICANN's meetings tends to destroy much of the week prior to the actual board meeting.)

Emerging Regional Internet Registries

I voted yes.

It's good to see something happening in the IP address arena.

It makes sense to me that there be new address registries, hence my vote in favor.

I do have some reservations:

- The address registries should not become pawns in any sort of "my region is bigger than your region" politics. Rather, it is important that the address registry system be organized so that registries coincide with concentrations of IP connectivity with relatively lower degrees of connectivity with the areas covered by other registries. In other words the registries need to be created according to the density maps of IP connectivity rather than according to geographic or national boundaries.
- The address registries that exist today, and the criteria expressed in ASO's memorandum, tend to give greater decision making roles to ISPs and relatively lesser roles to end-users of address space. While this may make sense as a matter of address conservation and of keeping routing tables small, we must recognize that there is a tradeoff being made and that end-users of address space ought to be blended into the process by which the equities are balanced.

Referral of .org Issues to DNSO

I voted yes.

When this resolution was initially brought up, it required that the future operator of .org be a non-profit entity. I found that to be too restrictive and could easily be avoided by the creation of a shell non-profit to be the registry while the back-room operations were contracted to a low-cost for-profit.

Similarly, the initial resolution failed to give sufficient hope to those already in .org that they would be able to retain their registrations.

Both of these issues were revised to my satisfaction.

I do, however, have substantial concerns with any concept of a "non-commercial" TLD space. Enforcement of "non-commercial" rules could be exceedingly difficult. The biggest difficulty would be

to define who is "non-commercial" and what constitutes "non-commercial" activity - for example, would links to doubleclick.com transform non-commercial into commercial use? What happens if one of these "non-commercials" raises revenue by selling its web access logs? And how might someone's hobby - a new "yahoo" - migrate to commercial use without destroying the goodwill value it has built in its formative years? But beyond enforcement, I do not see why ICANN should be in the business of divining what is commercial and what is not - in my opinion that is something that is far beyond from ICANN's proper role.

It's worth mentioning that this matter is being passed to the DNSO. I trust that the DNSO will address the issue and respond with a well considered response that is accepted by the Internet community at large and particularly by those who presently have names within .org.

Process for Monitoring and Evaluation of New TLD Program

I voted yes.

Personally I do not believe that we are really engaging in a "test" of new TLDs. To my mind what we are doing is on par with United Airlines running a "test" to determine whether airplanes are capable of carrying passengers. We know the answer already, and the answer is that new TLDs do not destabilize the Internet.

But I'm willing to play along with the fantasy in order to help speed the day when ICANN blesses more new TLDs.

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Proposed Resolution Regarding the At-Large

Recognizing that a viable at-large body is based not on a single election but, rather, is the product of evolutionary processes occurring over an extended period of time;

Recognizing that a viable at-large body is most effectively created by internal, bottom-up growth;

Recognizing that these processes require the free exchange of ideas among at-large participants;

Recognizing that an at-large membership of more than 100,000 people was created, at considerable expense and effort, to elect several members to the ICANN Board of Directors during the year 2000 pursuant to Article II of the ICANN By-Laws;

Recognizing that under Article II of the ICANN By-Laws that the at-large membership still exists;

Recognizing that this existing at-large membership has significant value as a core from which a long-term viable at-large body may evolve;

The ICANN Board of Directors Resolves:

1. ICANN's staff shall create a mailing list with the following characteristics:

- a. It shall be addressable as "at-large@icann.org"
 - b. Membership on the list shall be open to any person who indicates a desire to be on the list. Any member may leave at any time.
 - c. Any member of the list may post to the list subject to reasonable limitations on the number of postings that the member may make per day or week.
 - d. Content of postings shall not be moderated or limited by ICANN staff except that staff may elide
 - i. any posting that is clearly a solicitation for some purpose not related to the at-large, or
 - ii. any posting that is obscene or clearly defamatory, or
 - iii. any posting that is clearly excessively in size.
 - e. The e-mail addresses of the membership of the list shall be available to all list members. However, anyone who obtains this list shall be required to consent to conditions obligating the recipient to use the list only for purposes related to ICANN or the at-large.
 - f. List traffic shall be archived and such archive shall be accessible to any list member.
2. ICANN's staff shall place a prominent link on ICANN's home page to a new web page to be entitled "At-Large Participation". This page shall contain at least the following materials:
 - a. Instructions how one may join or quit the mailing list, how one may access the list archives, and how one may obtain the membership list.
 3. ICANN's staff shall send at least one e-mail to every person who indicated interest in participating in the election held in year 2000 pursuant to Article II of the ICANN By-laws inviting that person to participate in the at-large and giving the particulars of the mailing list and the web page described in this resolution.

Proposed Resolution Regarding a DNSO Constituency for Individuals Who Own Domain Names

Recognizing that individuals who have registered domain names have a significant stake in domain name policy;

Recognizing that the creation of new DNSO constituencies is subject to the requirements of Article VI, Section 3 of the ICANN By-Laws;

Recognizing that there is a long-standing community consensus for the formation of a constituency for individuals who have registered domain names;

Recognizing that there have been difficulties in the formation of a stable entity to act as the basis for such a constituency;

The ICANN Board of Directors Resolves:

1. The ICANN Board of Directors declares its desire that there be formed a DNSO constituency for individuals who have registered domain names.
2. That the ICANN Board of Directors requests that the Internet Community self-organize and create one or more detailed and concrete proposals for a DNSO constituency for individuals who have registered domain names.
 - a. Such proposals shall be presented to ICANN before its year 2001 annual meeting.
 - b. Such proposals shall describe at least the following:
 - i. The proposed structure

- ii. Sources of funding
 - iii. Criteria for membership
 - iv. Willingness to reconcile differences with others who have submitted proposals
3. The ICANN Board of Directors expresses its intention to promptly consider such proposals and hopes that a constituency for individuals who have registered domain names may soon be formed.

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Updated: Friday, June 29, 2001 11:46:05 PM

**At-Large Representative for Canada and the United States on the
ICANN Board of Directors
Karl Auerbach**

Diary - July 31, 2001

We had another crack-o'-dawn phone meeting of the Board yesterday morning. The subject of the meeting was the .name TLD.

Here's where you can see the official "preliminary" report of that meeting:
<http://www.icann.org/minutes/prelim-report-31jul01.htm>

As with all other meetings there were non-Board members present who had no compunctions about participating in the discussion. I happily accept this with regard to ICANN's General counsel who has done an excellent job during these meetings in presenting balanced statements of fact and professional opinions. However, I do object to the presence, and much more to the participation, of these other parties when at the same time the public isn't even permitted to observe, much less to participate.

The "Thank You" Resolution

There was a trivial resolution to thank those people who helped organize the Stockholm meeting - The resolution was trivial but the work and effort of those who contributed was quite significant and much deserving of a hearty "Thank You".

There was an interesting procedural glitch about this resolution: I do not believe that it was posted for public comment. And after the resolution was moved and seconded I didn't hear an actual vote. Considering the nature of the resolution I considered these flaws to be excusable. So, let me ask my readers: What's your advice: should I overlook these procedural errors on these kinds of innocuous resolutions or should I be hard-nosed about any and all such flaws?

The .name Resolution

I voted to approve the resolution

Not that I like .name - but I figure that the path to getting ICANN out of the regulatory business is to develop an institutional blindness to how TLDs are used.

