

2002

Form and Substance in Cyberspace

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Recommended Citation

A. Michael Froomkin, *Form and Substance in Cyberspace*, 6 *J. Small & Emerging Bus. L.* 93 (2002).

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FORM AND SUBSTANCE IN CYBERSPACE

by
A. Michael Froomkin*

In this Response to the preceding article by Joe Sims and Cynthia Bauerly, A. Michael Froomkin defends his earlier critique of ICANN. This Response first summarizes the arguments in Wrong Turn In Cyberspace, which explained why ICANN lacks procedural and substantive legitimacy. This Response focuses on how the U.S. government continues to assert control over the domain name system, and how this control violates the APA, the nondelegation doctrine as articulated by the Supreme Court in Carter Coal, and public policy. Professor Froomkin then proposes that ICANN's role be more narrowly focused away from policy making towards true standard-making and technical coordination.

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Unless otherwise noted, this article aims to reflect legal and technical developments as of Feb. 1, 2002.

"[E]ach of ICANN's accomplishments to date have all depended, in one way or another, on government support, particularly from the United States."¹

I. OVERVIEW OF WRONG TURN IN CYBERSPACE

In *Wrong Turn In Cyberspace*² I had two basic goals, one descriptive, the other analytical and persuasive. The first goal was to describe how the Department of Commerce (DOC) employed a legal sleight-of-hand to achieve certain outcomes regarding the management of the Domain Name System (DNS), a key Internet resource. Thus, in *Wrong Turn* I carefully explained—and with the encouragement of the Duke Law Journal staff perhaps over-footnoted—the story of how the United States came to find itself controlling the root of the DNS, relied on by the overwhelming majority of Internet users. The Clinton administration, and particularly an inter-agency group headed by Senior Presidential Advisor Ira Magaziner, soon found itself faced with conflicting and irreconcilable demands. Internet people, such as Jon Postel, wanted to create a large number of new top level domains (TLDs). Assertive trademark and intellectual property interests—to whom the Administration was heavily beholden—strongly opposed this.

In its effort to escape this seeming impasse, Magaziner and the DOC achieved the paradoxical feat of keeping ultimate control over the DNS while maximizing the government's deniability and distance from the way in which the DNS was managed. In so doing, the DOC created a scheme in which it and its agent can make de facto rules that apply to all the United States (and most foreign³) participants in the DNS, despite the absence of statutory authority from Congress. The result was an institution, the Internet Corporation for Assigned Names and Numbers (ICANN), that is increasingly able to impose its will on—that is, to *regulate*—domain name registrars, registries, and registrants, in ways that frequently benefit the trademark lobby and ICANN insiders.⁴

ICANN is, in form, a private non-profit California corporation and a U.S. government contractor. But the form of the U.S. government's relationship with ICANN is unusual, and the substance unique. The facts set out in *Wrong Turn* demonstrate that the U.S. government is the "but-for" cause of ICANN's existence, of ICANN's "recognition" by other relevant

¹ M. STUART LYNN, PRESIDENT'S REPORT: ICANN—THE CASE FOR REFORM, Feb. 24, 2002, at <http://www.icann.org/general/lynn-reform-proposal-24feb02.htm>.

² A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17 (2000) [hereinafter Froomkin, *Wrong Turn*].

³ As noted below, the political, albeit not the technical, position of the country code Top Level Domain ("ccTLD") registries differs slightly from that of other participants in the system.

⁴ The same result might have emerged from a traditional regulatory process, but the people making those decisions would be accountable to the political process, and the right of aggrieved parties to seek judicial review would be well-defined.

actors, of ICANN's ability to exact revenues from registrars and registries, and indeed of ICANN's continuing existence and relevance. In *Wrong Turn* I related each of these elements in perhaps tedious detail, including how ICANN and the U.S. government have entered into three different contracts. In these agreements the U.S. government lends ICANN power over the DNS, and ICANN provides what amounts to regulatory services for the government. *Wrong Turn* argued that these facts had, or should have, legal effect. Even though the form of ICANN's relationship with the United States was carefully crafted to disguise the fact, substantively, the DOC relies on ICANN to regulate those areas that the government fears or is unable to tread.

I also argued that, at least from a parochial, U.S.-centric, administrative law point of view, ICANN is a terrible precedent because it undermines the accountability we expect to accompany the use of public power. By vesting de facto regulatory power in a private body, the DOC insulates decisions about the DNS from the obligations (e.g., transparency and due process) and constraints (e.g., conflicts of interest, judicial review for procedural regularity, and reasonableness) that commonly apply to exercises of public power.⁵ Now that, thanks in large part to the energetic intervention of the U.S. government, ICANN has secured for itself a regular and contractually guaranteed income stream from the entities it regulates, it faces few external constraints on its behavior. Although firms that lobby ICANN as if it were a government body may face anti-trust liability,⁶ and ICANN theoretically might be seen as their co-conspirator, to date the chief source of external discipline on ICANN has been the looming possibility of U.S. government oversight combined with the background threat of the U.S. government exercising its right to take back all the powers and functions it previously bestowed on ICANN.⁷

My second goal in *Wrong Turn* was to explore the legal theories that could—and, I argued, should—be used to right this departure from administrative regularity. The key conceptual move was to focus the legal

⁵ It's certainly no secret that I became concerned about this question because, despite having originally been a tepid ICANN supporter, I came to believe that ICANN was making bad choices and, most importantly, acting without regard for even minimal procedural regularity. I use these examples to illustrate my arguments, although they are only a fraction of the problems discussed, in a more journalistic fashion, on the ICANNWatch web site of which I am an editor. See ICANNWATCH, at <http://www.icannwatch.org> (last visited Jan. 31, 2002).

⁶ See A. MICHAEL FROMKIN & MARK A. LEMLEY, ICANN AND ANTITRUST (forthcoming 2002) (copy on file with the Journal of Small and Emerging Business Law) (draft manuscript available at <http://personal.law.miami.edu/~froomkin/articles/icann-antitrust.pdf>).

⁷ "If DOC withdraws its recognition of ICANN or any successor entity by terminating this Agreement, ICANN agrees that it will assign to DOC any rights that ICANN has in all existing contracts with registries and registrars." ICANN, AMENDMENT 1 TO ICANN/DOC MEMORANDUM OF UNDERSTANDING (Nov. 4, 1999), at <http://www.icann.org/nsi/amend1-jpamou-04nov99.htm> [hereinafter MOU AMENDMENT 1].

argument on the government's role in DNS policy rather than on ICANN's actions.

In *Wrong Turn* I began by arguing that so long as the DOC continues to control the root, the law—cognizant of the substance of the relationship rather than focusing on form only—requires the DOC to regulate the participants in the DNS via traditional APA processes rather than through contracts and winks. We know at least part of the story about the DOC's role in ICANN's formation because it is public. We know that at one point the DOC estimated that monitoring and assisting ICANN would require the half-time dedication of four or five full-time employees.⁸ Further, the DOC testified to Congress that ICANN "consults" with the DOC before its major decisions,⁹ and that in at least one case the DOC amended an ICANN decision.¹⁰ On the *realpolitik* side, ICANN very much wants to have full control of the root, and the U.S. government, after initially signaling that it would transfer full control to ICANN, increasingly waffled as to when if ever it would relinquish control.¹¹ We also know that, while the government maintained this powerful club over ICANN's head, ICANN had in fact done pretty much what the U.S. government had said (in a formally non-binding statement of policy) that ICANN should do.¹²

These, and many other facts related in *Wrong Turn*, indicated that, despite a veneer of arms-length contracting, the DOC was either the instigator of, or the conduit for, ICANN's regulatory decisions, and as a result ICANN's actions should be fairly chargeable to the DOC. Thus, in *Wrong Turn* I concluded that the DOC's approval and acquiescence to ICANN's actions pursuant to the DOC's at least tacit instructions constitute regulatory actions that must conform with the APA. *Wrong Turn* also argued in a logically independent strand of the article that these same facts provided the foundation for a strong, but not unassailable, case that ICANN is a state actor, in which case at least some of its activities would be subject to the strictures of the due process clause.

On the other hand, the party line from both ICANN and, at times, the U.S. government was that ICANN was independent in substance as well as form. Because all the facts were not public, I could not conclusively disprove this assertion. It seemed important, however, to consider the legal consequences of this claim, whatever its factual merits. While a

⁸ See Froomkin, *Wrong Turn*, *supra* note 2, at 109.

⁹ *Id.*

¹⁰ See U.S. DEP'T OF COMMERCE, COMMERCE ENSURES COMPETITIVENESS AND STABILITY ARE PROTECTED IN NEW ICANN-VERISIGN AGREEMENT, PRIVATIZATION OF DOMAIN NAME SYSTEM ADVANCES (May 18, 2001), <http://www2.osec.doc.gov/public.nsf/docs/icann-verisign-0518> (announcing the result of the DOC's review of and revision to the agreement negotiated between ICANN and VeriSign); see also *infra* note 48 (discussing the DOC's direct assertion of its authority over the .us ccTLD).

¹¹ See Froomkin, *Wrong Turn*, *supra* note 2, at 31.

¹² Management of Internet Names and Addresses, 63 Fed. Reg. 31,741 (June 10, 1998).

private body could manage the DNS if the system were entirely private,¹³ from an administrative law perspective there seemed to be something very fishy about having the government retain the commanding heights of the DNS—control over the contents of the root—and contract out the policy management of that resource on a series of short-term agreements,¹⁴ while publicly washing its hands of (most of) the matter. It became increasingly clear that ICANN's deliberative procedures left almost everything to be desired, and that the policy outputs of those procedures were mistaken at best, self-interested at worst. Yet, on this version of the facts, neither private nor public law seemed to offer a remedy to parties aggrieved by ICANN's actions. If ICANN really were as independent as it claimed, it could not be a federal actor, and therefore there would be no public law remedies to be had against it.

On the private law front, ICANN carefully insulated itself from challenge by, for example, amending its bylaws to state that "members" who "joined" ICANN were not in fact members under California non-profit law,¹⁵ thus ensuring they could not bring even a meritorious derivative action.

Again, the key move in *Wrong Turn* was to focus on the DOC's role rather than ICANN's. I was struck by the similarities between the DOC's asserted relationship with ICANN and that of the Department of the Interior and the local coal boards in *Carter Coal*.¹⁶ It seemed that if the nondelegation-to-private-parties doctrine of *Carter Coal* (as distinct from the public nondelegation doctrine of *Schechter Poultry*)¹⁷ had any continuing validity, then this was the case for which we have been holding that dormant, but never quite discarded, doctrine in reserve. It goes without saying that anyone arguing for a revival of something calling itself a nondelegation doctrine is arguing uphill, even if the best understanding of that doctrine is more rooted in due process than in strict separation of powers.¹⁸

If the nondelegation aspects of *Carter Coal* are still good law, then I think the DOC's relations with ICANN are that very rare case to which the doctrine applies. But, just as the nondelegation doctrine's history is bound up in the struggle over the New Deal, so today it is likely that any

¹³ Private management is subject to anti-trust constraints. See Froomkin & Lemley, *supra* note 6, at 2. Whether DOC has the authority to release its hold on the DNS is disputed. See Froomkin, *Wrong Turn*, *supra* note 2, at 32.

