

## Form and Substance in Cyberspace

A. Michael Froomkin

■ [is an intro or abstract required?]

"We don't know what (ICANN) is there for,"<sup>1</sup>

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*Wrong Turn In Cyberspace*<sup>2</sup> 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 novel piece of legal sleight-of-hand to achieve certain outcomes regarding the management of the Domain Name System, a key Internet resource. Thus, *Wrong Turn* 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 Domain Name System (DNS) relied on by the overwhelming majority of Internet users. The Administration, and particularly an inter-agency group headed by Senior Presidential Advisor Ira Magaziner, soon found itself faced with conflicting and irreconcilable demands between Internet people such as Jon Postel who wanted to create a large number of new top level domains (TLDs), and assertive trademark and intellectual property interests who strongly opposed this -- and to whom the Administration was heavily beholden.

In its effort to escape this seeming impasse, Magaziner and 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 is managed; in so doing DoC created a scheme in which it and/or its agent can make de facto rules that apply to all the US (and most foreign<sup>3</sup>) 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 -- to regulate -- domain name registrars, registries, and registrants, and has done so in ways that frequently benefit the trademark lobby and ICANN

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<sup>1</sup>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. <http://news.zdnet.co.uk/story/0,,t269-s2102780,00.html>.

<sup>2</sup>A. Michael Froomkin, *Wrong Turn In Cyberspace: Using ICANN To Route Around The APA And The Constitution*, 50 **Duke L. J.** 17 (2000) (hereinafter *Wrong Turn*).

<sup>3</sup>As noted below, the political albeit not technical, position of the ccTLD registries differs slightly from that of other participants in the system.

insiders.<sup>4</sup>

ICANN is, in form, a private non-profit California corporation and a US government contractor. But the form of the US government's relationship with ICANN is unusual, and the substance unique. The facts set out in *Wrong Turn* demonstrate that the US government is the but-for cause of ICANN's existence, of ICANN's 'recognition' by other relevant actors, of ICANN's ability to exact revenues from registrars and registries, and indeed of ICANN's continuing existence and relevance. *Wrong Turn* related each of these elements of the relationship in perhaps tedious detail, including how ICANN and the US government have entered into three different contracts with the US government. In these agreements the US government lends ICANN power over the DNS, and ICANN provides what amount to regulatory services for the government. *Wrong Turn* argued that these facts had, or should have, legal effects because even though the form of ICANN's relationship with the U.S. is carefully crafted to disguise it, the substance of the US-ICANN relationship is to have DoC rely on ICANN to regulate where the government fears or is unable to tread.

*Wrong Turn* also argued that, at least from a parochial, US-centric, administrative law point of view, ICANN is a terrible precedent because it undermines the accountability we have a right to expect should accompany the use of public power. By vesting de facto regulatory power in a private body, DoC insulates decisions about the DNS from the obligations (e.g. openness, due process) and constraints (e.g. conflicts of interest, judicial review for procedural regularity and for reasonableness) that commonly apply to exercises of public power.<sup>5</sup> Indeed now that, thanks in large part to the energetic intervention of the US government, ICANN has secured itself a regular and contractually guaranteed income stream from the entities it regulates, it is in practice subject to only one realistic external constraint: whatever discipline is imposed by US government oversight, and the background threat of the US government exercising its right to take back all

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

Meanwhile, the behavior of firms that lobby ICANN as if it were a government body, turns out to have anti-trust implications. See A. Michael Froomkin & Mark Lemley, *ICANN & AntiTrust* (forthcoming).

<sup>5</sup>It's certainly no secret that I came to be concerned about this question because, despite having originally been a tepid ICANN supporter, I had come to believe that it was making bad choices and, most importantly, acting without regard for even minimal procedural regularity. I used examples of these to illustrate my arguments, although these were only a fraction of the problems discussed, in a more journalistic fashion, on the ICANNWatch web site, <http://www.icannwatch.org>, of which I am an editor.

the powers and functions it has bestowed on ICANN.<sup>6</sup>

*Wrong Turn*'s second goal 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 argument on the government's role in DNS policy rather than on what ICANN did. As no one but ICANN insiders is privy to the secret details of the US government's ongoing relationship with ICANN, *Wrong Turn* argued in the alternative.