As I see it, when we get to that marvelous day when we have enough TLDs so that there is real competition for services, then there will be personal name offerings that give the customer what the customer wants without extracting a pound of flesh and handing half to the local trademark-taxman.

It was a tough decision. There was a significant issue: To what extent may a TLD registry (or registrar)

evolve its offerings before it is so different that ICANN should take notice?

But my path of reasoning came to closure before I had to reach that question. I believe that ICANN ought to avoid becoming a body that regulates Internet business offerings. And what is this inquiry into .name's e-mail offering but an exercise in regulation of matters that are purely business and entirely non-technical? In other words, I felt that what the .name folks chose to do in conjunction with the TLD is simply none of ICANN's concern unless there was a demonstrated and concrete threat to the technical ability of the Internet to deliver its primary service.

I certainly have no intention of spending any of my own money on "auerbach.name". (I already have "auerbach.com" ;-). And given my own experience handling e-mail forwarding for relatives in auerbach.com, I can't see that the .name folks are going to have an easy time covering costs without levying some expensive fees or resorting to some kind of advertising-based revenue stream. But these are not my concern, nor should they be ICANN's.

I must admit that I am concerned that the central mail forwarding service that .name will be establishing could be a central point of attack for spammers who have recently resorted to sending out e-mails with huge lists of common names in hopes that one or two will get through. The .name mail forwarders may be a rich target for that kind of attack as names such as ann@smith.name fred@smith.name john@smith.name joe@smith.name, etc are all reasonably guessable targets.

I am also concerned about a central mail forwarding service imposing filtering policies (i.e. size limits, spam/RBL filters, etc) without adequately informing those who are affected.

And I'm wondering whether the .name folks will, as many others have done, surrender to the urge to derive revenue by selling information about the e-mail behavior of both its customers and those who send e-mail to its customers.

But should my concern be manifested via ICANN regulation? Would it not be more appropriate for such concerns to be handled via recourse to constitutionally established legislative bodies and duly empowered administrative agencies?

The big question is this: Is ICANN to be a consumer or trademark protection body that engages in heavy regulation? Or should ICANN allow innovation to proceed unencumbered and allow customers to make their own choices and vote with their own feet against those that offer poor service packages? My sense is that it is better for ICANN to be less intrusive and less willing to evaluate how a business operates

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Updated: Wednesday, August 01, 2001 12:17:08 PM

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

GUIDELINES FOR DIRECTORS

This memorandum is intended to provide Directors of Internet Corporation for Assigned Names and Numbers ("ICANN") with guidance concerning their duties and responsibilities under applicable law. In conjunction with other materials in this handbook, this paper will serve as a resource for individual Directors and the Board of Directors as a whole.

ICANN is a California nonprofit public benefit corporation which has been granted tax exempt status by the federal and state governments. Tax exempt status was conferred upon ICANN based on its mission of promoting the development of technical parameters and performing coordination functions which enhance the interconnectivity of the internet, and benefits the public at large. This status as a tax exempt organization carries with it certain responsibilities to federal and state authorities which are different than those associated with taxable, for profit enterprises. Nonetheless, many of the legal principles which govern the rights and duties of Directors of for profit corporations apply with equal force to nonprofit corporations.

Role of the Board of Directors. Under California law, the Board of Directors is charged with overall responsibility for the management of the business and affairs of the corporation. In exercising this authority, the Board of Directors is bound by limitations in the Articles of Incorporation or Bylaws of ICANN. It is important to understand the role of the Board of Directors relative to the officers and employees of the corporation. The Board of Directors, acting as a group, is responsible for establishing corporate policies, directing the officers as to their duties and the conduct of the corporation's activities and approving significant corporate commitments and decisions. Directors also have authority to retain or discharge the officers of the corporation. In contrast, the corporate officers are charged with day to day responsibility for the business operations of the corporation and for the implementation of policies and directives adopted by the Board of Directors. Individual directors do not have the power to direct the day-to-day operations of the staff of the corporation or bind the corporation, absent express authority from the Board of Directors.

Director Conduct and Duties. Directors of a nonprofit public benefit corporation have obligations under state law which govern their actions on behalf of the corporation. To the extent that they conform their conduct with the requirements of the law, they are accorded the important benefit of freedom from financial liability for their actions and decisions as directors. As a general matter, a Director of a California nonprofit organization who serves without compensation is not subject to personal liability for monetary damages to a party damaged by the acts or omissions of the Director, so long as the acts or omissions meet the following conditions: (1) they are within the scope of the Director's duties, (2) they are performed in good faith, (3) they are not reckless, wanton, intentional or grossly negligent, and (4) any damages are covered by a liability insurance policy maintained by the corporation. Non-compliance with these conditions or the standards of conduct described in this memorandum can subject the Directors to liability to the California Attorney General, on behalf of the public, to third parties injured by inappropriate conduct, and to federal and state tax authorities.

General Overview of Director Duties. The general duties of a Director of a nonprofit public benefit corporation, as prescribed by California law, are as follows:

A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be in the best interests of the corporation, and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

This legal standard is generally understood to embrace four duties which Directors owe to the corporation and its constituencies: (1) a duty of care, (2) a duty of inquiry, (3) a duty of loyalty and (4) a duty of prudent investment. Under California law, in the case of a nonprofit public benefit corporation, these duties are owed to the corporation itself, any members of the corporation (of which ICANN has none) and the public at large. In addition, due to the tax exempt status of ICANN, the Directors and officers of the corporation owe a duty to avoid transactions which inure to the benefit of any insider (i.e. an officer or Director of the corporation) or confer a benefit on a private party which is not an insider.

Duty of Care. The duty of care is best expressed in terms of the seriousness with which the Director brings to his or her responsibilities. Some indicators of whether a Director has discharged this duty are regular attendance at meetings, voting on important matters, reviewing reports, financial statements and other materials submitted to the Directors for consideration, gaining and maintaining familiarity with the assets, properties and business objectives of the corporation as well as important business considerations and industry information relevant to the corporation's activities, and serving on such committees to which the Director may be appointed. The standard for the duty of care is that of a reasonably prudent person serving in a similar capacity under similar circumstances. This is distinguished from the traditional duty of a trustee, who is liable for any breach of a trust, whether knowing or not. So long as the Director acts in a manner which is consistent with the standard of prudence, and which would be judged reasonable when viewed by others, the Director has generally met the duty of care. Compliance with the other duties described in these guidelines is also evidence of the exercise of care.

The duty of care also requires that the Director take reasonable measures to ensure that the corporation is managed and directed in a manner which is consistent with its mission. Satisfaction of this obligation requires that a Director consider the qualifications and performance of individuals chosen as officers of the corporation and exercise financial oversight through review, comment and endorsement of strategic plans and similar business plans of the corporation as well as its budgets, to ensure that they are consistent with the mission and business of the corporation. The Director must also consider the interests of constituencies and the public in the business of the corporation, and assist in making decisions which take these factors into account in determining the best interests of the corporation.

Another area in which the duty of care is significant is in matters which require legal advice, including litigation involving the corporation, significant business transactions, or the development of corporate policies and procedures which have legal implications. In such situations, the Directors must be attentive to the concerns expressed by its counsel and follow

directives concerning the confidentiality of advice and overall legal strategy approved by the Board of Directors or the officers for dealing with particular problems or issues.