¹⁴ See Froomkin, *Wrong Turn*, *supra* note 2, at 34.

¹⁵ See A. MICHAEL FROOMKIN, COMMENTS ON PROPOSED CHANGES TO ICANN BYLAWS (Oct. 22, 1999), at <http://www.law.miami.edu/~amf/bylaw-amend-comment.htm>; A. MICHAEL FROOMKIN, ICANN AND INDIVIDUALS (Oct. 25, 1999), at <http://www.law.miami.edu/~amf/individuals.htm>; A. Michael Froomkin, *Does ICANN Have Members?*, ICANNWATCH, Feb. 20, 2001, at <http://www.icannwatch.org/article.php?sid=3>.

¹⁶ *Carter v. Carter Coal*, 298 U.S. 238, 280 (1936).

¹⁷ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935).

¹⁸ See Froomkin, *Wrong Turn*, *supra* note 2, at 146–53.

nondelegation argument is going to carry substantial political or constitutional-structural baggage. Thus, in *Wrong Turn* I made both legal and policy arguments.

First, I suggested that, despite its seeming desuetude, the *Carter Coal* nondelegation doctrine had never been formally repudiated, and I cited modern state court decisions relying on it.¹⁹ Having established that the doctrine at least remains available, I then argued that ICANN's corporatist structure, its inbuilt self-dealing by design, and the regulatory nature of the services ICANN provides for the DOC, all combine to make it that rare and special case to which the *Carter Coal* nondelegation doctrine ought to apply. Given ICANN's recent behavior, that policy argument seems, if anything, stronger today,²⁰ while the doctrinal picture remains unchanged.²¹

II. FLAWS IN SIMS & BAUERLY'S CRITIQUE OF *WRONG TURN*

Although *Wrong Turn* focused on the legality of the DOC's actions rather than ICANN's,²² Joe Sims and Cynthia L. Bauerly (S&B) seem to

¹⁹ *Id.* at 155–59.

²⁰ See ICANNWATCH, *supra* note 5. There has, however, been one very important recent development, which might make much of this debate moot. On February 24, 2002, ICANN President Stuart Lynn issued a "Roadmap for Reform" of ICANN. The document combined stinging self-criticism with a plan for a radical restructuring of ICANN. In addition to eliminating popularly elected directors, the plan proposed inviting governments to name a third of a reconstituted (and re-titled) Board. The "Roadmap" also proposed increasing ICANN's budget and coercive powers, including a direct take over of all thirteen of the DNS root servers. It justified all this as necessary to sever ICANN's links with the U.S. government. See Lynn, *supra* note 1.

²¹ Although the Supreme Court refused to uphold the D.C. Circuit's revival of the *Schechter Poultry* nondelegation doctrine in *Whitman v. American Trucking Ass'n, Inc.*, it overturned the Court of Appeal's reliance on *Schechter* nondelegation in terms that did not affect the *Carter Coal* branch of the doctrine. *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457 (2001).

²² Thus, I wrote:

[A] few words about what [*Wrong Turn*] is *not* about may also be in order. Opinions differ—radically—as to the wisdom of ICANN's early decisions, decisions with important worldwide consequences. Opinions also differ as the adequacy of ICANN's decisionmaking procedures. And many legitimate questions have been raised about ICANN's ability or willingness to follow its own rules. Whether ICANN is good or bad for the Internet and whether the U.S. government should have such a potentially dominant role over a critical Internet resource are also important questions. This Article is not, however, primarily concerned with any of these questions. Nor is it an analysis of the legality of actions taken by ICANN's officers, directors, or employees. . . . Despite their importance, all of these issues will appear only tangentially insofar as they are relevant to the central, if perhaps parochial, question: whether a U.S. administrative agency is, or should be, allowed to call into being a private corporation and then lend it sufficient control over a government resource so that the corporation can use that control effectively to make policy decisions that the agency cannot—or dares not—make itself. Although focused on DOC's actions, this Article has implications for ICANN. If the government's actions in

take the critique very personally.²³ This is perhaps understandable as, more than anyone else, Joe Sims is responsible for the ICANN we have today. He launched ICANN even after his client, Jon Postel, tragically died, and through his advice and actions established its substance and style. He and his subordinates wrote ICANN's charter and by-laws, and then frequently revised the latter. He has presided at a number of ICANN meetings, and remains by some accounts its *éminence gris*.²⁴ Furthermore, since ICANN's inception on September 30, 1998, ICANN appears to have paid Joe Sims's law firm a total of at least \$2,171,283.88 in legal fees.²⁵ If one assumes an average fee of \$300 per hour,²⁶ that sum would work out to more than 7,200 lawyer hours, or well over three full-time lawyer-years; in fact, the number is likely to be substantially smaller because that figure

relation to ICANN are illegal or unconstitutional, then several—but perhaps not all—of ICANN's policy decisions are either void or voidable, and DOC might reasonably be enjoined from further collaboration with ICANN in other than carefully delineated areas.

Froomkin, *Wrong Turn*, *supra* note 2, at 36–37.

²³ See Joe Sims & Cynthia Bauerly, *A Response to Professor Froomkin: Why ICANN Does not Violate the APA or the Constitution*, 6 J. SMALL & EMERGING BUS. L. 65 (2002) [hereinafter S&B].

²⁴ See, e.g., KARL AUERBACH, AT-LARGE CANDIDATE FOR THE ICANN BOARD, PLATFORM: REFORM OF ICANN—JONES-DAY MUST GO, at <http://www.cavebear.com/ialc/platform.htm>.

²⁵ For the fiscal year ending June 30, 1999, ICANN's legal expenses totaled \$687,163. ICANN, INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS FINANCIAL STATEMENTS (Sept. 21, 1999), at <http://www.icann.org/financials/financial-report-fye-30jun99.htm> [hereinafter ICANN JUNE 1999 FINANCIAL STATEMENTS].

During the fiscal year ending June 30, 2000, ICANN paid a total of \$635,323.97 in legal fees. This sum was computed using amounts stated in the minutes of ICANN executive board meetings. ICANN, MEETING OF THE ICANN BOARD IN CAIRO (Mar. 10, 2000), at <http://www.icann.org/minutes/prelim-report-10mar00.htm> [hereinafter CAIRO MEETING] (\$553,535.13); ICANN, SPECIAL MEETING OF THE BOARD (Apr. 6 2000), at <http://www.icann.org/minutes/minutes-06apr00.htm> [hereinafter APR. 2000 MEETING] (\$81,788.84).

During the fiscal year ending June 30, 2001, ICANN's legal fees to Jones Day totaled \$576,224.63. This sum was computed using amounts stated in the minutes of ICANN executive board meetings. ICANN, SPECIAL MEETING OF THE BOARD (Aug. 30, 2000), at <http://www.icann.org/minutes/minutes-30aug00.htm> [hereinafter AUG. 2000 MEETING] (\$110,670.96); ICANN, MEETING OF THE EXECUTIVE COMMITTEE (Jan. 6, 2001), at <http://www.icann.org/minutes/prelim-report-06jan01> [hereinafter JAN. 2001 MEETING] (\$465,553.67).

During the current fiscal year, ICANN has paid a total of \$272,572.28 in legal expenses. This sum was computed using amounts stated in the minutes of ICANN executive board meetings. ICANN, MEETING OF THE EXECUTIVE COMMITTEE (Aug. 16, 2001), at <http://www.icann.org/minutes/prelim-report-16aug01> [hereinafter AUG. 2001 MEETING] (\$183,860.60); ICANN, MEETING OF THE EXECUTIVE COMMITTEE (Oct. 16, 2001), at <http://www.icann.org/minutes/prelim-report-16oct01> [hereinafter OCT. 2001 MEETING] (\$88,711.68).

²⁶ The \$300 per hour figure is merely an example. I do not know what the lawyers representing ICANN bill per hour, nor who has worked how many hours, as ICANN does not report this information publicly.

must include recovery of hotels, international airfares, meals, and other expenses. But whatever the actual number of hours billed and hourly rates, ICANN now amounts to a substantial, valuable, and recession-proof client.²⁷ In addition to casting doubt on the wisdom of the course pursued to date, were the DOC forced to rely less on ICANN it likely would reduce ICANN's importance, and its need for expensive legal advice.²⁸

S&B's chief rhetorical tactics are obfuscation and confusion. For example, S&B called my omission of most of the history of the Internet "misleading."²⁹ *Wrong Turn* did not discuss the large majority of the history of the Internet because the history of the Internet at large is not terribly relevant to the issue of the DOC's legal obligations regarding its management of the DNS, just as the article left out the history of computation, of capitalism, and of the United States, all of which are also parts of the background. Yes, much of the Internet—the devices using TCP/IP and the programs running on those devices—was at all relevant times private. Yes, the World Wide Web was created and open sourced by Tim Berners-Lee. So? Many Internet services, the Web among them, are layers above the DNS. That has nothing to do with ICANN because ICANN does not (yet) have any functions relating to the World Wide Web. ICANN's jurisdiction thus far has been limited to the DNS and to IP numbering. Those functions, especially the regulatory functions, were—for many years prior to ICANN—performed by the U.S. government or by its contractors, primarily Jon Postel and his associates.

A related rhetorical device frequently used by S&B is the attack on the straw man. The problem begins in their subtitle, which takes aim at a

²⁷ If Jones Day is organized like many major U.S. law firms, the billing partner earns a disproportionate share of these fees, either directly or indirectly, when it influences the computation of his annual partnership share. Even if this is not how it works at Jones Day, the ability to attract or, in this case, create and retain clients is prized.

²⁸ Because legal expenses have consumed a substantial fraction of ICANN's total revenue to date, that might not be so bad:

Year	Budget	Legal	Legal as % of total
FY 1999	\$1,466,637	\$687,163.00	46.85%
FY 2000	\$2,851,909	\$635,323.97	22.28%
FY 2001	\$5,899,470	\$576,224.63	09.77%
FY 2002	\$4,530,000*	\$272,572.28**	06.02%**

*projected **to date

ICANN JUNE 1999 FINANCIAL STATEMENTS, *supra* note 25; CAIRO MEETING, *supra* note 25; APR. 2000 MEETING, *supra* note 25; AUG. 2000 MEETING, *supra* note 25; JAN. 2001 MEETING, *supra* note 25; AUG. 2001 MEETING, *supra* note 25; OCT. 2001 MEETING, *supra* note 25.

Karl Auerbach's successful campaign for the North American Board seat focused on ICANN's relationship with the Jones Day law firm and raised questions of conflict of interest. See, e.g., Auerbach, *supra* note 24.

²⁹ S&B, *supra* note 23, at 70.

contention (“ICANN . . . Violate[s] the APA”) not found in *Wrong Turn*.³⁰ I ask the reader to look in S&B for citations to *Wrong Turn* indicating where I supposedly said the things S&B put in my mouth. You will not find many of them, often because they do not exist.³¹ That is a serious failure in an academic article (especially one that claims to be a response to something), a literary form where pounding the table is considered a poor substitute for pounding facts and law.