It began by laying out the case that so long as DoC continues to control the root, the law, cognizant of the substance of the relationship rather than focusing on only the form, requires it to regulate the participants in the DNS via traditional APA processes rather than through contracts and winks. We know, because it is public, at least part of the story about DoC's role in ICANN's formation. And we know that at one point DoC estimated that monitoring and helping ICANN would require the half-time dedication of four or five full-time employees.<sup>7</sup> Further, DoC testified to Congress that ICANN "consults" with DoC before its major decisions,<sup>8</sup> and that in at least one case DoC amended an ICANN decision.<sup>9</sup> On the *realpolitik* side, ICANN very much wants to have full control of the root, and the US government, after initially signaling that it would transfer full control to ICANN, was increasingly waffling as to when if ever it would relinquish its control.<sup>10</sup> And we know that while the government maintained this powerful club over ICANN's head, ICANN had in fact done pretty much what the US government had said (in a formally non-binding statement of policy<sup>11</sup>) that ICANN should do. These, and many other facts related in *Wrong Turn*, indicated that despite the veneer of arms-length contracting to do research or technology transfer, ICANN was in reality DoC's catspaw, and that ICANN's actions should be fairly chargeable to DoC, for DoC was either the instigator of or the conduit for ICANN's regulatory decisions. Thus, the article concluded that DoC's approval of or, in some cases

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<sup>6</sup>"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." Memorandum of Understanding (MOU) between the Department of Commerce (DOC) and the Internet Corporation for Assigned Names and Numbers (ICANN), AMENDMENT 1, <http://www.ntia.doc.gov/ntiahome/domainname/agreements/amend1-jpamou.htm> ¶ 5.

<sup>7</sup>See *Wrong Turn* at n. 398.

<sup>8</sup>*Wrong Turn* at p. 109.

<sup>9</sup>See *infra* note 86.

<sup>10</sup>See *Wrong Turn* at 31 n. 43.

<sup>11</sup>Management of Internet Names and Addresses, 63 Fed. Reg. 31,741 (1998), <http://www.ntia.doc.gov/ntiahome/domainname/6598dns.htm> [hereinafter White Paper].

acquiescence to, ICANN's actions pursuant to DoC's at least tacit instructions constitute regulatory actions that should be taken in conformity with the APA. *Wrong Turn* also argued, although this was 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 US government, was that ICANN was independent in substance as well as form. Since the public did not have all the facts, I could not conclusively disprove this assertion, it seemed important to consider the legal consequences of this claim, whatever I suspected of its factual merits. While a private body could manage the DNS if the system were entirely private,<sup>12</sup> 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 management of that resource on a series of short-term agreements,<sup>13</sup> 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 were 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 by-laws to state that "members" who "joined" ICANN were not in fact members under California non-profit law,<sup>14</sup> thus ensuring they could not bring even a meritorious derivative action.

Again, the key move in *Wrong Turn* was to focus on DoC's role rather than ICANN's. I was struck by the similarities between DoC's asserted relationship with ICANN and that of the Department of the Interior and the local Coal Boards in *Carter Coal*.<sup>15</sup> It seemed that if the non-delegation-to-private-parties doctrine of *Carter Coal* (as distinct from the public non-delegation

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<sup>12</sup>Subject, again, to anti-trust constraints, see Froomkin & Lemley, *supra*. Whether DoC has the authority to release its hold on the DNS is disputed. See *Wrong Turn@* -.

<sup>13</sup>See *Wrong Turn* at 34 n.47. [update coming]

<sup>14</sup>See A. Michael Froomkin, Comments on Proposed Changes to ICANN By-Laws (Oct. 22, 1999), <http://www.law.miami.edu/~amf/bylaw-amend-comment.htm>; A. Michael Froomkin, ICANN and Individuals (Oct. 25, 1999), <http://www.law.miami.edu/~amf/individuals.htm>; see also ICANNWatch, Does ICANN Have Members? (Feb. 20, 2001), <http://www.icannwatch.org/article.php?sid=3>.

<sup>15</sup>*Carter v. Carter Coal*, 298 U.S. 238 (1936).

doctrine of *Schechter Poultry*<sup>16</sup>) 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 non-delegation doctrine is arguing uphill, even if the best understanding of that doctrine is more rooted in due process than in strict separation of powers.<sup>17</sup> If the non-delegation aspects of *Carter Coal* are still good law, then I think DoC's relations with ICANN are that very rare case to which the doctrine applies. But, just as the non-delegation doctrine's history is bound up in the struggle over the New Deal, so today it is likely that any non-delegation argument is going to carry substantial political or constitutional-structural baggage. Thus in *Wrong Turn* I made a policy argument as well as a legal argument. First, I suggested that despite its seeming desuetude the *Carter Coal* non-delegation doctrine had never been formally repudiated, and cited modern state court decisions relying on it.<sup>18</sup> 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 DoC, all combine to make it that rare and special case to which the *Carter Coal* non-delegation doctrine ought to apply. Given ICANN's recent behavior, that policy argument seems if anything stronger today,<sup>19</sup> while the doctrinal picture remains unchanged.<sup>20</sup>

B.