Duty of Inquiry. The duty of inquiry requires that a Director take such steps as are necessary to be sufficiently informed to make decisions on behalf of the corporation and participate in the Board of Directors' activities. This obligation may be satisfied by the member undertaking investigation of proposed decisions, for example by asking appropriate questions at board meetings, as well as the Director's review of reports and information prepared for the benefit of the Board of Directors in order to support a decision. The Director must draw on such knowledge as he or she may possess in evaluating information and reports--for example an individual trained in a specialty which is the subject of a report must read it from the perspective of an expert in that field--but in areas in which the Director has no expertise, the standard for conduct is that of a similarly situated prudent person.

The duty of inquiry also encompasses the right of the Director to essential information, including review of corporate records and other similar documents. The law provides Directors with fairly extensive rights to obtain information about the corporation's business affairs, and Directors are expected to exercise those rights when appropriate. However, the interests of the corporation in a well informed Board of Directors are to be balanced against competing considerations, such as contractual obligations relating to confidentiality of information received from third parties, privacy rights of employees and others who deal with the corporation, attorney-client privilege relating to legal proceedings or legal advice to the corporation, and protection against disclosures of information which may damage the corporation's business or property interests. In many cases, action of the entire Board of Directors is required to authorize certain conduct which affects the rights of the corporation, and no Director can compromise these interests for individual ends, no matter whether the Director believes that his or her actions are in good faith.

Members of the Board of Directors are entitled to rely on the reports of committees of the Board, as well as information received from officers of the corporation, agents and advisors (including legal counsel and accounting professionals). In the case of reliance on officers or employees of the corporation, the Director must believe that the individual is reliable and competent in the matters presented. Advice from experts may be relied upon provided that the Director believes that the subject matter of the report or opinion is within the person's professional or expert competence. Finally, a Director may rely on a report from a committee on which the Director does not serve, so long as (1) the report is within the designated authority of the committee, (2) the Director believes that the committee merits the Director's confidence, and (3) the Director acts in good faith, including making reasonable inquiry of the committee where appropriate, and without any knowledge which would cause reliance to be unwarranted. As noted above, a Director must evaluate any report or other material on which the Director seeks to rely based on specialized relevant knowledge the Director may possess.

Duty of Loyalty. The duty of loyalty generally has three aspects, (1) protection of the corporation's interests in its business, properties, assets, employees and legal rights, (2) avoidance of conflicts of interest or self-dealing on the part of Directors and (3) serving the interests of the corporation and not the interests of any other person or group, including a constituency of the corporation which caused the Director to be selected.

In discharging the duty of loyalty, the Director must observe those policies which are established by the Board of Directors or the officers which are intended to protect the legitimate interests of the corporation. For example, policies concerning confidentiality of corporate information and employee relations must be strictly observed, even if a Director may personally disagree with the policy, since violations of these policies may cause damage to the corporation and subject all Directors to liability. The Board of Directors should, from time to time, develop and reevaluate such policies, in concert with management of the corporation, to maintain policies which are relevant to the corporation's business and activities and consistent with changes in law or business practices generally.

ICANN has developed a detailed policy on conflicts of interest, which is included in these materials and is binding on each Director. This policy, which is consistent with the legal requirements binding on the corporation, is intended to ensure that any decision on a corporate transaction which may involve the business or financial interests of a Director is made free of any taint from conflicts of interest. In summary, the policy requires that such decisions be assigned to a special committee of the Board of Directors. The interested Director is precluded from participation in the decision. The committee is required to consider whether the transaction is in the best interests of the corporation and whether the corporation has alternatives to the proposed transaction which do not involve the same issues. This is an area in which the Attorney General has a high level of interest and is granted specific authority to investigate and remedy corporate misdeeds. A related responsibility of Directors is to bring potential opportunities to further the business or activities of the corporation to the Board of Directors or officers for consideration prior to pursuing these opportunities for his or her own personal business interests.

Finally, each Director must place the collective best interests of the corporation and its constituencies (including the public) ahead of other personal interests of the Director. Aside from the circumstances described above concerning transactions in which the Director has a financial interests, this obligation extends to the manner in which the Director conducts himself or herself in the affairs of the corporation and voting on important decisions. The proper function of the Board of Directors depends upon the development of consensus from Directors with differing experiences, perspectives and opinions. In turn this requires that each Director exercise good faith in advancing the corporate interests as determined by the majority from time to time and the public interests imposed on the corporation by the law.

Duty of Prudent Investment. As a general matter, the Directors of a nonprofit corporation are required, in the management of the corporation's investment, to avoid speculation and to comply with any applicable standards in its articles, bylaws or the terms of any gift or grant of funds to the corporation. Avoidance of speculation requires that the board of Directors give primary consideration to the probable income and probable safety of the corporation's capital, with regard for the permanent disposition of the funds. The board shall consider both the long term and short term expenditure needs for its mission and the appropriateness of higher risk investment as part of an overall strategy for its capital. Compliance with the standard of conduct of the Directors will be measured on the basis of investment strategy rather than any individual investment selected by the Board of Directors or its advisors. The Board of Directors has authority to delegate investment responsibility to a committee and to contract with investment advisors, banks, trust companies and similar institutions for management and investment of its funds.

In the case of donated funds for which a gift instrument specifies a particular investment or strategy, as well as in a circumstance in which the gift is in the form of an investment assets rather than cash, the Directors are considered to have discharged their duty of prudent investment by conforming their investment decisions to the terms of the gift or grant, including holding the investment asset. It is permissible for the board to seek authority from a donor for changes in the investment strategy applicable to a gift or seek release from investment terms in a gift, if the Board of Directors determines such a course of action to be appropriate. In circumstances where it is not possible to obtain a release from the donor, due to death or incapacity, the corporation may seek a court order to that effect.

Private Inurement and Private Benefit Transactions. The assets of a corporation such as ICANN are subject to a "charitable trust," under federal and state law, and are considered to be held for the benefit of the public. It is therefore the duty of the Directors to ensure that ICANN's activities are primarily in furtherance of its charitable mission and to avoid transactions which may create an undue benefit for corporate insiders (private inurement) or private parties who enter into contractual or other relationships with the corporation (private benefit). The consequences of failure to abide by these duties include possible revocation of ICANN's tax exempt status and personal liability of officers and Directors who approve a transaction which violates the law.

At the core of private inurement and private benefit issues are concerns about (a) whether the corporation receives fair market value consideration for its goods or services and (b) pays fair consideration for purchased goods or services. It is important, therefore that the officers and Directors of the corporation are mindful of fair market value considerations in any transaction of consequence, particularly if any member of the board or management might incidentally benefit from the deal. For example, a transaction in which a Director earns a brokerage fee or commission from a party contracting with the corporation raises a question of private inurement if the Director was aware of the business opportunity due to his role on the board of Directors.

In 1996, the Internal Revenue Service was given authority to impose so-called "intermediate sanctions" on tax exempt corporations, in addition to the power of revocation of their status. These intermediate sanctions consist of taxes and penalties which can be imposed on a third party who contracts with the corporation and the management of the nonprofit corporation in the case of a transaction which the Service concludes conferred an "excess benefit" on a "disqualified person." Armed with this authority, the Internal Revenue Service has become increasingly aggressive in auditing tax exempt organizations and assessing taxes and penalties, which in some cases can be 200% of the amounts which the Service has determined to have been devoted to private benefit.

