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Muddling Through Internet Governance

Essay by Kenneth Neil Cukier, November 25, 2008 in response to ICANN's Constitutional Moment

The debate over Internet governance and the foundation of ICANN represented the Internet's first "civil war" — but all sides lost.

The only thing bonding the fractious "Internet community" together in the talks that led to ICANN a decade ago this year was an interest in keeping government away. The technical community tried to retain control of their creation from commercial interests and governments which they feared would erect toll booths or checkpoints, but saw their power whittled away. Meanwhile, "users" — an ambiguous concept ranging from ordinary web surfers to major businesses that rely on the web — wanted more say, but won only symbolic crumbs. A handful of Internet entrepreneurs pushed to open the market for domain names, but only one part was liberalized (retail registration) while another was basically protected (wholesale registry services) and new top-level domains remains largely closed. Finally, governments wanted more say — and got it, though not as much as most would like.

This abridged history provides the context with which to consider Susan Crawford's excellent essay. It raises troubling questions. ICANN fails to uphold the aims that were expected of it, she asserts; its "operation is not matching its design." So was the model unworkable, or the way it was executed? Is private governance of a "critical" public resource such as the Internet even possible? Computer science deals in binary logic (everything is either 0 or 1); likewise Susan's analysis admits little gray. The model was right, she says, the problem was the people who turned the institution to their own ends.

My view is more optimistic and less black and white. Has ICANN failed? Yes and no. Despite terrible errors and unnecessarily ugly actions, in large part ICANN has not failed. It has been a rough birth, but the institution lives and policies are established, albeit far more slowly and erratically than they should. Yes, ICANN hardly upholds its initial aims — but institutions are forced to change with their environment. Were the same standard applied to American democracy, the Great Experiment might have been declared a failure at the advent of Hamilton's central bank.

So is the problem the model or the way it is executed? Both, perhaps. The model is right, but is faulty (it is inherently cumbersome, conservative and lacks sufficient oversight). At the same time, the execution has been uneven, and the low points have been quite low (ICANN imposed too much centralization too quickly, its board was passive and it occasionally short-circuited its own processes, among other things). Susan identifies three areas where ICANN was designed to act: setting consensus-based policies, creating new top-level domains and keeping governments at bay. Mapped onto three specific issues, ICANN's operations have been found wanting: the privacy of domain name registrations, creating new internet domains, and government influence over "international" domains that use scripts other than the Roman alphabet.

A bit of history is useful to understand why ICANN failed to live up to its expectations in these ways. The model ICANN chose was based on what it replaced: the "rough consensus" of the Internet engineering community — yet formalized as befits a non-profit corporation, but not so formal as to be stultifying like an intergovernmental organization. It is true that today it is largely a fiction. The inability to enact basic privacy protections on domain registrations or

create new domains underscores this. (Susan's third plank of ICANN's model, that the US "would act as a good steward for the rest of the world" slightly misstates the issue: at the time the US planned to devolve its role altogether.)

This flows naturally to Susan's second question: whether critical resources can be handled by private institutions? The uncomfortable conclusion for the Internet community, but the most responsible one, may be: not completely. Again, an answer that falls outside the binary extremes of yes or no. Is it not in the nature of any "critical" resource that some degree of governmental oversight or control is essential — or at least, considered to be essential — to ensure that the public interest is protected? Why should we expect any less from the Internet?

Why indeed? To answer this question, it is necessary again to recall the situation when ICANN was born. The year 1998 was when the Internet economy took off in full force. There was a widespread feeling that governmental control over the nascent medium might choke it. Moreover, the person overseeing Internet governance in the Clinton administration was Ira Magaziner, who had been previously blasted by Congressional Republicans for trying to "socialize" America's healthcare system; he needed to avoid seeming too governmental at all costs. And there was a view that just as the Internet posed new challenges to businesses and governments, that it therefore required new approaches in the way in which it was regulated.

Thus ICANN's self-regulatory model was a both a victor and a victim of its times. It was specifically established to handle tasks that in an earlier era were done by intergovernmental organizations. Yet it was only a matter of time before governments would want to reassert themselves and question ICANN's responsibilities vis-à-vis their own. In fact, ICANN was established with little input from other countries. Other than the EU, which was on board, if the US administration talked to other countries, it was to mid-level telecoms officials who favored deregulation and liberalization, to which ICANN's creation seemed in line. The higher-level foreign diplomats either didn't know about it, couldn't understand it, or didn't care — until later.

Now that the Internet is clearly a mainstream medium, governments want a bigger seat at the table. They are a class of stakeholder that the original ICANN model did too little to satisfy since they were unaware of ICANN's importance at the time. And much of ICANN's reforms in the past decade has been aimed at remedying this deficiency.

Why was the model created as it was; why so little global buy-in? It is important to recall that ICANN was meant as a ceasefire, not a peace treaty. And the negotiations took place under a merciless stopwatch: the agreement between the US government and Network Solutions Inc. (NSI), the domain name register for .com, .net and .org, was poised to expire and there was no institutional arrangement to take its place. So the design was rushed — and was never meant to be definitive. On top of this, the white-bearded (and silver pony-tailed) professor who formerly ran it all, Jon Postel, passed away on the eve of ICANN's creation. So ICANN's staff lacked the fatherly oversight that was always presumed would exist — and hence its conduct was initially poor.

The crux of the problem, Susan explains, is that the ICANN model "underestimated the tendency of people to turn institutions to their own ends." But we can sympathize with how that happened. Here's the hidden history: In looking for an initial board, there was a debate among insiders — basically, the technical community that ran the system and US government officials who were reforming it — over whether it should comprise people of unassailably high stature (to ward off NSI, which played dirty) or people with deep Internet knowledge (to ward off the loudly critical domain-name entrepreneurs). It was decided that NSI — rich, powerful and organized — represented more of a threat to the new entity than the Internet-community loudmouths.

Besides, if the Internet were indeed entering a phase of mainstream adoption as testified by the institutionalization of Dr. Postel's system, then it only made sense that leaders from wider

society than just the technical community serve on the board, the thinking went. So the first directors included the president of Radcliff College, an American telecoms CEO and a retired EU official — people unscarred by the domain-name wars, but also clueless as to its history (with the notable exception of its chairman, Esther Dyson who is a technology expert).

In essence, ICANN took people who knew law and politics and applied it to the Internet (with all the misfortune that created), rather than take people who knew the Internet and could carefully apply it to law and politics. They were not so much turning ICANN to their "own ends" as simply deferring to the mechanisms with which they were most familiar. The result has been two-fold: the shortcomings that Susan so aptly describes, and the evolution of a new institution that albeit imperfect, is nevertheless underway.

Ultimately, I am not sure I agree with the Susan's premise and that of the Publius Project, that there is a singular "constitutional moment" or "moments" of cyberspace, or of Internet governance specifically. There may be many small, fleeting legal milestones — but the very multitude seems to argue against the idea of a central powershift (perhaps in the same way as the network itself is fluid and decentralized, not monolithic or prone to the primacy of singular events).

Indeed, the very concept of a constitutional moment is a strong part of the American experience of governance, but it is also unique to it. It does not always apply well in other contexts and traditions. For Internet governance, the British approach of "muddling through" might be more fitting. More than 700 years since the Magna Carta, there is still no constitution per se. Now that's procrastination. God save the queen!

Kenneth Neil Cukier is a business writer at The Economist. He has covered Internet governance since 1996, based in Paris, London and Hong Kong. In 2002-04 he was a research fellow at Harvard's Kennedy School of Government. He is currently based in Tokyo for the newspaper. Some of his writings on Internet governance are online at: www.cukier.com

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