Although *Wrong Turn* focused on the legality of DoC's actions rather than ICANN's,<sup>21</sup>

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<sup>16</sup>A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

<sup>17</sup>See *Wrong Turn*@ 146-153.

<sup>18</sup>See *Wrong Turn* at 155-.

<sup>19</sup>See generally ICANNWatch.org

<sup>20</sup>Although the Supreme Court refused to uphold the D.C. Circuit's revival of the *Schechter* non-delegation doctrine in *Whitman v. American Trucking Ass'ns, Inc.*, 121 S.Ct. 903 (2001), it overturned the court of appeals's reliance on *Schechter* non-delegation in terms that did not affect the *Carter Coal* branch of the doctrine.

<sup>21</sup>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 to 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

Joe Sims and Cynthia L. Bauerly (S&B) seem to take all this very personally.<sup>22</sup> This is perhaps understandable as, more than anyone else, Joe Sims is responsible for the ICANN we have today. He launched the body even after his client, Jon Postel, tragically died, and has 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*.<sup>23</sup> 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.<sup>24</sup> If one assumes an average fee of \$300 per hour that would

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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 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

*Wrong Turn* at 36-37 (footnotes omitted).

<sup>22</sup>See Joe Sims & Cynthia L. Bauerly, *A Response to Professor Froomkin: Why ICANN Does not Violate the APA or the Constitution*. [Hereinafter S&B].

<sup>23</sup>See, for example, the fulminations of ICANN Board Member Karl Auerbach Karl Auerbach, Platform: Reform of ICANN-Jones Day Must Go, <http://www.cavebear.com/ialc/platform.htm#reform-jdmg>

<sup>24</sup>For the fiscal year ending June 30, 1999, ICANN's legal expenses totaled \$687,163. Internet Corporation for Assigned Names and Numbers, Financial Report (Fiscal Year Ending June 30, 1999) <http://www.icann.org/financials/financial-report-fye-30jun99.htm>.

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 several ICANN executive board meetings. See <http://www.icann.org/minutes/prelim-report-10mar00.htm>; <http://www.icann.org/minutes/minutes-06apr00.htm>.

For 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 several ICANN

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 since that figure 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.<sup>25</sup> In addition to casting doubt on the wisdom of the course pursued to date, were DoC forced to rely less on ICANN likely would reduce ICANN's importance, and its need for expensive legal advice.<sup>26</sup>

This personal rancor infects much of S&B's critique. S&B's chief rhetorical tactics are obfuscation and confusion. For example, S&B call my omission of most of the history of the Internet "misleading".<sup>27</sup> *Wrong Turn* did not discuss the large majority of the history of "the Internet" because the history of "the Internet" at large isn't terribly relevant to the issue of DoC's legal obligations regarding its management of the DNS, except in a background way, just as for

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executive board meetings. See <http://www.icann.org/minutes/minutes-30aug00.htm> and <http://www.icann.org/minutes/prelim-report-06jan01.htm>.

For 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 several ICANN executive board meetings. See <http://www.icann.org/minutes/prelim-report-16aug01.htm>; <http://www.icann.org/minutes/prelim-report-16aug01.htm>; and <http://www.icann.org/minutes/prelim-report-16oct01.htm>.

Karl Auerbach's successful campaign for the North American Board seat focused on ICANN's relationship with Jones, Day and raised questions of conflict of interest. See, e.g., Karl Auerbach, Platform, Reform of ICANN-Financial Reform, at <http://www.cavebear.com/ialc/platform.htm#financial-reform>.

<sup>25</sup>If Jones Day is organized like many major US 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 it is not, the ability to attract (or, in this case, create) and retain clients is prized.

<sup>26</sup>Given that 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)

<sup>27</sup>See S&B at

the same reasons it left out the history of computation, of capitalism, and of the United States, all of which are also part 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 doesn't (yet) have any functions relating to the world wide web. ICANN's jurisdiction is limited to the DNS and to IP numbering. And those functions, especially the regulatory functions, were, for many years prior to ICANN, performed by the US 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 sub-title, which takes aim at a contention ("ICANN .. Violate[s] the APA") not found in *Wrong Turn*.<sup>28</sup> I ask the reader to look in S&B for citations to *Wrong Turn* for where I'm supposed to have said half the things S&B put in my mouth. Reader, you will not find them, often because they don't exist.<sup>29</sup> That's 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, and it is a failure that a self-respecting law journal should not have allowed.

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.

■ [roadmap?]

## **1 Factual foundation of ICANN, and of ICANN's 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: the US government's support, and the root server operators's 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 US government, since it controls a substantial minority of the root servers itself.

There is no question that the idea of an ICANN-like body had important supporters when it was formed, and that it has a somewhat different but not inconsiderable set of supporters today. Intellectual property interests and some important foreign, and especially European, governments

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<sup>28</sup>As explained below, I do not claim that ICANN violates the APA, rather I claim that the US government violates it by relying on ICANN. This is not a trivial difference. It is essential.