I would stop here, were it not for the fear that someone, perhaps put off by the length of *Wrong Turn*, might read S&B alone and decide that the absence of a more detailed rebuttal was in some way to acquiesce to it. The following sections thus respond to some of the fundamental errors in S&B’s response to *Wrong Turn*. S&B argue that ICANN’s power is either low, or not derivative from the U.S. government. This claim fails to recognize the source and scope of ICANN’s power—the U.S. government’s recognition of ICANN plus the government’s functional control over the authoritative root, a power based in part on the U.S. government’s ability to veto any move by the root server operators. S&B’s state actor argument is also flawed. ICANN, unlike an ordinary government contractor, performs regulatory functions for the DOC. The main issue is not, as S&B would have it, whether the APA applies directly to ICANN (it doesn’t), but rather what constraints the APA and the Constitution put on the DOC’s use of ICANN when ICANN performs public functions directly or advises the DOC on what actions to take. Finally, I touch on the nondelegation argument advanced in *Wrong Turn*. Even though S&B concede that ICANN makes policy decisions relating to the DNS, they concentrate on the *Schechter Poultry* branch of the nondelegation doctrine and thus fail to grapple with the doctrine’s due-process strand, as articulated in *Carter Coal*. This doctrine imposes a fundamental structural constraint on the entire government’s power to delegate public functions, like the power to regulate, to unsupervised private groups.

A. *Foundation of ICANN and Factual Basis of Its Authority*

S&B’s account of ICANN’s formation and operation glosses over crucial details relating to the source of ICANN’s coercive powers. ICANN has enormous power over registrars and registries for two reasons: (1) the U.S. government’s support; and, (2) the root server operators’ desire to avoid “splitting” the root for fear of technical chaos—a desire that means all root server operators feel a strong pressure to act in conformity with the U.S. government, which controls a substantial minority of the root servers itself.

³⁰ As explained below, I do not claim that ICANN violates the APA. Rather I claim the U.S. government violates the APA by relying on ICANN. This is not a trivial difference; it is essential.

³¹ I note examples of this several places below, notably in Part II.D.

Without question, the idea of an ICANN-like body had important supporters when it was formed, and it has a somewhat different, but not inconsiderable, set of supporters today. Intellectual property interests and some important foreign, and especially European, governments concerned about U.S. dominance of the root belong to both groups. But important dissenters existed at all times.³² Even the DOC itself forced ICANN to amend its by-laws to provide for greater end-user influence (although ICANN has to date managed to put off implementation of this commitment in any meaningful way).³³ In this light, it is particularly ironic to hear S&B suggesting that ICANN's powers are merely the product of some consensus, when in fact ICANN's powers have been controversial from the day its secretly-constituted, unelected initial Board was first revealed to the public.³⁴ ICANN did not spring from the waves like Venus, nor like Athena from the brow of Zeus. It came perilously close to

³² Somehow, in ICANN-speak, ICANN's actions always have consensus. Those who disagree with ICANN "have failed to achieve consensus support." The burden is never on ICANN to prove consensus, and it rarely bothers to explain how it discerned such consensus. Unlike S&B, I have never claimed, and don't believe for a second, that everyone agrees with me. Any rational observer would have to agree that no consensus exists regarding many, most, maybe almost all, DNS matters. Because ICANN and its frequently paid, or financially interested, apologists wish to wrap themselves in the extra-legal fig leaf of "international consensus" they are reduced to making fairly silly claims. See David Post et al., *Elusive Consensus*, ICANNWATCH, July 21, 1999, at http://www.icannwatch.org/archive/elusive_consensus.htm; David Post, *ICANN and the Consensus of the Internet Community*, ICANNWATCH, Aug. 20, 1999, at http://www.icannwatch.org/archive/icann_and_the_consensus_of_the_community.htm; David R. Johnson & Susan P. Crawford, *Why Consensus Matters: The Theory Underlying ICANN's Mandate to Set Policy Standards for the Domain Name System*, ICANNWATCH, Aug. 23, 2000, at http://www.icannwatch.org/archive/why_consensus_matters.htm; David R. Johnson & Susan P. Crawford, *What an ICANN Consensus Should Look Like*, ICANNWATCH, at http://www.icannwatch.org/archive/what_icann_consensus_should_look_like.htm (last visited Jan. 31, 2002). For an attack on the entire concept of reliance on consensus, see Cary Coglianese, *Is Consensus an Appropriate Basis for Regulatory Policy?*, SOCIAL SCIENCE RESEARCH NETWORK ELECTRONIC LIBRARY (May 25, 2001), at <http://papers.ssrn.com/sol3/DisplayAbstractSearch.cfm>.

S&B propose various entertaining fictions that follow in the general ICANN mold. These include the idea that ICANN (formed in secret without public input) is somehow an expression of the will of the Internet community, and that ICANN's actions have been dictated by Internet consensus. In fact, ICANN has yet to adopt a single consensus policy as it defines the term. The UDRP should have been a consensus policy, but by ICANN's own admission is not a consensus policy although ICANN demands it be treated as one. See, e.g. ICANN, ICANN BASELINE POLICIES (Aug. 25, 2001), at <http://www.icann.org/tds/agreements/sponsored/sponsorship-agmt-att22-25aug01.htm> ("the following shall be treated in the same manner and have the same effect as a 'Consensus Policy'").

³³ On ICANN's war against the concept of directly elected members of the Board, see Milton Mueller, *ICANN and Internet Governance: Sorting Through the Debris of 'Self-regulation'*, 1 INFO. 497, 508-09 (1999); Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187 (2000).

³⁴ Mueller, *supra* note 33, at 503-05.

being the product of a cabal, however well-intentioned. Had Jon Postel lived, the trust he had earned, and the idea that the organization existed primarily to provide him with political and legal cover, would have most likely carried the day. But it was not to be. Jon Postel's untimely death robbed ICANN of both guidance and its chief source of legitimacy before birth. As a result, ICANN's relevance, and probably its survival, depended critically on the support of the U.S. government.

S&B assert that "ICANN was created by the global Internet community. Its policies are those (and only those) that have generated consensus support from that community, and the DOC does not have, and certainly has not 'loan[ed] . . . control over the root' to ICANN."³⁵ They are so persuaded of the truth of these assertions that they suggest that anyone who disagrees is "literally making it up."³⁶ The willingness of ICANN partisans to make such breathtakingly false statements—no one could seriously believe, for example, that ICANN's decisions are backed by anything like consensus³⁷—suggests that all those footnotes in *Wrong Turn* might have been necessary after all.

B. Role of the U.S. Government

1. U.S. Control Over the Root

The question of the nature of the DOC's authority over the root is an interesting one, and S&B advance a novel theory of it in their article. Part of S&B's argument for why ICANN receives no delegated authority from the DOC is that the DOC has no authority over the DNS to delegate. Here is how they characterize the DOC's pre-ICANN role:

[The USG, pre-ICANN], depended on the voluntary cooperation of other governments and the DNS infrastructure operators for the effective implementation of any instructions it gave to NSI to make changes in the root zone file. Thus, the only practical "power" that the USG had available for transfer to ICANN was the administrative responsibility for determining global consensus. This responsibility is not governmental power.³⁸

S&B provide no support for this extraordinary suggestion that the DOC lacked the legal or practical authority to make changes in the root zone file without the approval of others. And it is not true, and flies directly in the face of the posture that the DOC has taken in all of its statements to Congress.³⁹ It is true that both before and after ICANN the U.S. government, perhaps wisely or perhaps because of its thrall to trade-

³⁵ S&B, *supra* note 23, at 69-70 n.15.

³⁶ *Id.* at 86.

³⁷ On the question of consensus, see, e.g., *supra* note 32. On the question of the DOC's authority, see *infra* Part II.B.

³⁸ S&B, *supra* note 23, at 75.

³⁹ It is also contrary to the view recently expressed by their client: In a report published after S&B completed their article, ICANN President M. Stuart Lynn prefaced his call for a radical reshaping of ICANN with a complaint that the United

mark interests, has decided that in most cases discretion was the better part of valor. Even so, in the .us re-delegation, carried out single-handedly by the United States without recourse to the ICANN process, we recently witnessed a clear reminder of the U.S. government's power.⁴⁰

Ignoring both the existence of other claimants for the role of the consensus-based organization at the time ICANN was formed,⁴¹ and the explicit terms of the contract ICANN signed with the DOC,⁴² S&B argue that,

[I]f, for whatever reason, the DOC chose to end its recognition of ICANN, it could not simply "choose another body" to replace ICANN, because ICANN was not chosen by the DOC—it was created by the Internet community and that act of creation was simply recognized and accepted by the DOC. The removal of DOC recognition of ICANN might or might not mean the end of ICANN, but it would not change the fact that the USG does not have the capacity to unilaterally determine how the DNS will be managed.⁴³

To see just how credible the S&B theory of zero (or limited) U.S. government power over the root is, one need only consider a few rhetorical questions. First, can it seriously be suggested that the White Paper was the *only* option legally open to the government? Do S&B really mean to suggest that if the U.S. government were to legislate about domain names or the DOC were to issue a legislative rule, these actions would violate national or international law or somehow exceed the U.S. governments "power"? Second, why is it that both ICANN and some foreign governments keep insisting that the U.S. government turn over the control it retains to ICANN if that control is in fact an empty set? Or, to be really blunt about it, does anyone think that if the U.S. government issues an instruction regarding the root zone file to VeriSign/NSI it would fail to implement it regardless of the presence or absence of dissenting views abroad? Or, if the U.S. government were to exercise its right to replace ICANN with some other entity,⁴⁴ would it be acting illegally?

Whatever the justice of the matter, which is debatable, the United States has the power to determine outcomes relating to the DNS.⁴⁵ At

States retained too much power, that "[t]he process of relocating functions from the US government to ICANN is stalled." See LYNN, *supra* note 1.

⁴⁰ See ICANN, ANNOUNCEMENT (Nov. 19, 2001), at <http://www.icann.org/announcements/announcement-19nov01.htm> (admitting that "re delegation occurred before the completion of the normal IANA requirements").

⁴¹ See Mueller, *supra* note 33.

⁴² See MOU AMENDMENT 1 *supra* note 7.

⁴³ S&B, *supra* note 23, at 74 n.29.

⁴⁴ See MOU AMENDMENT 1 *supra* note 7.