In many cases, the consideration of transactions under the conflict of interest policy will necessarily force the Board of Directors to address private inurement/private benefit problems. However, in dealings with third parties which are not otherwise affiliated with ICANN, the Directors must be conscious of issues such as market value and other key terms (e.g., contractual term of obligations, ability of the corporation to terminate agreements or renegotiate payment obligations) and obtain advice where appropriate to support a corporate decision. The Internal Revenue Service has promulgated proposed regulations which afford a tax exempt corporation a rebuttable presumption of reasonableness as to the terms of a transaction on three conditions: (a) the transaction is approved by a disinterested governing body (the entire Board or a Committee not including any interested persons), (b) the governing body shall obtain and rely upon data

(including advice from an independent consultant or advisor) to support its conclusion that the terms of the transaction are fair and reasonable, and (c) the governing body must adequately document the basis for its conclusions concurrently with the approval of the transaction.

Conclusion. This memorandum is intended for your reference as a brief orientation into your duties as a Director of ICANN. It is not, nor should it be regarded as definitive advice on any particular issue which may arise in the future. In those circumstances, the Board of Directors should be guided by its counsel and outside advisors in reaching its decisions, consistent with the obligations outlined in these materials.

KARL AUERBACH
Member, Board of Directors
Internet Corporation for Assigned Names And Numbers
(ICANN)

December 3, 2000

Michael M. Roberts
Corporation for Assigned Names and Numbers (ICANN)
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292
USA

Dear Michael:

In the performance of my role as a Director, I am interested in better understanding the financial aspects of ICANN's operation. As such I will be making various requests for information.

I will endeavor to do this with minimal impact on ICANN's staff. There will, of course, be some, hopefully small, work involved. Please do feel free to make suggestions if you see a way to get me the same information with less effort.

I would like to obtain copies of the following items:

1. ICANN's general ledger from November 1998 through the present (or as close to present as is reasonably feasible.) If possible, I'd prefer to get it in two distinct forms:
 - a. An electronic capture of a general ledger report (i.e. something like an Adobe Acrobat capture of a general ledger report.)
 - b. Some format that can be loaded into Microsoft Excel.

I'd like to get these reasonably soon – Hopefully before Christmas. However, I recognize that this is holiday season and there are probably various end-of-year chores that ought to take priority.

I'd like to arrange so that in the future I can get a copy of the general ledger report as it is generated every month.

Thinking of the holidays – Let me take this opportunity to wish everyone down in Marina del Rey the best of wishes for the holidays.

Thank you, Sincerely,

Karl Auerbach
Member, Board of Directors
ICANN

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Date: Sat, 3 Mar 2001 16:03:13 -0800 (PST)
From: Karl Auerbach <karl@cavebear.com>
To: <icann-board@icann.org>, Mike Roberts <roberts@icann.org>
Subject: Re: [icann-board] December 31 Financial Statements

> The text below appears in the footnotes to the statements. As a
> result of discussions with our auditors, our accountants, and the
> Audit Committee in November, the ICANN finance staff is providing
> limited banking services to the Names Council...

Banking services?

ICANN is not a bank. Period.

Given that the neither the DNSO nor the Names Council have a distinct legal existence apart from ICANN, and that we board members are ultimately responsible for the proper use of the DNSO-tagged funds and payment of the DNSO's debts, I do find this method of accounting to be, at best, unusual.

Since the DNSO has no distinct legal existence, the DNSO's assets are ICANN's assets, the DNSO's obligations are ICANN's obligations, the DNSO's expenditures are ICANN's expenditures, any liabilities the DNSO incurs are ICANN's liabilities, and the DNSO's records are ICANN's records.

The DNSO is an integral part of ICANN and it is appropriate for the board to see the DNSO's finances clearly stated as part of ICANN's overall financial report.

If ICANN has made representations that amount to promises that we are acting as a "bank" or have some trustee relationship, it is quite appropriate for the board to know all the details of these obligations.

I, for one, would like to see the detailed statements of account for all financial matters related to the DNSO. Consider this a request for that material.

Is there anyone who has authority to disburse any DNSO-related funds who is not an ICANN corporate officer?

Is there any person who has authority to enter into obligations on behalf of the DNSO who is not an ICANN corporate officer?

--karl--

Subject: [icann-board] Re: December 31 Financial Statements
Date: Sun, 4 Mar 2001 19:32:27 -0800
From: Mike Roberts <roberts@icann.org>
To: icann-board@icann.org

Karl -

Whatever your motives for your recent barrage of e-mails angrily lambasting the manner in which the DNSO finances are handled, they cast considerable doubt on your willingness to work cooperatively with the rest of the Board (including its committees) to promote sound management of ICANN and on your intentions to abide by the obligations you incurred to the corporation when you became a Director.

For the record, at no time have I ever told you that you could not have access to the records of the corporation. I said to you that if you felt this was necessary, I would discuss the matter with General Counsel, with the Chair of the Board, and with the Chair of the Audit Committee, with the intention to establish a written procedure for the finance staff to follow, which hasn't been necessary in the past because the other Directors have felt that their responsibilities on financial matters were fulfilled by the work of the Audit Committee and the external auditors.

I did this shortly after the November Board meeting at which you took office and during which you mentioned your desire for access to financial records to me. I was advised by Vint, following his conversation with Linda, that he would have further conversation with you about the need for such access. I have had no further contact with this issue until the last day or so. In my message earlier today, I indicated to you that if you wish to resume this effort, you should contact Louis, who will seek guidance from the Chair of the Audit Committee, which has oversight of the financial records of the corporation, and you will be advised of the manner in which you may gain access to the records you wish to review.

Further for the record, the funds you are talking about are funds that were raised by the Names Council through calls to the constituencies to make contributions to fund the DNSO's own activities. Those funds were in fact contributed by the constituencies and their members with the understanding that decisions about spending them (for a secretariat, for meeting rooms, for paying for webcasting DNSO functions, and for other DNSO programs) would be made by the Names Council. This is completely in line with the Board's preference, stated at the public meeting in Cairo and otherwise, that the Supporting Organizations should take responsibility for raising funds and paying for their own activities. Based on consultations with the Board's Audit Committee, as well as our outside accountants and the independent auditors, we are giving a modest level of administrative support to the DNSO by placing funds contributed

for the DNSO's activities into a separate bank account and making payments from that account when we are authorized to do so by the Names Council. Although of course only authorized signatories on the accounts disburse funds (see the relevant Board check-signing resolutions), we do so when authorized by the Names Council. These funds are restricted from general ICANN use by the terms under which they have been given and ICANN and its officers are obliged to follow the restrictions that have attached to these funds. Your notion that the Board can step in and claim these funds as its own would not only be a serious breach of the contributors' trust, but would deprive the DNSO of the funds that it has raised with such difficulty, hobbling its ability to act as a consensus development body.

Further for the record, your statement with regard to "spinning off" the DNSO is completely irrelevant to this discussion, since as you state, there is no separate entity created by the provisions of Article VI of the Bylaws. However, the members of the Names Council are entitled to form any organizational entity, incorporated or not, that they believe is needed to support the work of the DNSO. It happens, as a matter of historical accident, that the Address Council and the Protocol Council are populated by existing organizations that have volunteered to provide administrative and financial support to the work of the Councils. Having participated in the DNSO WG Review process, you are fully aware that many in the DNSO believe that its work would benefit from having a permanent secretariat that would function in a parallel fashion to the other Councils' support organizations. Whether any of the three SO Councils receives support from a third party entity, existing or to be devised, is immaterial to the functions which the Councils themselves perform under Article VI of the Bylaws.