<sup>29</sup>I note examples of this below.

concerned about US dominance of the root belong to both groups. But there were also at all times important dissenters,<sup>30</sup> and even 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 a meaningful way<sup>31</sup>). 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 it has been controversial from the day its secretly-constituted unelected initial Board was first revealed to the public.<sup>32</sup> ICANN did not spring from the waves like Venus, nor like Athena from the brow of Zeus. It came perilously close to 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 US government.

S&B assert that "most knowledgeable observers" -- not one single citation follows -- agree that ICANN's authority is utterly independent of the US government.<sup>33</sup> They are so

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<sup>30</sup>Somehow, in ICANN-speak, what it does always has 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 attempt to explain how it discerned it. 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 there is not a consensus 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 generally David Farber, Michael Froomkin & David Post, *Elusive Consensus* (7-21-99), [http://www.icannwatch.org/archive/elusive\\_consensus.htm](http://www.icannwatch.org/archive/elusive_consensus.htm); David Post, *ICANN and the Consensus of the Internet Community* (8-20-99), [http://www.icannwatch.org/archive/icann\\_and\\_the\\_consensus\\_of\\_the\\_community.htm](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 for the Domain Name System* (8-23-00), [http://www.icannwatch.org/archive/why\\_consensus\\_matters.htm](http://www.icannwatch.org/archive/why_consensus_matters.htm); David R. Johnson & Susan P. Crawford, *What ICANN Consensus Should Look Like* (9-5-00), [http://www.icannwatch.org/archive/what\\_icann\\_consensus\\_should\\_look\\_like.htm](http://www.icannwatch.org/archive/what_icann_consensus_should_look_like.htm).

For an attack on the entire concept of reliance on consensus, see Cary Coglianese, *Is Consensus an Appropriate Basis for Regulatory Policy?* (2001), available online at [http://papers.ssrn.com/paper.taf?abstract\\_id=270488](http://papers.ssrn.com/paper.taf?abstract_id=270488).

<sup>31</sup>On ICANN's war against the concept of directly elected members of the Board, see Mueller, Weinberg.

<sup>32</sup>See Mueller, *Debris of Self-Regulation*.

<sup>33</sup>S&B at n.15.

persuaded of the self-evident truth of this assertion that they neglect to document it, and suggest that anyone who disagrees is "making it up".<sup>34</sup> The willingness of ICANN partisans to make such breathtakingly false statements is the reason why I put so many footnotes in *Wrong Turn*.

### **Role of the US Government**

The centrality of the US government's support to ICANN is easily demonstrated. First, the US government retains control over the content of the authoritative root.<sup>35</sup> 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 US government's current policy is, in most cases,<sup>36</sup> to follow ICANN's recommendations regarding changes to the root.<sup>37</sup> 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 US 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 file, no one would have any interest in ICANN's views on the matter, nor would gTLD registries pay ICANN a dime.<sup>38</sup>

ICANN's US-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 only accept 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 includes the UDRP.<sup>39</sup> Before ICANN imposed this requirement, registrars competed on basic service

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<sup>34</sup>S&B text at n. 87.

<sup>35</sup>See supra note 6 and infra note 81.

<sup>36</sup>The disposition of the .us ccTLD is a notable recent example of the US using its power over the root directly. See infra text at notes ---.

<sup>37</sup>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 ICANNWatch.org, *Commerce Dept: We Don't Do TLDs*, <http://www.icannwatch.org/article.php?sid=237> (July 8, 2001) (quoting letter denying petition for rulemaking).

<sup>38</sup>See supra note 6.

<sup>39</sup>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 p.17. The truth is that Laina Raveendran Greene, another Member WIPO of Panel of Experts authorized me to note her

terms including their solicitude for trademark interests; now they cannot.<sup>40</sup>

While ICANN's delegated power from DoC sufficed to induce, even coerce, payments from those interested in new gTLDs<sup>41</sup> and those interested in registering names in both old and new gTLDs, it did not at first suffice to motivate the level of payments ICANN sought from incumbent TLD registries. Both NSI/VeriSign (the .com, .net and .org registry) and the ccTLD registries understood that, for political, legal, and technical reasons, the US 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 US 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.<sup>42</sup> As I explained in *Wrong Turn*, NSI was only persuaded to sign an agreement requiring to submit to ICANN's rulings, and make payments to ICANN, by intense, direct, US government pressure backed by the threat that NSI's contract to run the lucrative registries was due to expire after which the US might hand the franchise to someone else.<sup>43</sup> As for the ccTLDs, despite first