⁴⁵ According to a DOC spokesperson in 1999, "[t]he authoritative root is operated by NSI under the direction of the U.S. government." See Courtney Macavinta, *ICANN to Control Domain Name Server*, CNET NEWS.COM, June 30, 1999, at <http://news.com.com/2100-1023-227889.html>. Similarly, NSI's senior vice president Don Telage stated, "We will only follow express written direction from the

some very extreme point, were the United States to abuse that power, the users of the net would probably perceive this as intolerable damage and find a way to route around it. But the Internet's tolerance of the costs and damage imposed by ICANN demonstrate that it will act only on the most extreme provocation.⁴⁶

2. *U.S. Power Over ICANN*

The centrality of the U.S. government's support to ICANN is easily demonstrated. First, the U.S. government retains control over the content of the authoritative root zone file.⁴⁷ Thus, it remains the ultimate authority for anyone wishing to create a new TLD and for anyone wishing to update information pertaining to an existing TLD. The U.S. government's current policy is, in most cases,⁴⁸ to follow ICANN's recommendations regarding changes to the root zone file.⁴⁹ ICANN's power here is thus wholly derivative. Every fee that ICANN collects from registries or would-be registries is due to this delegation from the Department of Commerce. Were the U.S. government to take on this function directly, or choose to rely on a different third party to make the decisions as to what changes should be proposed for the root zone file, no one would have any interest in ICANN's views on the matter—nor would generic top level domain ("gTLD") registries pay ICANN a dime.⁵⁰

ICANN's U.S.-government-created power over gTLD registries in turn creates a power over registrars. Since gTLD registrars need access to ICANN-approved gTLD registries, and the ICANN registries have agreed to accept only registrations from ICANN-accredited registrars, the registrars who wish to sell domain names that work everywhere must sign agreements with ICANN. In these agreements, they agree to impose terms of service on their clients that include the Uniform Dispute Resolution Policy (UDRP).⁵¹ Before ICANN imposed this requirement, regis-

Department of Commerce, and if they were to tell me to take the [A-root server] and ship it to Moscow, then that's where it would go We will comply." *Id.*

⁴⁶ See *infra* text accompanying notes 65–73 (discussing root server operators' fear of "splitting the root").

⁴⁷ See *supra* note 45.

⁴⁸ The disposition of the .us ccTLD is a notable recent example of the United States using its power over the root directly. See *supra* text accompanying note 40.

⁴⁹ This is expressed in the MOU, the CRADA, and was recently reiterated in a denial of a petition for rulemaking signed by DOC Acting Assistant Secretary for Communications and Information John F. Sopko. See A. Michael Froomkin, *Commerce Dept.: We Don't Do TLDs*, ICANNWATCH, July 8, 2001, at <http://www.icannwatch.org/article.php?sid=237> (quoting letter denying petition for rulemaking).

⁵⁰ See MOU AMENDMENT 1 *supra* note 7 (citing the DOC's contracts with ICANN entitling the DOC to transfer obligations due to ICANN to a successor chosen by the DOC).

⁵¹ S&B's discussion of the UDRP contains an example of more general features of their article. In their attempt to marginalize me, they suggest (without a footnote) that I was the "lonely" dissenter on the WIPO Committee of Experts. S&B, *supra* note 23, at 78. The truth is that Laina Raveendran Greene, another Member of the WIPO

trars competed on basic service terms, including their solicitude for trademark interests; now they cannot.⁵²

While ICANN's delegated power from the DOC sufficed to induce, even coerce, payments from those interested in new gTLDs⁵³ and those interested in registering names in both old and new gTLDs, it did not suffice to motivate the level of payments ICANN sought from incumbent TLD registries. Both NSI/VeriSign (the .com, .net, and .org registry) and the country code Top Level Domain (ccTLD) registries understood that, for political, legal, and technical reasons, the U.S. government would not take them out of the root. Unlike would-be new entrants, therefore, their incentive to pay ICANN was limited. Some foreign ccTLD registries did make voluntary payments to ICANN because they wished it to succeed, seeing it as preferable to direct U.S. government control of the root. Neither they nor NSI/VeriSign, however, were willing to undertake contractual obligations to make regular payments, much less to give ICANN the power to determine the size of the levy.⁵⁴

As I explained in *Wrong Turn*, NSI was only persuaded to sign an agreement, requiring it to submit to ICANN's rulings and make payments to ICANN, by intense, direct, U.S. government pressure, backed by the threat that NSI's contract to run the lucrative registries was due to expire, after which the United States might hand the franchise to someone else.⁵⁵ As for the ccTLDs, despite first strong-arming, and now a combina-

Panel of Experts, authorized me to note her agreement with the substance of my dissent. See A. MICHAEL FROMKIN, A COMMENTARY ON WIPO'S THE MANAGEMENT OF INTERNET NAMES AND ADDRESSES: INTELLECTUAL PROPERTY ISSUES (May 19, 1999), at <http://personal.law.miami.edu/~amf/commentary.htm> [hereinafter FROMKIN, COMMENTARY ON WIPO] (copy on file with the Journal of Small & Emerging Business Law). Harald Tveit Alvestrand published his own pungent comments. See HARALD TVEIT ALVSTRAND, MY COMMENTS TO THE WIPO PROCESS AND ITS RESULT, at <http://www.alvestrand.no/ietf/wiponote.html> (last visited Feb. 4, 2002) (supporting the UDRP in principle but disagreeing with other parts of the WIPO report). In any case, it would not have been surprising if I had been the lone dissenter because I was a late addition to the panel—the sole “Public Interest Representative” added about a third of the way into the process in response to a barrage of criticism that WIPO had appointed a completely one-sided group. As it transpired, even the one-sided panel was too interventionist for WIPO; it tried to keep the drafts on which we were supposed to comment away from us. See FROMKIN, COMMENTARY ON WIPO, *supra*; A. Michael Froomkin, *Semi-Private International Rulemaking: Lessons Learned from the WIPO Domain Name Process*, in REGULATING THE GLOBAL INFORMATION SOCIETY 211 (Christopher Marsden ed. 2000), <http://www.law.miami.edu/~froomkin/articles/tprc99.pdf>.

⁵² See Froomkin & Lemley, *supra* note 6, at 3.

⁵³ A striking example is the \$50,000 non-refundable application fee ICANN demanded and received from would-be new gTLD registries.

⁵⁴ See, e.g., Letter from Sue Leader, Chair, ICANN Funding Working Group, to Mike Roberts, CEO, ICANN Inc. (Mar. 1, 2000) (regarding Asia Pacific Top Level Domains), <http://www.isocnz.org.nz/international/apltd000301letter-funding.html> (copy on file with the Journal of Small and Emerging Business Law).

⁵⁵ See Froomkin, *Wrong Turn*, *supra* note 2, at 89–93.

tion of soft soap⁵⁶ and hardball,⁵⁷ no ccTLD has signed ICANN's model ccTLD agreement except for the .au and .jp ccTLDs. Both are special cases. The signature of .au appears to be a *quid pro quo* for ICANN forcibly removing control of the .au ccTLD (in violation of the applicable Internet Standards⁵⁸) from the private operator to whom Jon Postel had delegated it, and giving it to an Australian government-sponsored ICANN-like body.⁵⁹ As for .jp, until the agreement with ICANN it had been controlled by Jun Murai, a member of the ICANN Board of Directors.⁶⁰ The only other ccTLD known to be planning to agree to ICANN's terms is .us, because its subservience to ICANN is required by the .us contract recently issued by the DOC.⁶¹

S&B point to this recalcitrance on the part of the ccTLD operators as evidence that ICANN could not possibly have the power over the root that I ascribe to it.⁶² In fact, the ccTLDs' recalcitrance is evidence of several other things, not least that only organizations with a government behind them can stand up to ICANN. First, it is evidence of a special kind of stalemate; because the ccTLDs are frequently connected to their governments, they understand that they are not directly threatened by ICANN because they know that the U.S. government would not remove them for the root in defiance of their local government's wishes under any but the most extreme circumstances. Not only is there no reason for the United States to do this and risk the diplomatic consequences, but a move that suggested the United States was flexing its power over the root in a way that so threatened the interests of other nations would be one of

⁵⁶ ICANN has increased staffing devoted to the care of ccTLDs. See, e.g., e-mail from Louis Touter to ICANN Names Council (Jan. 18, 2001), <http://www.dnso.org/clubpublic/council/Arc04/msg00699.html> (announcing appointment of Herbert Vitzthum to new post of ccTLD Liaison).

⁵⁷ ccTLD registries complain that ICANN has adopted a go-slow policy on entering updates to ccTLD technical information, saying that ccTLDs who do not sign contracts with ICANN cannot expect better service. See Press Release, CENTR, Press Release from 12th CENTR General Assembly in Luxembourg (Dec. 12, 2001), at <http://www.centri.org/news/20012111.htm> (on file with the Journal of Small and Emerging Business Law); Jon Weinberg, *ICANN and CENTR at Odds*, ICANNWATCH Jan. 7, 2002, at <http://www.icannwatch.org/article.php?sid=510>.

⁵⁸ See A. Michael Froomkin, *How ICANN Policy Is Made (II)*, ICANNWATCH, Sept. 5, 2000, at <http://www.icannwatch.org/essays/dotau.htm>.

⁵⁹ See *The Other Shoe Drops, II*, ICANNWATCH, Oct. 26, 2001, at <http://www.icannwatch.org/article.php?sid=428>; A. Michael Froomkin, *The Other Shoe Drops*, ICANNWATCH, July 17, 2001, at <http://www.icannwatch.org/article.php?sid=339>.

⁶⁰ See ICANN, AGREEMENT FOR .JP ccTLD COMPLETED (Feb. 28, 2002), at <http://www.icann.org/announcements/announcement-28feb02.htm>.

⁶¹ See BRIAN KAHIN, CTR. FOR INFO. POLICY, UNIV. OF MD., MAKING POLICY BY SOLICITATION: THE OUTSOURCING OF .US (July 16, 2001), at <http://cip.umd.edu>; see also *.US Goes to Neuster*, ICANNWATCH, Nov. 1, 2001, at <http://www.icannwatch.org/article.php?sid=438>; A. Michael Froomkin, *DoC Stakes Out Maximalist Position on .us*, ICANNWATCH, July 17, 2001, at <http://www.icannwatch.org/article.php?sid=254>.

⁶² S&B, *supra* note 23, at 72–73.

the few things that could create a near-consensus to migrate to a new root.

The recalcitrance of the ccTLDs is also evidence that any claim of near-unanimous or even consensus support for ICANN is wishful thinking (although I hasten to add that many ccTLDs do support the concept of an independent body much less activist than ICANN, and at least some clearly see ICANN as a lesser evil than the U.S. government). The ccTLD situation dovetails neatly with the account I summarized above and detailed in *Wrong Turn* about how ICANN needed to use strong-arm tactics, aided directly by the U.S. government, to reach agreements with the registries.⁶³ Registrars knuckled under much earlier than registries both because the registrars had little choice, and because they had more to gain; new TLDs mean new product to sell, and they were also anxious to see NSI/VeriSign's near-monopoly in the registrar market broken. Some registrars also wanted to break into the registry market, which also required new TLDs. ICANN seemed the only way to achieve those goals. Now, however, some are having second thoughts.⁶⁴

C. *Role of the Root Server Operators*

Complete with italics, S&B advance the contention that *Wrong Turn* ignores . . . the critical fact that any "control" over the DNS through the root file exists *only because of, and relies entirely on, the voluntary cooperation of the other root server operators*. The authority exercised by the DOC is thus not control, but rather stewardship made possible only by the consensus of the Internet community.⁶⁵

Indeed, their overall case for the legality of the DOC's relationship with ICANN rests heavily on this claim. First, they use it to suggest that the U.S. government cannot be accused of delegating control over the DNS because the DOC has, they say, no meaningful control in the first place.⁶⁶ Second, they argue, on the same principle, that ICANN itself has no meaningful control over the DNS, because, again, the real control rests offstage, in the hands of the root server operators, or the nebulous "Internet Community." It follows, if neither the DOC nor ICANN really controls anything of importance, they cannot really be regulating, and

⁶³ See Froomkin, *Wrong Turn*, *supra* note 2, 89–93.