In my email to you yesterday, I indicated that ICANN management was performing limited banking services for the DNSO pending a decision on a permanent solution to the secretariat issue which has been under discussion for over a year. If you wish to be constructive, rather than destructive, in this matter, your energies could be usefully employed in helping the DNSO chart its future and determine its financial requirements so that the current trust account arrangement can be put to rest.

- Mike

At 14:28 -0800 3/4/01, Karl Auerbach wrote:

> > as I understand this (and it was set up before I became a
> > director, I think), DNSO raised some funds and needed to
>> place them in an account. ICANN was asked to hold these
>> funds. If it is an ICANN account, I assume ICANN would act
>> on requests from DNSO to disburse any such funds. I also
>> assume that records are being kept of any disbursements
>> or receipts.

>
>What you describe may be true. But that doesn't matter.

>
>The funds are not "the funds of the DNSO" - remember the DNSO has no
>distinct legal existance, they are part of ICANN. So those funds are
>actually "the funds of ICANN". Perhaps they might be earmarked for a
>particular use - in which case I wonder about the obligations that are
>attached to that earmarking.

>
>There is an active effort now underway to spin the assets of the DNSO off
>to a separate corporation. I want to know what those assets are, what
>ancillary obligations may be tied to them, etc.

>
>And since those funds are indeed ICANN's funds, perhaps earmarked funds
>but nevertheless still ICANN's funds for which we Directors are
>responsible, it is a very proper question to know what non-ICANN officers
>have authority over those funds.

>
>As for the question of whether I have the right to see the books of
>account of the corporation - I do. It is one of the most fundamental
>rights of a director. And as a Director I have a duty to make my own
>independent inquiries into the operation of the corporation.

>
>I asked for the general ledger - the chart of accounts, the current
>account balances, and the journal of transactions - three months ago.
>I've been very reasonably and patiently waiting for someone to spend a few
>minutes, and it is just a few minutes, to make a few mouse clicks on the
>accounting software and generate these very standard reports.

>
>But given yesterday's knee-jerk reaction to my inquiry, my patience became
>exhausted by the recognition that unless I respond to this management
>sandbagging with an undeniable demand, that I will never get the
>information that I feel that I must examine.

>
>

--karl--

ICANN Audit Committee

Minutes of Meeting of August 21, 2001

The Audit Committee met by teleconference on August 21, 2001, convening at 1515. Committee members participating were Chairman Phil Davidson and Frank Fitzsimmons. Staff members attending were Stuart Lynn, Louis Touton, and Diane Schroeder. Absent was Jun Murai.

The meeting opened with an update on the audit for fiscal year 2000-2001 by Diane Schroeder.

The Committee discussed whether to ask the auditors to review any specific items during the course of the audit. The auditors will address the handling of DNSO funds by ICANN in a footnote. Presenting these funds as ICANN funds may complicate the desire of the Board to leave the setting of expenditures and contributions for the DNSO to the Names Council.

The staff will provide the Audit Committee with an update on reserving for debt and write offs at the Montevideo meeting.

Louis Touton presented the Inspection Code of Practices to the Committee. The Committee requested changes to reflect that these are procedures rather than practices and to clarify that these procedures did not diminish a Director's rights to inspect as reflected in California law and under the bylaws. The Audit Committee discussed the procedures, which the President will use to handle the requests for access to records and any appeals of restrictions made by Board Members. The Audit Committee believes the President should follow these procedures and is willing to shoulder the burden of the appeals. The Audit Committee accepted and endorsed the document as revised. The revision will be distributed to the Committee in the next several days for their review. Stuart will distribute the document to all directors emphasizing that we want to be solicitous of Directors' ability to do their jobs by inspecting documents on premises and to do it in an orderly fashion.

The revised Administrative Procedures for Reimbursement of Expenses was approved by the Executive Committee on Aug 16 2001 and will be distributed to the Board by the Secretary.

An update on the renewal of ICANN's professional liability insurance policy and the Directors' and Officers' Liability Policy was given by Diane Schroeder and Louis Touton.

The meeting was adjourned at 1615.

Subject: Re: [icann-board] Directors' Access to Corporate Records

Date: Mon, 03 Sep 2001 15:04:03 -0700

From: Louis Touton <touton@icann.org>

To: icann-board@icann.org

Karl,

Thanks for your note. I believe that the procedures provide a good framework to provide all concerned a clear understanding of the requirements of any inspection. While it appears there may be disagreements along the way, it is good to have a process with civility for resolving them.

Best regards,

Louis Touton

----- Original Message -----

Subject: Re: [icann-board] Directors' Access to Corporate Records

Date: Mon, 3 Sep 2001 14:17:17 -0700 (PDT)

From: Karl Auerbach <karl@cavebear.com>

Reply-To: Karl Auerbach <karl@cavebear.com>

To: Louis Touton <touton@icann.org>

CC: <icann-board@icann.org>

On Mon, 3 Sep 2001, Louis Touton wrote:

> After reviewing the applicable legal principles, in my opinion both
> California law and Section 21 of ICANN's bylaws permit (in fact,
> encourage) establishment of clear, reasonable procedures regarding
> access and use of items to be inspected.

I personally am very happy that there are now clearly specified procedures. And as I sit here looking at the letter in which I requested to inspect the General ledger, I see that my original request - a request made nearly ten months ago - was quite in conformance with the new procedure.

However, that procedure can only go so far as to specify the "when" and "how" of inspection. The procedure may not constrain the "what" - the procedure may not place any materials off limits.

For example, in my intended inspection of the general ledger, I expect to see every item - including payroll items - without exception.

And it is my present intention to send an agent, as I am entitled to do, to obtain the copies - copies that I am clearly entitled to make - of these materials. The behaviour of that agent and his/her obligation to confidentiality is, of course, my responsibility.

That some of this, perhaps even all of this, is confidential is understood by me. In fact I embrace the thought that there is a clear statement of what such concerns may be so that mistakes may be avoided.

However, the burden of such limitations is upon my shoulders already - as it is with each Director individually - without any agreement that a Director must sign as a pre-condition of access.

I personally find the concept of an agreement to be something that is dangerous - From the Director's point of view it muddies the obligations by creating a duplicate, and perhaps dissonant, definition of what actions are permissible and thus creates a question as to which obligation is controlling. And from the corporation's point of view such an agreement could be construed as a waiver should the Director find a way within the scope of the agreement but that otherwise violates the Director's obligations.

I'd like to add that I do find it somewhat troubling to know that these provisions are being levied on directors yet at the same time we do not have in place a handbook of employee obligations.

I, personally, am far more concerned that our employees have clear and enforceable rules governing their behavior rather than for rules for directors that are at best duplicative of the obligations that Directors are already obliged to follow.

--karl--

DRAFT

Audit Committee Meeting

Nov. 15, 2001

Attendees: Phil Davidson, Diane Schroeder, Stuart Lynn, Jun Murai (who joined late) and Louis Touton (who joined late)

The Audit Committee started at 7:05 am.

Diane Schroeder gave an update on recent banking issues and also on the search for new insurance.

A draft of the audit for FY2000-01 was distributed to the Committee. The Committee questioned whether it could be indicated in a footnote that the amount remaining of the application fees received for the new TLDs would be used for ongoing work not done by FY2000-01. The Committee agreed to give Frank Fitzsmmons, who was not in attendance, 5 days to review the draft and submit any comments. Stuart Lynn said he would update the Board in his report as to why the audit is late. The Committee discussed when there would be an opportunity for the Board to have a presentation from the auditors and agreed that a telephone presentation would be set up after the final audit was received.