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agreement with the substance of my dissent, see A. Michael Froomkin, *A Commentary on WIPO's The Management of Internet Names and Addresses: Intellectual Property Issues*, <http://personal.law.miami.edu/~amf/commentary.htm> and Harald Tveit Alvestrand published his own pungent comments. Harald Tveit Alvestrand, "comments to the WIPO process and its result" <http://www.alvestrand.no/ietf/wiponote.html> (supporting UDRP in principle but disagreeing with other parts of WIPO report). In any case, it would have been unsurprising if I had been the lone dissenter, since 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. In the event, even the one-sided panel was too interventionist for WIPO and they tried to keep the drafts we supposed to comment away from us. See Commentary, *supra*, at [http://personal.law.miami.edu/~amf/commentary.htm#\\_1\\_8](http://personal.law.miami.edu/~amf/commentary.htm#_1_8); A. Michael Froomkin, *Semi-Private International Rulemaking: Lessons Learned from the WIPO Domain Name Process*, book chapter in Christopher T. Marsden (ed), *Regulating the Global Information Society* 211 (2000), available online <http://www.law.miami.edu/~froomkin/articles/tprc99.pdf>.

<sup>40</sup>See Froomkin & Lemley, *supra* note -.

<sup>41</sup>Most strikingly, the \$50,000 non-refundable application fee for would-be new gTLD registries.

<sup>42</sup>See, e.g. APTLD - Asia Pacific Top Level Domains, Letter to Mike Roberts, <http://www.isocnz.org.nz/international/aptdl000301letter-funding.html> (Mar. 1, 2000).

<sup>43</sup>*Wrong Turn* at.

strong-arming, and now a combination of soft soap<sup>44</sup> and hardball.<sup>45</sup> Despite this, to date the only ccTLD that has signed ICANN's model ccTLD agreement is the .au ccTLD. That appears to be a quid pro quo for ICANN forcibly removing control of the .au ccTLD (in violation of the applicable Internet Standards<sup>46</sup>) from the private operator to whom Jon Postel had delegated it, and giving it to an Australian government-sponsored ICANN-like body.<sup>47</sup> 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 Department of Commerce.<sup>48</sup>

S&B point to this recalcitrance on the part of the ccTLD operators as evidence that ICANN couldn't possibly have the power over the root that I ascribe to it.<sup>49</sup> 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: since the ccTLDs are frequently connected to their governments, they understand that they are not directly threatened by ICANN because they know that the US 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 US to do this and risk the diplomatic consequences, but a move that suggested the US was flexing its power over the root in a way that so threatened the interests of other nations would be one of 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

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<sup>44</sup>ICANN has increased staffing devoted to the care of ccTLDs.

<sup>45</sup>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 CENTR, Press release from 12th CENTR GA in Luxembourg, <http://www.centri.org/news/20012111.htm>; Jon Weinberg, ICANN and CENTR at odds (Jan. 7, 2002), <http://www.icannwatch.org/article.php?sid=510>. [to come .cx]

<sup>46</sup>See A. Michael Froomkin, ICANNWatch.org, *How ICANN Policy Is Made (II)*, <http://www.icannwatch.org/essays/dotau.htm> (Sept. 5, 2001).

<sup>47</sup>See ICANNWatch.org, *The other shoe drops, II (or III, ...)*, <http://www.icannwatch.org/article.php?sid=428> (Oct. 26, 2001), and ICANNWatch.org, *The Other Shoe Drops* <http://www.icannwatch.org/article.php?sid=339> (Sept. 5, 2001).

<sup>48</sup>See Brian Kahin, *Making Policy by Solicitation: The Outsourcing of .us*, <http://cip.umd.edu/Solicitation.doc>; see also ICANNWatch.org, *.US goes to Neustar*, <http://www.icannwatch.org/article.php?sid=438> (Nov. 1, 2001); DoC Stakes Out Maximalist Position on .us, <http://www.icannwatch.org/article.php?sid=254> (July 17, 2001).

<sup>49</sup>S&B at p. 10.

consensus support for ICANN is wishful thinking (although I hasten to add that many ccTLDs do support the concept of an independent body that is much less activist than ICANN, and at least some clearly see ICANN as a lesser evil than the US government). Third, it 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 US government, to reach agreements with the registries.<sup>50</sup> 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.<sup>51</sup>

### **Role of the Root Server Operators**

Complete with italics, S&B advance the contention that *Wrong Turn* "ignores...the really 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 stewardship made possible only by the consensus of the Internet Community, rather than control."<sup>52</sup> Indeed, their overall case for the legality of DoC's relationship with ICANN rests heavily on this claim. They use it to suggest, first, that the US government cannot be accused of delegating control over the DNS, since DoC has, they say, no meaningful control in the first place.<sup>53</sup> Secondly, they argue on the same principle that ICANN itself has no meaningful control over the DNS, since again the real control rests offstage, in the hands of the Root Server operators, or the nebulous "Internet Community." It follows, if neither DoC nor ICANN really controls anything of importance, that they cannot really be regulating, and that there are no administrative law or constitutional issues of substance to discuss since 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 twelve A-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 DoC, then DoC would indeed become irrelevant to the root. The continued reliance of the root server operators is thus a but for cause of DoC's and thus ICANN's power over the DNS. True as this fact is, there is also a reason why it is of almost no relevance, and it has everything to do with the fact that the US 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

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<sup>50</sup>See *Wrong Turn* at -.