⁶⁴ See, e.g., Gwendolyn Mariano, *European Net registrars boycott ICANN*, ZDNET UK News, Jan. 18, 2002, at <http://news.zdnet.co.uk/story/0,,t269-s2102780,00.html> (quoting Nominet Managing Director, William Black, who is also chairman of the general assembly for the Council of European National Top-Level Domain Registries (CENTR), an association of European registries as saying "We don't know what (ICANN) is there for."); Weinberg, *supra* note 57.

⁶⁵ S&B, *supra* note 23, at 71. For my discussion of this issue, see Froomkin, *Wrong Turn*, *supra* note 2, at 64–65.

⁶⁶ See S&B, *supra* note 23, at 74 n.29. In addition to simply being false, the plausibility of this claim was substantially undercut by ICANN President Stuart Lynn's recent complaint that ICANN has too little power over the root, and the U.S. has too much. See LYNN, *supra* note 1.

that there are no administrative law or constitutional issues of substance to discuss because the whole structure turns on independent voluntary acts of private root server operators.

It sounds great. Alas, only a very little of it is true. The true part is this: if the operators of the thirteen root servers were to get together and declare that henceforth they would collectively rely on a root zone file originating somewhere other than the file currently controlled by the DOC, then the DOC would indeed become irrelevant to the root. The continued reliance of the root server operators on the zone file controlled by the U.S. government is thus a but-for cause of the DOC's, and thus ICANN's, power over the DNS. True as this fact is, it is of almost no relevance to the legal issue of the U.S. government's power over the root because the U.S. government itself operates sufficient root servers to veto any change. That is in part why, as I explained in *Wrong Turn*, Jon Postel's failed attempt to take personal control of the root is an important moment in DNS history.⁶⁷ If there had been any lingering doubt remaining as to whether the U.S. government controlled the legacy root,⁶⁸ that moment dispelled it.

The same two structural features that killed Jon Postel's "experiment" in redirection of the root in January 1998 would doom any similar project that did not have the U.S. government's endorsement. The independent root server operators who do not work for governments are among the old guard of the Internet. They subscribe strongly to the view, enunciated by the Internet Architecture Board, that

To remain a global network, the Internet requires the existence of a globally unique public name space. The DNS name space is a hierarchical name space derived from a single, globally unique root. This is a technical constraint inherent in the design of the DNS. Therefore it is not technically feasible for there to be more than one root in the public DNS. That one root must be supported by a set of coordinated root servers administered by a unique naming authority.⁶⁹

Quite simply, the last thing in the world the root server operators are going to do is "split the root." Every member of the club has an effective

⁶⁷ Froomkin, *Wrong Turn*, *supra* note 2, at 45, 64–65.

⁶⁸ Personally, from a legal point of view, I think doubt was resolved earlier when Postel's IANA disclaimed the power to make changes in the root, and NSI therefore declared that the authority rested in the U.S. government directly. *See* Froomkin, *Wrong Turn*, *supra* note 2, at 62–65. But Postel's failed attempt certainly demonstrated the realities of the situation. *Id.* S&B argue that Postel's attempt to redirect the root demonstrated that the root server operators considered themselves independent from the U.S. government. S&B, *supra* note 23, at 75 n. 32. In fact, the attempt's failure proves the reverse, because the attempt collapsed as soon as U.S. government officials made it clear that they opposed the move.

⁶⁹ INTERNET ARCHITECTURE BOARD, IAB TECHNICAL COMMENT ON THE UNIQUE DNS ROOT (May 2000), RFC No. 2826, at <http://www.ietf.org/rfc> (on file with the Journal of Small and Emerging Business Law).

veto on any move, because anyone who fails to go along ensures that the attempted move would result in a split and therefore ensures that any other operators favoring the move in principle will forbear.

We come then to the critical fact mentioned in *Wrong Turn*,⁷⁰ but conveniently ignored by S&B in order to support their fairy-tale story of a toothless ICANN and an impotent DOC: Because the U.S. government controls a significant fraction of the root servers, the DOC has an effective veto on any attempt to switch to a new authoritative root file. The "E," "G," and "H" root servers are operated by U.S. government agencies and the "A," "B," and "L" root servers are operated by U.S. government contractors.⁷¹ Given the root server operators' reluctance to "split" the root, three out of thirteen is more than enough to serve as an effective veto; and six out of thirteen even more so. Thus, S&B's statement that "the USG has absolutely no ability to prevent the nongovernmental root servers (and especially the non-U.S. root servers) from pointing" to any root⁷² is artful, only partly accurate in the narrowest sense of "ability," and misses everything important and relevant about the relationship between ICANN and the root server operators as a whole.⁷³

S&B's argument regarding the root server operators is especially ironic because ICANN has been working assiduously for more than a year to take direct control of the root zone file (the file that has the data copied by the root servers everyone else depends on).⁷⁴ ICANN has also been

⁷⁰ See Froomkin, *Wrong Turn*, *supra* note 2, at 141.

⁷¹ ICANN itself operates the "L" root server, which can be demonstrated from a unix computer connected to the Internet by doing a traceroot of "l.root-servers.net". A list of web-accessible traceroot servers can be found at Geekttools, <http://www.geekttools.com/traceroute.php>. Only the "I," "K," and "M" root servers are operated in other countries (Sweden, the United Kingdom, and Japan, respectively). See DNS ROOT SERVER SYSTEM ADVISORY COMM., ICANN, ROOT NAMESERVER YEAR 2000 STATUS Appendix A (July 15, 1999), at <http://www.icann.org/committees/dns-root/y2k-statement.htm>. Of the non-federal-governmental U.S.-based servers, "C" is operated by psi.net, "D" by the University of Maryland, and "F" by the Internet Software Consortium. The authoritative list, at <ftp://ftp.rs.internic.net/domain/named.root> reports (last updated Aug. 22, 1997), that the "J" root server is "temporarily housed at NSI (InterNIC)." Other sources, however, report that the status of the "J" root server remains to be determined. See, e.g., DNS ROOT SERVER SYSTEM ADVISORY COMM., *supra*; Jun Murai, Chair, Root Server System Advisory Committee, Presentation to ICANN Public Meeting, slide 6 (July 15, 2000), http://cyber.law.harvard.edu/icann/yokohama/archive/presentations/murai-071500/index_files/slide0034.htm.

⁷² S&B, *supra* note 23, at 73 n.24.

⁷³ Note that S&B are especially disingenuous here: Their claim that the government's control of the legacy root is not meaningful because the Internet community could just choose to recognize another, a "decision [that] is not subject to the 'control' of . . . the USG," *id.* at 84 n.72, is a claim falsified by the U.S. government's direct control of root servers.

⁷⁴ See, e.g., Jon Weinberg, *Busy With the Root*, ICANNWatch, May 10, 2001, at <http://www.icannwatch.org/article.php?sid=142>.

ICANN President M. Stuart Lynn's plan to remake ICANN envisions it taking over all the root servers. See LYNN, *supra* note 1. This would cement its authority. See A.

working to get the root server operators to sign a contract with it, a goal recently demoted to the more ambiguous status of a "Memorandum of Understanding."⁷⁵ What the text of that agreement might be is a secret, something that the "bottom-up," "consensus-based," and "open and transparent"⁷⁶ ICANN has not yet seen fit to share with the public, and presumably won't until it is a done deal.

D. APA and Constitutional Issues

As a legal matter, ICANN is either "public" or "private." In one formal, and quite important sense, it is obviously private: ICANN is not a body created by Congress. Indeed, one of the sources of the current ICANN mess is the *absence* of statutory authority for the DOC's "calling forth" of ICANN and its subsequent relations with it. Thus, despite S&B's attempt to put foolish words in my mouth, I never argued that the APA "applies to ICANN," and S&B fail to cite to where I make this argument. What I argued is both more subtle and more plausible: The APA applies to the DOC, and that imposes constraints on the DOC's relationship with ICANN.

ICANN is subject to public law constraints, notably the Constitutional requirement of due process, if and only if it is a state actor. I argued in *Wrong Turn* that ICANN is a state actor,⁷⁷ although I also noted that the ICANN facts fall somewhere between the leading cases on what is and is not a state actor.⁷⁸ Indeed, there is something unintentionally tell-

Michael Froomkin, *IP: Where goes ICANN—the second of two notes*, INTERESTING-PEOPLE, Feb. 27, 2002, at <http://www.interesting-people.org/archives/interesting-people/200202/msg00259.html>; David Post, *ICANN ver. 2.0 and 'Mission Creep'*, ICANNWATCH, Feb. 28, 2002, <http://www.icannwatch.org/article.php?sid=577>. Compare LYNN, *supra* note 1 (proposing that ICANN take direct control of all the root servers and thus the entire root), with S&B, *supra* note 23, at 70 n.15 ("ICANN neither does nor ever will have 'control' of the root . . .").

⁷⁵ See ICANN, SPECIAL MEETING OF THE BOARD (Jan. 21, 2002), at <http://www.icann.org/minutes/prelim-report-21jan02.htm> (last visited Feb. 4, 2002) (giving president authorization to enter into MOUs with root server operators). The status of a "Memorandum of Understanding" is ambiguous because it may or may not be a contract depending on whether there is an exchange of consideration, and whether the parties intend to be bound. An MOU is

A document which, if meeting the other criteria, can be, in law, a contract. Generally, in the world of commerce or international negotiations, a MOU is considered to be a preliminary document; not a comprehensive agreement between two parties but rather an interim or partial agreement on some elements, in some cases a mere agreement in principle, on which there has been accord. Most MOU's imply that something more is eventually expected.

<http://www.duhaime.org/dict-m.htm> (last visited February 17, 2002).

⁷⁶ ICANN BYLAWS (July 16, 2000), <http://www.icann.org/general/bylaws.htm>.

⁷⁷ Froomkin, *Wrong Turn*, *supra* note 2, at 113–25.

⁷⁸ *Id.* at 113; see also Kathleen E. Full, *An Interview with Michael Froomkin*, 2001 DUKE L. & TECH. REV. 0001 (2001), at <http://www.law.duke.edu/journals/dltr/articles/2001dltr0001.html> (admitting that "the case for finding ICANN to be a state actor although strong is not at all a certainty, especially given the current trend in the

ing in S&B's sheltering ICANN behind the United States Olympic Committee (USOC). The USOC has been revealed to be a deeply corrupt, crony-ridden, organization.⁷⁹ ICANN needs oversight to ensure it does not go the way of the USOC. Currently, largely by historical accident, that role falls to the U.S. government.

1. APA

Wrong Turn does not address whether, were ICANN found to be a state actor, the APA would then apply to it.⁸⁰ Rather, I argued that "[i]f ICANN is a state actor, its regulatory acts are directly chargeable to DOC, and need to comply with the Administrative Procedures Act,"⁸¹ because the DOC's activities must comply with the APA. To put this in concrete terms, even if ICANN is a federal actor, APA-based lawsuits will name the DOC only as a party.⁸² Indeed, one such suit, naming the DOC but not ICANN, was recently filed in the Eastern District of Virginia.⁸³

I do believe that were ICANN required to observe due process in its dealings with those whom it regulates, this would work a minor revolution, all to the good. But that argument, for some reason, is not one that

case law against finding private bodies to be state actors without overwhelming evidence").