Stuart Lynn referred Karl Auerbach's request for inspection of the corporation records and the lack of agreement on the arrangements for access or use to the Committee for consideration. The Committee considered the arrangements requested by the CEO in his letter of 5 October 2001 to provide reasonable safeguards for the confidentiality of ICANN information. The Committee requested the CEO to ensure that these restrictions were made generally applicable to all Directors seeking similar access to the Corporation's records.

The Chair of the Audit Committee stated that he had urged Director Auerbach to reconsider his refusal to accept the arrangements in the letter dated 5 Oct6 2001 to sign and return the letter so that he might proceed with the inspection of the records he had requested.

The meeting adjourned at 7:50 am.

>>Date: Wed, 05 Dec 2001 18:25:53 -0500
>>From: "Paul Levy" <PLEVY@citizen.org>
>>To: <dave@farber.net>

>>
>>entirely fair. I must say, if Auerbach is insisting he has the
>>right to go public with private corporate information, and that is
>>the only obstacle, he has nothing so far as I can see. An entity
>>has the right to decide about the privacy of its information. On
>>the other hand, if there were other restrictions, his best bet
>>would be to call their bluff, agree not to disclose TO THE PUBLIC
>>(as opposed to other board members) without their consent, subject
>>of course to his right to go to court over a particular piece of
>>info, and then see if they still deny him access.

>>
>>Paul Alan Levy
>>Public Citizen Litigation Group
>>1600 - 20th Street, N.W.
>>Washington, D.C. 20009
>>(202) 588-1000
>><http://www.citizen.org/litigation/litigation.html>

>
>



INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS

January 31, 2001

Mr. Phil Davidson
British Telecom
TW79/RSBLG4, Adastral Park
Martlesham Heath
Suffolk,
IP5 7RE

Re: Request for Inspection of Records

Dear Phil:

In response to your request to inspect various books and records of Internet Corporation for Assigned Names and Numbers ("ICANN"), this letter is to advise you as to the time and place at which the records will be available for inspection and the arrangements and conditions for your access to the materials. As you know, the procedures that I follow for handling such requests are detailed in the Procedures Concerning Director Inspection of Records and Properties, which were prepared in consultation with, and endorsed by, the Audit Committee of the ICANN Board.

1. The materials will be made available for your inspection at the ICANN offices in Marina del Rey. We can make the materials available between 8:30 a.m. and 5:00 p.m. on January 31, 2002, which you have indicated is a convenient date for you.

2. Much of the material you have requested to review contains non-public and confidential information. In making this information available for inspection, ICANN in no way intends to diminish its confidentiality. As you know, all Directors of ICANN owe a duty of loyalty to ICANN to respect and to strictly maintain this confidentiality. (If during the inspection you have questions regarding the extent of confidentiality of any item disclosed to you, you should direct the questions in writing to me and maintain the utmost confidentiality until receiving a response from me relaxing the confidentiality.) By signing at the bottom of this letter, you acknowledge your duties as Director to preserve confidentiality.

3. Because the inspection is being conducted to assist you with your personal role as a Director of ICANN, you must be present at the inspection. You may be accompanied at such inspection by your counsel or other advisor, provided that you must furnish me, in advance the name of any such person and an explanation of how the presence of counsel or advisor contributes to the discharge of your duties as a Director in assisting in the inspection process. (In this regard, the counsel or advisor must not have any interest in conflict with ICANN or otherwise be so situated that disclosure to her or him of confidential information in the inspection would likely

576 Admiralty Way, Suite 330

Marina del Rey, CA 90293-6601

(310) 823-9358

(310) 823-8649 FAX

icann@icann.org

lead to harm to ICANN's interests.) Any individual who accompanies you must agree in writing to reasonable limitations on access to the materials produced as well as such confidentiality restrictions as may be determined appropriate by the General Counsel.

4. I will be pleased to ensure that you will be given access to paper copies of the general ledger reports of ICANN, from the date of its organization through the fiscal quarter ending December 31, 2001, including chart of accounts, transaction journal and account balances. (This will include any supplemental materials showing funds or financial obligations held by ICANN and pertaining to subsidiary ICANN groups.) As is the case of much of the material you seek to inspect and as noted above, these materials are confidential, and their release or disclosure to anyone other than an officer or Director of ICANN has not been approved by the Board of Directors of ICANN. Provision of these materials in the electronic formats you have requested has been determined to be inconsistent with the preservation of confidentiality of this material, due to the risk of inadvertent dissemination or alteration of the data.

5. You will also be given access to copies of ICANN's employee policies and general forms used in documenting employment relationships at ICANN.

6. You will also be given access to copies of those materials in ICANN's files concerning the engagement of legal counsel, conflict notices and waiver requests, and invoices for services. Please note that, as in the case of the other materials you seek to inspect, these items are confidential and may also contain information as to which ICANN holds a privilege. Again, all ICANN Directors are duty bound to preserve this confidentiality and privilege.

7. Finally, you will be given access to a list of international trips taken by ICANN officers, other than myself, related to ICANN's business (but not including those associated with the regular public meetings), for the period January 1 through September 30, 2001.

8. In accordance with paragraph 5 of the Procedures, I advise you that the only limitations on your access to the materials your have requested are those set forth in this letter. However, to the extent that you require copies of any of the foregoing materials which you intend to retain for purposes of your duties as a Director of ICANN, you should request those copies at the conclusion of the inspection. Your request for copies will be given prompt consideration by me with the advice of the General Counsel of ICANN – acting in consultation with the Board's Audit Committee – as to whether any request you have made implicates confidentiality or privilege concerns which require limitations on the provision of such copies. No request from any counsel or advisor who may accompany you will be considered.

Mr. Phil David.
January 31, 2002
Page 3

9. In accordance with paragraph 5 of the Procedures, I request that you countersign the enclosed copy of this letter, acknowledging the foregoing terms. If you decline to do so, it would be inconsistent with the Procedures endorsed by the Board's Audit Committee to make these materials available for inspection by Directors.

10. If you feel any of the above is unreasonable, I encourage you to refer the matter to the Audit Committee of the Board as contemplated in paragraph 6 of the Procedures.

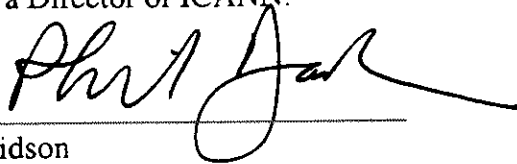
We look forward to accommodating your requests as provided for in the foregoing to assist you in carrying out your duties as a Director of ICANN.

Sincerely,

A handwritten signature in black ink that reads "M. Stuart Lynn" followed by a large, stylized flourish that extends to the right.

M. Stuart Lynn
President

I hereby acknowledge the above terms of the inspection of records, in furtherance of my duties as a Director of ICANN.

A handwritten signature in black ink that reads "Phil Davidson" with a long, sweeping flourish extending to the right.

Phil Davidson

Cc: Vint Cerf, Chairman of the ICANN Board of Directors
ICANN Board of Directors Audit Committee

Declan McCullagh's Politech

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New: [Politech dinner](#) in San Francisco on Tuesday, April 16!