<sup>51</sup>See supra text at note 1.

<sup>52</sup>S&B p. 8 (italics in original). In fact I discussed this issue, notably at pages 64-65.

<sup>53</sup>See infra text at notes -.

control of the root is an important moment in DNS history.<sup>54</sup> If there had been any lingering doubt remaining as to whether the US government controlled the legacy root,<sup>55</sup> 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 US 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.<sup>56</sup>

Quite simply, the last thing in the world the Root Server Operators are going to do is 'split the root'. Every member of the twelve-member club has an effective veto on any move, since anyone who fails to go along ensures that the attempted move would result in a split and therefore insures that the operators favoring the move in principle will forbear.

We come then to the critical fact, mentioned in *Wrong Turn*,<sup>57</sup> but conveniently ignored by S&B in order to support their fairy-tale story of a toothless ICANN and an impotent DoC: Because the US government controls a significant fraction of the root servers, 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.<sup>58</sup> Given the root server operators' reluctance to 'split'

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<sup>54</sup>Wrong Turn at 45, 64-65.

<sup>55</sup>Personally, I think that from a legal point of view that 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 US government directly. See *Wrong Turn* at 62-63. But Postel's failed attempt certainly demonstrated the realities of the situation. Id.

<sup>56</sup>Brian Carpenter, IAB Technical Comment on the Unique DNS Root, RFC2826, <http://www.ietf.org/rfc/rfc2826.txt?number=2826>.

<sup>57</sup>See *Wrong Turn* at p. 141.

<sup>58</sup>Only the "I," "K," and "M" root servers are operated in other countries (Sweden, the United Kingdom, and Japan, respectively). See David Conrad et al., Root Nameserver Year 2000 Status, at <http://www.icann.org/committees/dns-root/y2k-statement.htm>, at Appendix A. Of the non-federal-governmental U.S.-based servers, "C" is operated by psi.net, "D" by the

the root, three out of twelve is more than enough to serve as an effective veto; and six out of twelve would be enough to prevent a majority vote in favor of a change. Thus, S&B's statement that the "USG has absolutely no ability to prevent non-governmental root servers (and especially the non-US root servers) from pointing" to any root<sup>59</sup> is artful, only partly accurate as a formal matter, and misses everything important and relevant about the relationship between ICANN and the root server operators as a whole.<sup>60</sup>

S&B's argument regarding the root server operators is especially ironic since ICANN has been working assiduously for more than a year to take direct control of the 'A' root server (the one that has the data copied by the twelve root servers everyone else depends on).<sup>61</sup> ICANN has also been 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.'<sup>62</sup> What the text of

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University of Maryland, and "F" by the Internet Software Consortium (the group that publishes BIND, see supra note 81). The authoritative list at <ftp://ftp.rs.internic.net/domain/named.root> reports that the "J" root server is "temporarily housed at NSI (InterNIC)." Id. Other sources, however, report that the status of the "J" root server remains to be determined. See, e.g., Conrad, supra; Jun Murai, Root Server System Advisory Committee, Presentation to ICANN Public Meeting, Yokohama, Japan, slide 6, Berkman Center for Internet and Society, at <http://cyber.law.harvard.edu/icann/yokohama/archive/presentations/murai-071500/index.html> (July 15, 2000). [update coming]

<sup>59</sup>S&B at fn 24.

<sup>60</sup>In this context, note S&B at n.69 is especially disingenuous. The 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," is a claim falsified by the US government's direct control of root servers.

<sup>61</sup>See, e.g. Jonathan Weinberg, ICANNWatch.org, *Busy With the Root*, <http://www.icannwatch.org/article.php?sid=142> (May 10, 2001).

<sup>62</sup>See ICANN Board Preliminary Minutes <http://www.icann.org/minutes/prelim-report-21jan02.htm#RelationshipswithRootNameserverOperators> (ICANN Board authorizing president 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> ;

that agreement might be is a secret, something that the ‘bottom-up’, ‘consensus-based’ and ‘open and transparent’<sup>63</sup> ICANN has not yet seen fit to share with the public, and presumably won’t until it is a done deal.