⁷⁹ See GEORGE J. MITCHELL ET AL., REPORT OF THE SPECIAL BID OVERSIGHT COMMISSION (Mar. 1, 1999), at <http://www.senate.gov/~commerce/hearings/0414ioc.pdf>; Froomkin, *Wrong Turn*, *supra* note 2, at 176. S&B's treatment of *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987), seems to miss the point of the case. The case held that the U.S. Olympic Committee was not a state actor because the necessary element of government control was lacking. An indicia of that was the small fraction of its total funds the Olympic Committee received from the U.S. Instead of focusing on the question of what fraction of ICANN's revenues would continue be paid to it if the DOC were to re-assign ICANN's contracts to another body, which is the issue that goes to the government's ability to exert financial pressure, S&B focus on the *dollar value* of ICANN's *direct* support from the U.S. government. See S&B, *supra* note 23, text accompanying notes 83–101.

⁸⁰ It's actually a slightly interesting question because the APA applies to "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," 5 U.S.C. §551(1) (2000), but it's not a question I addressed in *Wrong Turn*.

⁸¹ Froomkin, *Wrong Turn*, *supra* note 2, at 94.

⁸² ICANN might face declaratory judgment actions claiming due process violations, and perhaps suits against its officers under *Bivens*. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). ICANN itself is safe from a § 1983 challenge because it acts under instructions from a federal agency, not a state agency, and § 1983 applies to individuals acting under the "color" of *state* law only. ICANN is also safe from *Bivens* actions because of the Supreme Court's decision in *Correctional Servs. Corp. v. Malesko*, 122 S. Ct. 515 (2000) (holding that *Bivens* actions can be brought against individuals only, not corporations), a case decided after *Wrong Turn* was published.

⁸³ Plaintiff's First Amended Complaint, *Bord v. Banco de Chile* (E.D. Va. filed Dec. 27, 2001), <http://www.icannwatch.org/essays/bord-complaint.htm>; see also A. Michael Froomkin, *A Very Interesting Lawsuit*, ICANNWatch, Jan. 4, 2002, at <http://www.icannwatch.org/article.php?sid=507> (discussing complaint).

S&B seem inclined to address. Perhaps this is because, as ICANN's zealous counsel, they view their mission as carving out for ICANN the maximum freedom of arbitrary action.

The Department of Commerce, on the other hand, is very much a federal body and a federal actor. It is always subject to the Constitution and is subject to the APA as and when that statute applies to its activities.⁸⁴ This is true whether or not ICANN is a state actor.

Thus, the APA argument in *Wrong Turn* was not that the APA applies to ICANN *qua* ICANN. Rather, I argued something slightly more subtle and far more likely to be true: So long as the DOC wishes to perform the regulatory functions for which it has engaged ICANN by contract, then the DOC, *not* ICANN, can only do so in conformity with the APA. This does not mean ICANN is "subject to the APA,"⁸⁵ although it is no doubt convenient for S&B to attack that straw man. It means that if the DOC wants ICANN to continue doing regulatory things for the DOC, then the DOC must do so via traditional APA procedures for issuing regulations, whether or not ICANN happens to be involved in it.⁸⁶

S&B's response to this, the core of *Wrong Turn*'s APA argument, consists of five contradictory paragraphs.⁸⁷ Their five assertions are: (1) the APA applies only to agency rules and regulations made pursuant to statutory authority, and because no statute authorizes the DOC's reliance on ICANN, the APA doesn't apply;⁸⁸ (2) in any case, when the DOC decides to make an entry into the root zone file, this is neither adjudication nor rulemaking but rather something else (what that might be is not specified);⁸⁹ (3) "[t]he DOC/ICANN MOU for the provision of services does not mean that ICANN's actions are chargeable to the DOC" because agency actions in "directing or reviewing" contractors are not subject to the APA;⁹⁰ (4) nor does ICANN's contract to perform the so-called "IANA function" for the DOC create APA obligations for the same reason;⁹¹ and (5) notwithstanding points three and four, "the DOC has not

⁸⁴ Government contracts are one exception to the APA's notice and comment requirement. But other parts of the APA still apply. See *infra* text accompanying note 97.

⁸⁵ S&B put these words in my mouth without citation. S&B, *supra* note 23, at 68-69.

⁸⁶ After a full privatization, one in which the DOC no longer had any ongoing role in DNS rulemaking, there would be no nondelegation issue. Some difficult legal questions remain, however, as to how this hypothetical full privatization might be managed without authorizing legislation. See Froomkin, *Wrong Turn*, *supra* note 2, at 32 n.44. In any case, the DOC continues to say both that it has no plan to relinquish its powers over the DNS, and that it doesn't particularly want to exercise them. *Id.* at 31 n.43. Except, of course, when it does. See *supra* note 40 (discussing .us redelegation by U.S. government).

⁸⁷ S&B, *supra* note 23, Part V.B.

⁸⁸ *Id.* at 82.

⁸⁹ *Id.*

⁹⁰ *Id.* at 83.

⁹¹ *Id.* at 83 n.71.

engaged ICANN to perform services on its behalf”!⁹² I am not making this up.

These five statements reduce to two issues: whether it is true that the DOC does not either “make rules or adjudicate individual rights with respect to the root zone file,”⁹³ and whether, if the DOC does either of those things, the absence of statutory authorization for them, or the existence of contractual relations between the DOC and ICANN take those decisions out of the APA.

The various suggestions that the DOC’s actions regarding entries to the root are neither adjudications nor rulemakings, but instead some nebulous other category, are unsupported and unsupportable. It could reasonably be asserted that the DOC’s acquiescence to some of ICANN’s decisions might not be the sort of decision that the APA addresses; although I think this flounders on the fact that the APA does include “failure to act” as part of its definition of “agency action.”⁹⁴ But no such argument could seriously be made regarding changes to the content of the root zone file, which is a conscious decision that the DOC makes independently, and indeed explicitly reserves for itself,⁹⁵ even if it also tries to disclaim responsibility for it.⁹⁶ The reasons for this are set out in Part III.C. of *Wrong Turn*, and need not be repeated here. S&B’s suggestion that the DOC might lack the statutory authorization to run the root is plausible, but rather than allowing the DOC to ignore the APA, S&B’s suggestion would have the effect of making the DOC’s contracts with ICANN *ultra vires* and thus void, which is probably not the result that S&B seek to achieve. One wonders what ICANN will make of its lawyers’ suggestion that the government lacks the authority to contract with it.

The contracts exception to the rulemaking provision of the APA⁹⁷ is a more substantial argument, but one of only limited reach at best as the exception applies only to the notice and comment provision of the APA; agency actions subject to this exception remain subject to other parts of the APA, notably § 706, which provides for review of agency action. As noted in *Wrong Turn*, the exception is usually construed narrowly, and there are reasons why it should not apply to the facts of the ICANN mat-

⁹² *Id.* at 83.

⁹³ *Id.*

⁹⁴ 5 U.S.C. § 551(13) (2000); *see also* Froomkin, *Wrong Turn*, *supra* note 2, at 110–13, 132–38.

⁹⁵ *See* DEPARTMENT OF COMMERCE & NETWORK SOLUTIONS, INC., DOC-NSI AMENDED AGREEMENT, SPECIAL AWARDS CONDITIONS, NCR-9218742, AMENDMENT NO. 11 (Oct. 6, 1998), at <http://www.ntia.doc.gov/ntiahome/domainname/proposals/docnsi100698.htm>.

⁹⁶ That the DOC may have a particular motive for its decision may affect the reasonableness of the choice, but it cannot affect the applicability of the APA.

⁹⁷ 5 U.S.C. § 553(a)(2) (2000).

ter.⁹⁸ In considering this issue it is particularly important to distinguish between the DOC's direction of ICANN pursuant to the contracts, and the DOC's actions or inactions with effects on third parties following ICANN's actions. The DOC's direction of ICANN is very likely to fall under the contracts exception. Thus, for example, a suit seeking to have the DOC direct ICANN to do something is likely to fail. In contrast, once ICANN has spoken, the DOC has decisions to make. In the case of changes to the root, nothing happens unless the DOC acts.⁹⁹ Similarly, when the DOC wishes to countermand or amend ICANN's decisions, it does so.¹⁰⁰

Furthermore, as noted in *Wrong Turn*, but ignored by S&B, even if the contracts exception did apply, it only excludes the parts of the APA requiring notice and comment; other parts, notably § 706, which gives a right of review of arbitrary and capricious agency action, remain applicable. That requirement in turn imports other duties, notably the agency's duty to make a record sufficient to allow the court to conduct meaningful review.¹⁰¹

2. *State Actor*

Wrong Turn argued that ICANN is a state actor. As S&B note, several courts have held that NSI is not a state actor, and thus not subject to direct constitutional constraints. S&B write as if this settled the issue.¹⁰² In fact, the NSI cases are almost irrelevant to a serious analysis of whether ICANN is a state actor and whether the government's reliance on ICANN to regulate and adjudicate¹⁰³ in its stead may raise constitutional issues. As the courts have recognized, NSI hews quite well to the classic contrac-

⁹⁸ See Froomkin, *Wrong Turn*, *supra* note 2, at 126–29. One might also ask whether S&B are wise to rely on a case construing the reach of the *benefits* part of the clause that includes the contracts exception.

⁹⁹ See DEPARTMENT OF COMMERCE & NETWORK SOLUTIONS, INC. *supra* note 95.

¹⁰⁰ One notable example is ICANN's original attempt to capture \$1 for all domain name registrations, see Froomkin, *Wrong Turn*, *supra* note 2, at 109. More recently, DOC forced ICANN to amend the agreement it negotiated with VeriSign relating to its obligations to divest itself of either its registry or registrar operations. See Martin Kady II, *Commerce to Scrutinize VeriSign's Grip on Web*, WASH. BUS. J., May 4, 2001, at <http://Washington.bcentral.com/Washington/stories/2001/05/07/story4.html> (noting DOC's review beginning); A. Michael Froomkin, *Spin Cycle: Commerce Release on Final ICANN/VeriSign Domain Name Registry Deal*, ICANNWatch, May 18, 2001, at <http://www.icannwatch.org/article.php?sid=159> (quoting DOC press release).

¹⁰¹ See Froomkin, *Wrong Turn*, *supra* note 2, at 126–29.

¹⁰² S&B, *supra* note 23, at 78–79.