ICANN has voted to eliminate public elections --Karl Auerbach

-
- *Date:* Thu, 14 Mar 2002 14:00:50 -0500
 - *To:* politech@politechbot.com
 - *Subject:* FC: ICANN has voted to eliminate public elections --Karl Auerbach
 - *From:* Declan McCullagh <declan@well.com>
 - *Cc:* karl@cavebear.com

The folks at icannwatch have written a far more accurate summary of what actually happened in Ghana than the confusing, incomprehensible press release (<http://www.politechbot.com/p-03264.html>) would have you believe.

<http://www.icannwatch.org/article.php?sid=607&mode=thread&order=0>
>The Board thus rejected the key recommendation of its blue-ribbon At
>Large Study Committee. It indicated that while it "appreciated" the
>committee's work, the committee's minimalist call for a limited,
>scaled-back version of elections was still, well, unacceptable.

This is important stuff, folks. Karl sent us the following too.

-Declan

Date: Thu, 14 Mar 2002 09:18:06 -0800 (PST)
From: Karl Auerbach <karl@CaveBear.com>

What kind of NewSpeak Orwellian world was the attached written in?

This morning ICANN killed the concept of public participation in ICANN and established in its stead a paternalistic oligarchy. The Internet will now be run by a body that adheres to principles that otherwise died with the era of Queen Victoria and King Leopold.

My board seat, and those of the other four elected board members will simply vaporize this fall, with no replacements, no elections ... no nothing. ICANN will be reduced a body run by those who have today proclaimed themselves to be our self-designated "betters", who know better than we do what is best for you and me.

The Board's action eliminates the at-large, it does not establish it. The faux at-large that the board resolution calls for are nothing but external clubs that have no role in ICANN and play no role in the choosing of the Board of Directors or play any role in the development of Internet policy. The use of the name "at-large" is purely a fig leaf to cover a policy that is naked of even the slightest hint of democracy.

For the ICANN's At-Large Study Committee (ALSC) to say that the evisceration of their work amounts to an endorsement of their work is truly an exercise in advanced self deception.

--karl--

> ----- Forwarded Message
 > From: Esther Dyson <edyson@edventure.com>
 >
 > hard-fought.... FYI from Esther
 >
 >
 > >ÓGO FORTH AND MULTIPLY!^Ó
 > >
 > >ICANN BOARD APPROVES INDIVIDUAL INTERNET USER PARTICIPATION, CALLS FOR
 > >ORGANIZATION OF AT-LARGE MEMEBERSHIP
 > >
 > >March 14, Accra, Ghana -- The Internet Corporation for Assigned Names and
 > >Numbers (ICANN) Board of Directors approved a resolution during its
 > >meeting today that called for the creation of an At-Large mechanism for
 > >Ómeaningful, informed participation by Internet users,^Ó as recommended by
 > >the At-Large Study Committee (ALSC). Taking a critical step towards
 > >structuring participation and representation of individuals from
 > >throughout the diverse global Internet user communities ("At-Large
 > >constituency") within ICANN, the Board called upon the ICANN community to
 > >create an At-Large membership based on Óbottom-up, self-organized, local
 > >Internet community^Ó groups.
 > >
 > >"The ALSC is pleased the Board committed to a strong role for individual
 > >Internet users in ICANN and acknowledged the merits of our report," said
 > >Carl Bildt, ALSC Chair. "We worked to find a solution that ensures
 > >Internet users have a sustained role in the technical coordination of the
 > >Internet, and are gratified the Board has now recognized the Internet
 > >community^Ós bottom-up organizing activities.^Ó
 > >
 > >In the resolution, the Board stated that it Ówishes to move forward with
 > >energy and enthusiasm to build a meaningful structure for informed
 > >participation by the full range of Internet users, and seeks avenues to
 > >achieve these objectives that are bottom-up, self-organized, and
 > >self-sustaining.^Ó
 > >
 > >ICANN is in the process of considering wholesale restructuring, and the
 > >resolution instructs the Board Committee on Restructuring to ensure that
 > >their ongoing efforts at crafting a blueprint for ICANN reform include
 > >Óworkable mechanisms and procedures that enable meaningful opportunities

> >for participation by the full range of Internet users, and an
> >appropriate role for those interests in ICANN's coordinating and
> >management structures.

> >
> >In its annual meeting in November, 2001, the Board formally accepted the
> >ALSC's final report as a basis for discussion and received in Accra the
> >Committee's Implementation Report, which provided details on the
> >processes needed to implement the ALSC's final report. The final report
> >proposes a regionally based global framework for all interested
> >individuals' structured participation in ICANN, focuses At-Large
> >membership (an electorate) on an identifiable and vested community,
> >provides a reasonable, initial mechanism for registration and
> >self-funding, and grants At-Large members a proportionate responsibility
> >for selecting ICANN's Board. While the Board, today, made clear that
> >there would be no direct elections to fill At-Large Board seats at this
> >time, it left open the possibility of future At-Large elections.

> >
> >"We are still moving forward from where we were, although we have not yet
> >reached our goal of regularly elected At-Large directors," said Esther
> >Dyson, an ALSC member and former chairman of ICANN. "Now the At-Large
> >Membership has the challenge and responsibility of meeting the Board's
> >call for informed, active participation which we hope will lead to
> >issue-oriented, transparent elections."

> >
> >The ALSC's reports are available on the Internet (at www.atlargestudy.org)
> >and the Board's resolution is available at www.icann.org.

> >
> >ABOUT THE ALSC
> >The ALSC is an independent Committee created by ICANN earlier this year to
> >provide recommendations to ICANN's Board on how to structure the diverse
> >global Internet community's participation within ICANN. The ALSC is
> >conducting an aggressive outreach, discussion, research, and
> >consensus-building campaign that will culminate with the submission of a
> >final report to the Board in November. In addition to Carl Bildt, the ALSC
> >includes Charles Costello, Pierre Dandjinou, Esther Dyson, Olivier Iteanu,
> >Ching-Yi Liu, Thomas Niles, Oscar Robles, and Pindar Wong. Biographies of
> >these individuals, and information on the ALSC, can be found at
> >www.atlargestudy.org.

> >
> >ABOUT ICANN
> >ICANN is a technical coordination body for the Internet. Created in
> >October 1998 by a broad coalition of the Internet's business, technical,
> >academic, and user communities, ICANN is assuming responsibility for a set
> >of technical functions previously performed under U.S. government contract
> >by IANA and other groups. Specifically, ICANN coordinates the assignment
> >of identifiers that must be globally unique for the Internet to function:
> >Internet domain names, IP address numbers, and protocol parameter and port
> >numbers. In addition, ICANN coordinates the stable operation of the
> >Internet's root server system. As a non-profit, private-sector
> >corporation, ICANN is dedicated to preserving the operational stability of
> >the Internet; to promoting competition; to achieving broad representation
> >of global Internet communities; and to developing policy through
> >private-sector, bottom-up, consensus-based means. ICANN welcomes the
> >participation of any interested Internet user, business, or organization.

> >
> >CONTACT
> >Denise Michel
> >+1 310 823 9358
> >dmichel@atlargestudy.org

Date: Thu, 14 Mar 2002 17:35:20 +0100
From: Thomas Roessler <roessler@does-not-exist.org>
To: declan@well.com

Unofficial minutes taken by Alexander Svensson during the ICANN Board Meeting in Accra are available at
<<http://does-not-exist.org/icann-log.html#resolutions>>.