## 2. APA and State Actor 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 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 do. What I argued is both more subtle and more plausible: the APA applies to DoC, and that imposes constraints on DoC’s relationship with ICANN.

### APA

ICANN can be subject to public law constraints, notably the Constitutional requirement of due process, if and only if it is a state actor. Being found to be a state actor requires the actor to behave in conformity with the Constitution. I argued in *Wrong Turn* that ICANN should be found to be a state actor,<sup>64</sup> although I also noted that the ICANN facts fall somewhere between the leading cases on what is and is not a state actor, making the case for state actor status "strong, but not unassailable."<sup>65</sup> *Wrong Turn* does not address whether, were ICANN to be found to be a

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<http://www.lawinfo.com/lawdictionary/dict-m.htm#MOU>

<sup>63</sup>ICANN By-laws <http://www.icam.org/general/bylaws.htm>.

<sup>64</sup>*Wrong Turn* at 113-25.

<sup>65</sup>*Wrong Turn* at 113; see also Duke Law and Technology Review, *An Interview With Michael Froomkin*, 2001 Duke L. & Tech. Rev. 0001 (Feb. 28, 2001) (in which I admit 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 case law against finding private bodies to be state actors without overwhelming evidence."). This is not the place to rehash the arguments over the state action precedents. Suffice it to say that S&B have a very creative way with cases. *Edmonson*, one of the worst cases for their view, they essentially ignore. And their treatment of *San Francisco Arts and Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987). deserves an award for chutzpah. The case held that the US Olympic committee was not a state actor because the necessary element of government control was lacking. Instead of focusing on that issue, they focus on the *dollar value* of ICANN’s support from the US government.

Indeed, there is something unintentionally telling in S&B's sheltering ICANN behind the United States Olympic Committee. The USOC, it will be recalled, was later revealed to be a deeply corrupt, crony-ridden, organization. See George J. Mitchell et al., Report of the Special

state actor, the APA would then apply to it.<sup>66</sup> 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"<sup>67</sup> -- because DoC's activities must comply with the APA. To put this in concrete terms: if ICANN is a federal actor, it faces declaratory judgment actions claiming due process violations, and perhaps suits against its officers under *Bivens*.<sup>68</sup> APA-based lawsuits will name DoC only. Indeed, one such suit, naming DoC but not ICANN, was recently filed in the Eastern District of Virginia.<sup>69</sup>

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 S&B seem inclined to address, perhaps because they view their mission as ICANN's zealous counsel as being to carve 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 (there are a number of things DoC does to which the APA does not apply<sup>70</sup>). This is true whether or not ICANN is a state actor.

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Bid Oversight Commission (Mar. 1, 1999); *Wrong Turn* at 176. ICANN needs oversight to ensure it does not go the way of the USOC. Currently, largely by historical accident, that role falls to the United States government.

<sup>66</sup>It's actually a slightly interesting question, since 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), but it's not a question I addressed in *Wrong Turn*.

<sup>67</sup>*Wrong Turn* at 94.

<sup>68</sup> *Bivens v. Six Unknown Fed. Narcotics Agents*, 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 one and § 1983 applies only to those acting under "color of state law." ICANN is also safe from *Bivens* actions because of the Supreme Court's decision in *Correctional Services Corp. v. Malesko* 122 S.Ct. 515 (2001) (holding that *Bivens* actions can only be brought against individuals, not corporations), a case decided after *Wrong Turn* was published.

<sup>69</sup>Amended Complaint, *Eric S. Board v. Banco De Chile*, C.A. No. CA01-1360-A (E.D. Va. 2002), <http://www.icannwatch.org/essays/bord-complaint.htm>; see also, ICANNWatch, A Very Interesting Lawsuit, <http://www.icannwatch.org/article.php?sid=507> (Jan. 4, 2002) (discussing complaint).

<sup>70</sup>One such exception to the APA's reach applies to government contracts. See *infra* text at note ?.

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 DoC wishes to perform the regulatory functions for which it has by contract engaged ICANN, or in some cases for which ICANN by contract provides rough drafts which are then rubber-stamped by DoC, then *DoC (not ICANN)* can only do so in conformity with the APA. That doesn't mean that ICANN is "subject to the APA"<sup>71</sup> although it is no doubt convenient for S&B to attack that straw man. It means that if DoC wants to continue to do the regulatory things that it's got ICANN doing for it, then DoC must do so via traditional APA procedures for issuing regulations, whether or not ICANN happens to be involved in it.<sup>72</sup>

S&B's response to this, the core of *Wrong Turn*'s APA argument, consists of five contradictory paragraphs.<sup>73</sup> Their five assertions are: (1) that the APA applies only to agency rules and regulations made pursuant to statutory authority, and since no statute authorizes DoC's reliance on ICANN the APA doesn't apply,<sup>74</sup> and (2) in any case, when DoC decides to make an entry into the root zone this is neither adjudication nor rulemaking but rather something else (what that might be is not specified),<sup>75</sup> and (3) "the 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<sup>76</sup>; (4) nor does ICANN's contract to perform the so-called "IANA function" for DOC create APA obligations for the same reason<sup>77</sup>; and (5) notwithstanding points three and four, "DOC has not engaged ICANN to perform services on its behalf"<sup>78</sup>! I am not making this up.