¹⁰³ I use the word adjudicate here in the APA sense; one might describe the proceeding when ICANN selected new TLD strings and registries as an adjudication, or one could call it a hearing that produced a draft rule later adopted by the DOC. Whichever it was, the proceeding was in shambles, and the distinction is of no importance to the constitutional question of whether DOC could legally adopt ICANN's conclusions without a proper APA procedure of its own. I am not here referring to the UDRP, which is a different sort of adjudication. I do not think UDRP arbitrators should to be found to be state actors, although language in *Mutual Ins.*

tor model. NSI provides services (domain name registrations and registry database functions) to the public for a fee. At relevant times, some of these fees have been set or approved by the government. NSI also performed, and still performs to this day, the ministerial task of implementing the DOC's instructions regarding the creation of new gTLDs. From an early date, NSI has disclaimed the power to create new TLDs. Further, NSI has never claimed the power to regulate other registries nor, subject to the occasional exercise of some tough near-monopolistic business practices by the NSI registry, has NSI ever claimed to regulate registrars. Similarly, the NSI policies challenged in the cases relied on by S&B were set independently by NSI, either to minimize its liability or for other reasons, and without either overt or covert direction from the United States.¹⁰⁴

ICANN is completely different. It provides no product to the government or to third parties other than technical coordination and regulatory services. S&B's attempt to find shelter behind the NSI cases flounders on the obvious fact that NSI's function was to act as registry and registrar. ICANN does neither, and is prohibited from doing so by its by-laws.¹⁰⁵ Rather, ICANN generates rules that are binding on all registries, registrars, and their clients, save only those willing to forgo the benefits of the legacy root. Cases about NSI's role as registrar are not particularly applicable to ICANN's role as regulator. Further, NSI was able to argue persuasively that to the extent it did make rules with regulatory consequences (e.g., deciding what sort of names it would refuse to register), it did so without consultation with the U.S. government and without any formal or informal instructions from the government. ICANN could never make such a claim because much of its initial activities consist precisely of executing the missions set out in the formally non-binding White Paper, missions which are the reasons ICANN was created and the U.S. government entered into agreements with it.

S&B nevertheless seek to make the NSI cases relevant with their assertion that the cases "are instructive because the NSI/DOC contract provides the DOC with far greater control over NSI than the MOU provides over ICANN."¹⁰⁶ As noted above, even if this is true, which is debatable, it compares apples and oranges. The government's close control and supervision over, say, a photocopy repair service that services government property does not turn that firm or its employees into state actors to

Co. v. Sullivan, 526 U.S. 40, 54 (1999) suggests such a finding; *cf.*, Froomkin, *Wrong Turn*, *supra* note 2, at 116 n.430.

¹⁰⁴ For example, in *Island Online Inc. v. Network Solutions, Inc.*, 119 F. Supp. 2d 289 (E.D.N.Y. 2000), the government had not suggested—or even hinted at a desire—that NSF order NSI's policy rejecting obscene domain names. Indeed, it was obvious that the government had not imposed this requirement, because the names were registerable via other registrars.

¹⁰⁵ See ICANN BYLAWS, *supra* note 76, Art. IV(1)(b).

¹⁰⁶ S&B, *supra* note 23, at 79.

whom the First Amendment applies. Courts are prepared to find state action “where a state tries to escape its responsibilities by delegating them to private parties”¹⁰⁷ but only where a “traditional public function” is at stake. Admittedly, the case for calling the management of the DNS a “traditional public function” is not iron-clad.¹⁰⁸ While that matters greatly for a determination of NSI’s status, it is of little relevance to ICANN’s status because the function that ICANN performs for the DOC is that of regulation, which is a traditional government function.¹⁰⁹

A harder question is whether ICANN might qualify as an “authority of the Government of the United States” as the term is used in the APA, in which case ICANN would be an “agency” for APA purposes.¹¹⁰ Be that as it may, I did not make that argument in *Wrong Turn*. As noted above, the actionable issue on which *Wrong Turn* focused was the government’s outsourcing of regulatory functions to ICANN, and the DOC’s often unquestioning reliance on ICANN’s decisions.

In any case, while ICANN may have some degree of autonomy from the U.S. government—our knowledge of exactly how much must await the key actors’ depositions¹¹¹—ICANN’s major decisions taken to date

¹⁰⁷ *Barrios-Velazquez v. Asociacion de Empleados del Estado Libre Asociado de P.R.*, 84 F.3d 487, 494 (1st Cir. 1996) (quoting *Rockwell v. Cape Cod Hosp.*, 26 F.3d 254, 258 (1st Cir. 1994)).

¹⁰⁸ See Froomkin, *Wrong Turn*, *supra* note 2, at 118.

¹⁰⁹ See *id.* at 118–19. An arguably better case for S&B’s position, one they neglect to cite, might be *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238 (S.D.N.Y. 2000). There, the district court examined ICANN’s role in regulating the conduct of registrars via the ICANN Accreditation Agreement and concluded that “ICANN is not a governmental body.” *Id.* at 247. The court, however, reached this conclusion in a peculiar fashion. Rather than applying the tests for state or federal actors, the court simply reasoned that because the DOC’s establishment of ICANN was intended to move “away from nascent public regulation of the Internet and toward a consensus-based private ordering regime” and because the White Paper was a statement of policy only, rather than a substantive rule, it followed that “the Accreditation Agreement represents a private bargain” between ICANN and the affected registrars. *Id.* at 247–48. Perhaps S&B do not rely on *Register.com* because they found this logical leap as unconvincing as I do.

Cases relating to government-sponsored enterprises have some limited relevance. It seems fairly clear that ICANN is not a federal “agency” for purposes of the Freedom of Information Act (FOIA) or the Government Corporation Control Act (GCCA) because it is neither a “Government controlled corporation” as contemplated by the GCCA nor some “other establishment in the executive branch of the Government.” 5 U.S.C. § 552(f)(1) (2000); *c.f.*, A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543, available at <http://www.law.miami.edu/~froomkin/articles/reinvent.htm>. The test in these matters is control of the sort used to measure corporate control—tests which often focus on the reality of control as much as the form.

¹¹⁰ See 5 U.S.C. § 551(1); 5 U.S.C. § 701(b)(1).

¹¹¹ Take, for example, S&B’s assertion that ICANN “neither sought nor received approval” of the UDRP from the U.S. government. S&B, *supra* note 23, at 78. Regardless of whether ICANN and the government officially communicated, are we seriously expected to believe that ICANN staff never discussed this with Becky Burr, or

consist of executing the instructions dictated to it by the government in the White Paper. S&B rest their case on the form of the transactions; ICANN is privately incorporated, and it could in theory act independently. But the real issue for state-federal actor cases isn't the form, it's the substance.

3. *Nondelegation*

In advancing a nondelegation argument in *Wrong Turn*, I focused on proving that ICANN "regulates," and does not merely engage in "standard-setting." If ICANN were limited to standard-setting, as it used to argue, a nondelegation issue would likely not exist.¹¹² It is refreshing to see S&B admit what has, in any case, become obvious, that ICANN makes policy decisions relating to the DNS.¹¹³

Wrong Turn argued that if I was wrong about the DOC being required to use APA procedures when contracting out for regulatory services, then there was instead a *Carter Coal* issue about 'nondelegation' to a private group. S&B attempt to trash this argument by saying that because there is no Congressional action delegating power to the DOC to manage the DNS, much less allowing sub-delegation to ICANN, there can't possibly be a nondelegation issue because the doctrine "prohibits only Congress from delegating its legislative power to any other entity."¹¹⁴ This argument might work if I were relying on the traditional nondelegation doctrine of *Schechter Poultry*, although it would then raise a serious *ultra vires* question. The single term 'nondelegation' actually refers to two quite different ideas, and I relied on the one in *Carter Coal*. The idea, that there may be a fundamental structural constraint on the legislature's power to delegate public power to private groups, a limit sounding in Due Process, is one that completely blunts S&B's doctrinal challenge. It is somewhat odd to speak of a sub-delegation of power from the DOC to a private party as violating even *Carter Coal* nondelegation in the absence of

the other U.S. government officials interested in DNS policy? In any case, as I explained in *Wrong Turn*, the critical instruction to impose something like the UDRP was in the DNS White Paper. See Froomkin, *Wrong Turn*, *supra* note 2, at 24-25, 69-70, 96, 110; ICANN, STATUS REPORT TO THE DEPARTMENT OF COMMERCE § I (June 15, 1999), at <http://www.icann.org/statusreport-15june99.htm>. That ICANN in fact did what the U.S. government told it to do is not the greatest evidence of its independence.

¹¹² See Froomkin, *Wrong Turn*, *supra* note 2, at 95-97.

¹¹³ S&B, *supra* note 23, at 66.

¹¹⁴ *Id.* at 69. Here, S&B are in good company, as the GAO also advanced this argument. Letter from Robert P. Murphy, General Counsel, General Accounting Office, to Sen. Judd Gregg, Chairman, United States Senate Subcommittee on Commerce, Justice, State, and the Judiciary 26 n.41 (July 7, 2000), <http://www.gao.gov/new.items/og00033.pdf> ("Since it is a role not specifically required by statute, the Department was not delegating or transferring a statutory duty when it proposed to transition administrative control over the domain name system to a private entity."). One of my goals in *Wrong Turn* was to explain how the GAO erred in this assertion.

legislation clearly allowing it. One would devoutly wish for a statute to put the DOC's relation with ICANN on a less shaky legal footing. But even without one, it's hornbook law that agencies have no inherent powers; they can only validly exercise the powers delegated to them by Congress.¹¹⁵ It is equally axiomatic that the Due Process clause applies to all three branches of our government. In light of these two maxims, it follows fairly simply that *if* there is a structural due process bar to the sub-delegation of public power to a private group of the sort described in *Carter Coal*, then it applies at all times to all of the DOC's activities.

S&B advance the obvious doctrinal rejoinder to my claim, the counter-assertion that the nondelegation doctrine is dead, that *Carter Coal* is a dead letter. As noted in *Wrong Turn*, in light of the case law since the New Deal, this argument has force. Academic authorities tend to be divided between seeing nondelegation as a residual doctrine deployed to justify limiting constructions of potentially over-broad statutes¹¹⁶ and a historical relic. Recognizing this, I also argued that the ICANN facts are so egregious and the self-dealing so similar to the facts that prompted *Carter Coal* (itself the least obnoxious of the three anti-New Deal "nondelegation" cases) that it makes a case for why the doctrine, even if thought to be dead, should be revived for this limited purpose. Interestingly, S&B choose to rest their case on doctrine alone, ignoring the policy question entirely except to accuse me of arguing with the heart.¹¹⁷ Yet, in this sort of case the policy strand is inseparable from the doctrinal one.¹¹⁸ What ought to be has, and should have, influence on what doctrinally is. In any case, I am far from alone in expressing concern that "privatization" is being used as a cover to avoid accountability for fundamentally governmental decisions.¹¹⁹

III. A WAY FORWARD

One way to perpetuate yourself is to persuade others that *après moi le deluge*. ICANN has traded heavily on this fear, and I suspect that it has

¹¹⁵ Or, an agency might exercise powers delegated to it by the President, but that is not at issue here.

¹¹⁶ See, e.g., WALTER GELLHORN ET AL., ADMINISTRATIVE LAW 64 (David L. Shapiro et al. eds., 8th ed. 1987).

¹¹⁷ S&B, *supra* note 23, at 91.

¹¹⁸ Even just on doctrinal grounds, "[c]ounting published cases . . . is meaningless in resolving a fact-intensive question. . . . Rather, the proper question is which case is most analogous." *Pabst v. Okla. Gas & Electric*, 228 F.3d 1128 (10th Cir. 2000). Here, that is *Carter v. Carter Coal*, 298 U.S. 238, 280 (1936); and *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454 (Tex. 1994).