(He sent his minutes to an IRC channel in real time, which was then logged to that web site.)

--
Thomas Roessler <roessler@does-not-exist.org>

POLITECH -- Declan McCullagh's politics and technology mailing list
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Tilting at ICANN

Karl Auerbach, elected to the Internet domain-name authority with a mandate from the people, explains why he is suing his own organization.

By Damien Cave



March 19, 2002 | Karl Auerbach begin his tenure at ICANN, the Internet Corporation for Assigned Names and Numbers, with a mild sense of optimism. By the time he joined the board of directors in November 2000, the nonprofit -- the controlling authority over the allocation and administration of Internet domain names -- had already earned a reputation for ineptitude and closed-door policies that favor corporate interests. But as one of five board members (out of 19) elected at large by the general public, Auerbach intended to guide ICANN

toward reform.

Auerbach's hopes have not been realized. In February, ICANN CEO and president M. Stuart Lynn proposed a massive overhaul of the organization -- a shift of power away from public input toward national governments. At a meeting in Accra, Ghana, last week, ICANN agreed to go along, suspending at-large elections until further notice.

Auerbach -- a founder of several software companies who also spent time protesting the Vietnam War -- isn't ready to fold his tent yet, however. On Monday, he sued the organization he represents. He filed charges in California Superior Court against ICANN for withholding financial information in violation of a state law that gives directors "the absolute right at any reasonable time to inspect and copy all books, records and documents of every kind."

ICANN officials couldn't be reached for comment.

Salon chatted with Auerbach about the case and other ICANN-related matters.

You've been trying to see ICANN's financial records for a while. What led you to file a lawsuit?

I made my first request to see the financials within five minutes of my election to the board. ... I submitted written requests. They went off and hemmed and hawed and said they'd have to write procedures and send it to such-and-such committees. ICANN has a committee structure that makes the U.S. government look simple.

But nothing happened and I wrote more letters. Then, eventually, finally, around September, I get, out of the blue, this set of procedures, which Stuart Lynn simply declared by fiat to be applicable to all directors.

What were the procedures and why didn't you comply?

No. 1, they were unlawful in that they put conditions on me, which impaired my ability to make independent judgments. I essentially have to ask the approval of management to see certain documents. They go cogitate and then tell me whether I can see them. And they place conditions on my use of that material. They call it a nondisclosure, but it really amounts to conditional use.

So there are two parts to this: First, I'd have to sign the general agreement; then there would be additional conditions when I showed up at the door. To do this would be to abrogate my duties as a director. It would be contrary to my duty as a director to sign the agreement.

And what's really interesting is that through all of this process -- with Stuart piling more and more procedures on me -- he responded, out of the blue, to one of my requests. It was a request for fairly innocuous information -- I wanted the logs of international travel of all officers and executives for all international travel not pertaining to a board meeting -- but nevertheless he felt free to dispense with all of these procedures [and give me the logs] with just the wave of his hand. So he's playing fast and loose with these procedures.

What are you hoping to achieve with the suit?

I want to look at the records because I want to make better decisions. Part of Stuart's reorganization plan is inspired by the fact that ICANN is running out of money and needs cash. So I want to know where the cash is going. All I've seen are broad public statements and, to my eyeballs, they're very deficient. And I want to understand the conflicts of interest. I've seen signs that there are conflicts of interest at Jones, Day [the Washington law firm retained by ICANN] and elsewhere and I want to know the details.

What's going on is that we have the classical tension between managers and directors. This has been going on at corporations ever since they've existed. But at ICANN we have a passive board and an activist management who seem to want to be building an empire.

Some folks just don't get the notion that directors are there to oversee the corporation. ICANN's management seems to consider the board as a kind of rubber stamp to be used to approve management's fait accomplis.

I guess that some folks just haven't learned from Enron. My own sense is that this lack of director responsibility is mirroring the crisis in corporate accounting as shown by Andersen in the Enron situation.

In corporations, especially nonprofits and tax-exempts like ICANN, the public interest is often protected only through the vehicle of active, inquiring directors. As directors become lax and lazy, or in ICANN's case, as corporate management imposes unlawful limitations on directors that the directors accept, then the corporation becomes unaccountable and the public loses.

Look at Lynn's reform plan. His response to ICANN not having enough money is to build an ICANN that has 10 times the budget.

But Lynn is arguing that he's trying to streamline the organization and make it more effective -- goals that you share.

Yes, but his budget went up tenfold. It went from a couple million to \$23 million. And it's virtually all staff people. So

even if you give \$250,000 per person per year, we're talking about 100 people. It's already too large with 20 people. I mean, what are they doing? ICANN's job is supposed to be narrow and technical. And here it is, 20 people? What in the world are they doing? It's inconceivable.

That's why I want to look at the records, to find out where the money goes. Why does it take \$2.4 million (47 applicants paid \$50,000 each) to evaluate seven top-level domains?

What do you make of ICANN's decision to suspend at-large elections -- the format that put you on the board?

I'm just appalled at the at-large study committee, which came back and said, "Oh, well, this is an improvement for the at-large community because they can organize." Well, we've always had the ability to organize so-called garden clubs of comment. It's the lack of the vote that matters. This is something that ICANN has promised Congress, promised the public, ever since its inception. Now, it's gone back on its promise.

But there were serious problems with the last election. Countries like China, for example, pounded the servers in what appears to have been an attempt to stuff the ballot box.

There were large problems with the U.S. election, but we didn't tear down the U.S. and rewrite the Constitution, did we?

What kinds of alternatives are you offering? How do you think some of the problems, particularly with fraud, should be fixed?

First, get rid of management. Here are people whose primary belief is that elections will never work, therefore they don't try. There's a lack of will here. Also, we don't have to have electronic elections. We can have good old paper elections, the kind that work for all kinds of nonprofits all over the world. You send people an envelope, they fill out the paper and send it back.

Is that so hard? Is that so extensive?

Why do you think these kinds of things aren't being considered?

Because it gets in their way of building an empire. A lot of people really get excited by having a huge organization chart with them at the top, and with lots of money to spend. And that's what ICANN is turning into -- bureaucracy upon bureaucracy.

Do you think the removal of at-large elections is the biggest flaw with Lynn's proposal? What other problems do you have with the plan?

The repudiation of public participation is the most egregious part. The imposition of the nominating committees [under Lynn's plan, five members of ICANN's board would be chosen by the organization's internal committees] is just awful because it creates a self-perpetuating organization in which the insiders determine who will be let in. It's very much like the College of Cardinals in Rome, who are not going to let a Protestant become pope.

As far as finances go, the thing is just naive. Here he is asking governments to pay. Who in the U.S. has been the most vociferous opponent to ICANN at the federal level? Congress. If anybody at ICANN would bother to read something simple, like the U.S. Constitution, they'd recognize that funds have to be approved by Congress; the executive branch doesn't print money and spend it. If someone's going to pay ICANN, it's going to have to be passed by Congress. And that certainly gives Congress a much stronger level to exert control.

And how are you going to get governments to agree? Governments are required, under the Lynn plan, to gather into clubs

and select someone. But now, according to a recent clarification, they have to select from a list prepared by this council -- and then pay for the privilege.

From a financial point of view, it's very naive. And it's also naive from a legal point of view.

Is there anything in the plan that's useful?

I think it would make great kindling for a fire. There's nothing in it that's useful.

About the writer

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