¹¹⁹ See, e.g., Paul S. Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation*, 71 U. COLO. L. REV. 1263 (2000); Alan R. Burch, *Purchasing the Right to Govern: Winstar and the Need to Reconceptualize the Law of Regulatory Agreements*, 88 Ky. L.J. 245 (1999–2000); Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627 (2001).

accounted for a good deal of its support. S&B advance a version of this line, suggesting that “[i]f this experiment is not successful, the only practical alternative is some form of multinational agency or authority.”¹²⁰ Personally, I do not agree that the only alternative to the ICANN we have is a world treaty body. It is possible to imagine what a good ICANN would look like.

Today, ICANN’s processes little resemble either standard-making or technical coordination. To date, ICANN’s “standard-making” has produced no standards. ICANN’s “technical coordination” has been neither technical nor has it coordinated anything. Rather, in its initial foray into the creation of new gTLDs, ICANN has acted like a very badly organized administrative agency. Instead of engaging in standards work, ICANN is engaged in recapitulating the early procedural errors of federal administrative agencies such as the Federal Communications Commission (FCC).¹²¹

A. *What Real Standard-Making Would Look Like*

A standard-based (or at least standardized) approach to gTLD creation would require ICANN to craft a pre-announced, open, neutral, and objective standard of competence rather than to pick and choose among the applicants on the basis of the ICANN Board’s vague and inconsistent ideas of aesthetic merit, market appeal, capitalization, and experience. All applicants meeting the standard would be accepted unless there were so many that the number threatened to destabilize the Internet.¹²² ICANN might also impose reasonable limits on the number of TLDs per applicant, and on sequencing, in order to keep them from going online the same day, week, month, or even year.

Under a standards-based approach, ICANN would have tried to answer the following questions in the abstract, before trying to hold comparative hearings in which it attempted to decide to which specific applicants it should allocate a new gTLD registry:

- What is the minimum standard of competence (technical, financial, whatever) to qualify to run a registry for a given type of TLD?
- What open, neutral, and objective means should be used to decide among competing applicants when two or more would-be registries seek the same TLD string?

¹²⁰ S&B, *supra* note 23, at 75–76.

¹²¹ See Jonathan Weinberg, ICANN As Regulator, *COMPUTER SCIENCE*, at <http://arXiv.org/abs/cs.CY/0109099> (revised v.3 Mar. 10, 2002). An abridged version will be published as *ICANN, Internet Stability, and New Top Level Domains*, in *COMMUNICATIONS POLICY AND INFORMATION TECHNOLOGY: PROMISES, PROBLEMS, PROSPECTS* (Lorrie Cranor & Shane Greenstein eds., forthcoming 2002).

¹²² If there is such a number, it is likely to be very large. See Froomkin, *Wrong Turn*, *supra* note 2, at 22 n.12.

- What are the technical limits on the number of new TLDs that can reasonably be created in an orderly fashion per year?
- What open, neutral, and objective means should be used to decide among competing applicants, or to sequence applicants, if the number of applicants meeting the qualification threshold exceeds the number of gTLDs being created in a given year?

Today, reasonable people could no doubt disagree on the fine details of some of these questions, and perhaps on almost every aspect of others. Resolving these issues in the abstract would not necessarily be easy. It would, however, be valuable and appropriate work for an Internet standards body, and would greatly enhance competition in all affected markets.

Once armed with a set of standards and definitions, ICANN, or any other allocation body, would be on strong ground to reject technically incompetent or otherwise abusive applications for new gTLDs, such as those seeking an unreasonably large number of TLDs. A thoughtful answer would inevitably resolve a number of difficult questions, not least the terms on which a marriage might be made between the DOC's "legacy" root and the so-called "alternate" roots.

B. What Technical Coordination Would Look Like

An alternate approach to gTLD creation, one that would most certainly enhance competition, would take its inspiration from the fundamental design of the Internet itself, and from major league sports. The Internet was designed to continue to function even if large parts of the network sustained damage. Internet network design avoids, whenever possible, the creation of single points of failure. When it comes to policy, however, ICANN is currently a single point of failure for the network. A solution to this problem would be to share out part of ICANN's current functions to a variety of institutions.

In this scenario, ICANN would become a true technical coordination body, coordinating the activities of a large number of gTLD policy partners. These partners would be drawn from a wide variety of institutions including nongovernmental organizations (NGOs), corporations, inter-governmental and regional bodies, and professional societies.¹²³ ICANN's functions would be as follows:

- (1) to keep a master list of TLDs and ensure that the data in the A root file is accurate;
- (2) to ensure that there were no "name collisions"—two registries attempting to manage the same TLD string;
- (3) to fix an annual quota of new gTLDs;
- (4) to run an annual gTLD draft;

¹²³ The list is illustrative, not exhaustive.

- (5) to coordinate the gTLD creation process so that new gTLDs came on stream in an orderly fashion instead of all at once;
- (6) to ensure that registries kept or provided a proper back-up or "escrow" of critical data; and,
- (7) to coordinate protocol numbers.

Each of ICANN's policy partners would be assigned one or more draft choices and then ICANN would randomly (or perhaps randomly within quotas assigned for each type of policy partners) assign each one their draft picks. As each policy partner's turn came up, it would be entitled to select a registry, imposing whatever conditions it wished, to manage any gTLD that had not yet been claimed on ICANN's master list. In keeping with the transnational and public-private nature of the Internet, ICANN's policy partners could be a highly diverse mix of international, national, and private, "civil society" bodies.

I think this alternate solution would best achieve the ends of internationalization, competition, and diversity. It is unclear if the DOC has the will (or the authority) to demand such a plan, and we have seen no sign that ICANN is about to divest itself of any policy authority unless forced to do so.¹²⁴

ICANN faces a choice. On one path it becomes a true standards body, or a true technical coordination body, and leaves the social policy choices to those, like Congress, who have the legitimacy to make them. On the other path, the one it currently seems to be following, it is a state actor. In that case, its actions to date have been far too arbitrary to survive judicial review.

ICANN's nature currently tends to function creep, which emphasizes the need for democratic legitimacy. Yet, the mechanics for providing this legitimacy via the sort of election ICANN could run do not exist, indeed may be impossible. The very crabbed and limited proposals that ICANN is prepared to approve are substantially unequal to the task. Furthermore, representation structures that might increase legitimacy for ICANN's new functions would introduce obstacles (democracy) to the adoption of new policies, obstacles that the ICANN staff is determined to prevent (indeed, it already routes around some of the ones that exist). Streamlining operations reduces legitimacy but increases efficiency, enabling further function creep and increasing the legitimization deficit. And once they are as entrenched as they now are, the very non-representative structures that enable function creep can be used to block representation.

¹²⁴ Indeed, the Lynn 'Roadmap' paper rather suggests the opposite. See LYNN, *supra* note 1.

IV. CONCLUSION

S&B waste part of their energies attacking a straw man—something I never said.¹²⁵ Their presentation of the facts is peculiar, although here one suspects calculation rather than carelessness. In particular, S&B's argument that ICANN is not dependent on the U.S. government relies on the independence of the root server operators, then flounders on the fact that many of the root servers are operated by the U.S. government or its contractors.¹²⁶ The claim that the United States lacks the power to replace ICANN flies in the face of the express reservation of that right in ICANN's contract with the United States.¹²⁷

Although S&B seek to focus attention elsewhere, the main issue from an administrative and public law perspective is not ICANN, but the DOC's reliance on ICANN. The DOC relies on ICANN to advise it, and to take decisions that the White Paper suggested the DOC desires, but that the DOC does not choose to take directly. When the DOC allows ICANN's decisions to go forward without countermand, and most clearly when the DOC itself acts on ICANN's advice, the DOC commits the sort of agency action that the APA and the Constitution exist to constrain. And if the DOC's attitude is so completely hands-off that it defers to ICANN without considering the substance of ICANN's decisions, then we have reached a point where there is cause to reawaken the slumbering nondelegation-to-private-parties doctrine. Or, if we allow agencies to contract with ICANN-like bodies to make de facto regulations for them, we should at least embark on an open discussion of the implications for democratic accountability in the modern administrative state.¹²⁸

It did not have to come to this. ICANN could have chosen a different structure. Alas, given where we are today, it seems unlikely that ICANN itself has an incentive to turn itself into a leaner, better, less centralized organization.¹²⁹ Nor does it seem likely that public law is a tool that can compel this result without some Congressional action.¹³⁰ ICANN, a formally private California non-profit organization, has no legal obligation to be democratically accountable other than whatever duties it may owe its members under state law;¹³¹ even if it is a federal actor, its duties under federal law run to due process, not representation or decentraliza-

¹²⁵ See *supra* text accompanying notes 30, 84–86.

¹²⁶ See *supra* text accompanying notes 38–46.

¹²⁷ See *supra* note 7.

¹²⁸ *C.f.*, Kenneth C. Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 713 (1969) (“judicial inquiries [under the nondelegation doctrine] should shift from statutory standards to administrative safeguards”).

¹²⁹ Indeed, the reform plan proposed by ICANN's CEO contemplates a larger, wealthier, more powerful and more centralized ICANN. See LYNN, *supra* note 1.

¹³⁰ Some gains may be possible via private law. See Froomkin & Lemley, *supra* note 6.

¹³¹ See *supra* text accompanying note 15.

tion. Nor, despite the title of S&B's article, does *Wrong Turn* argue that the APA applies directly to ICANN.

The U.S. government could have chosen a different relationship with ICANN. We have available workable models of how an agency constitutionally interacts with a self-regulatory organization (SRO). The SEC's relationship with the various stock exchanges provides one model. There, pursuant to statute, the agency retains the right to regulate, but in most cases the SRO regulates its own members. Before important rules go into effect, those rules are submitted to the agency for its review and by the agency for public comment. As a practical matter, the agency's approval is usually little more than a rubber-stamp, but the procedural hurdle serves the important functions of discouraging the SRO from proposing abusive rules and providing an avenue for judicial review if one slips through. But such a relationship would have required authorizing legislation, for which neither the Clinton administration, nor ICANN, had any desire.

In choosing how to decide any APA or public-law controversy spawned by the DOC's reliance on ICANN, a reviewing court will almost inevitably be forced to navigate between form and substance. Leaving aside their exaggerations and misrepresentations, S&B's core argument seems to be that we should close our minds to thick description and let the forms control: ICANN is private; the White Paper was just a policy statement of no legal import; the DOC's relationship with ICANN is one of contract, and the contracts do not seem to say much; third parties are not in privity with, and are not involved in, issues of power over the root; indeed, that power itself is chimeral because large parts of it do not rest on legal formalities. Don't rock the boat.

As a positive matter, it is not impossible that a court might indeed adopt the formalistic view.¹³² But it would be an avoidable error. As I sought to detail in *Wrong Turn*, and to suggest in this Response, one need not look very far underneath the surface to discover that the substance of the U.S. government's relationship with ICANN is materially different from what it may appear to be from the forms alone. Look a little beyond the forms to the actual means by which the DOC can, and on occasion does, exercise control over the root. Look to the extent to which the DOC keeps ICANN on a short leash, and the consequences that would flow were the DOC to de-recognize ICANN and instead recognize another body in its place, and you begin to see the things to which Joe Sims and Cynthia L. Bauerly seem to have closed their eyes very tightly indeed.

¹³² Indeed, arguably that is more or less what the district court did in *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238 (S.D.N.Y. 2000).