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<sup>71</sup>S&B put these words in my mouth on p. 5, without citation.

<sup>72</sup>After a full privatization, one in which DoC no longer had any ongoing role in DNS rulemaking, there would of course be no ongoing non-delegation issue. There are, however, some difficult legal questions as to how this hypothetical full privatization might be managed without authorizing legislation. See *Wrong Turn* at 32 n.44. In any case DoC continues to say that 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 *infra* note 104 (discussing .us re-delegation by US government).

<sup>73</sup>S&b pp. 23-24.

<sup>74</sup>S&B p. 23.

<sup>75</sup>S&B p. 23.

<sup>76</sup>S&B p. 24.

<sup>77</sup>S&B p. 24 n68.

<sup>78</sup>S&B at p. 24.

These five statements reduce to three issues: whether it is true that "DOC does not" either "make rules or adjudicate individual rights with regard to the root zone"<sup>79</sup> and whether, if DoC does either of those things, either the absence of statutory authorization for them, or the existence of contractual relations between DoC and ICANN take those decisions out of the APA.

The various suggestions that DoC's actions regarding entries to the root are neither adjudications nor rulemakings but instead some nebulous other category is unsupported and unsupported. It could reasonably be asserted that DoC's acquiescence to some of ICANN's decisions might not be the sort of decision that the APA addresses, although I think this founders on the fact that the APA does include "failure to act" as part of its definition of "agency action."<sup>80</sup> But no such argument could seriously be made regarding changes to the content of the root zone, which is a conscious decision that DoC makes independently and indeed explicitly reserves for itself,<sup>81</sup> even if it also tries to disclaim responsibility for it.<sup>82</sup> 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 DoC might lack the statutory authorization to run the root is plausible, but rather than allowing DoC to ignore the APA it would have the effect of making 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 APA<sup>83</sup> is a more substantial argument, but one of only limited reach at best. 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 matter.<sup>84</sup> In considering this issue it is particularly important to distinguish between DoC's direction of ICANN pursuant to the contracts and DoC's actions or inactions with effects on third parties following ICANN's actions. DoC's direction of ICANN is very likely to fall under the contracts exception. Thus, for example, a suit seeking to have DoC direct ICANN to do something is likely to fail. In contrast, once ICANN has spoken, DoC has decisions to make. In

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<sup>79</sup>S&B p. 23.

<sup>80</sup>5 U.S.C. § 551(13); see also *Wrong Turn* at 110-13, 132-38.

<sup>81</sup>See Cooperative Agreement No. NCR-9218742, Amendment 11, <http://www.ntia.doc.gov/ntiahome/domainname/proposals/docnsi100698.htm> (Oct. 6, 1998).

<sup>82</sup>See *supra* note 37. That 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.

<sup>83</sup>5 USC § 5 U.S.C. § 553(a)(2).

<sup>84</sup>See *Wrong Turn* 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.

the case of changes to the root, nothing happens unless DoC acts.<sup>85</sup> Similarly, when DoC wishes to countermand or amend ICANN's decisions, it does so.<sup>86</sup> 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.<sup>87</sup>

## State Actor

*Wrong Turn* argued that ICANN should be found to be a state actor. As S&B note, several courts have held that NSI is not a state actor, and thus neither subject to direct constitutional constraints nor to the APA. S&B write as if this were some sort of great "gotcha."<sup>88</sup> 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 adjudicate<sup>89</sup> in its stead may raise constitutional issues. As the courts have recognized, NSI hews quite well to the classic contractor model. NSI provides services (domain name registrations and registry

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<sup>85</sup>See supra note 81.

<sup>86</sup>One notable example is ICANN's original attempt to capture \$1 for all domain name registrations, see *Wrong Turn* at p. 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*, Washington Business Journal, <http://washington.bcentral.com/washington/stories/2001/05/07/story4.html> (May 4, 2001) (noting DoC's review beginning); ICANNWatch.org, SPIN CYCLE: Commerce Release on Final ICANN/VeriSign Domain Name Registry Deal, <http://www.icannwatch.org/article.php?sid=159> (May 18, 2001) (quoting DoC press release).

<sup>87</sup>See *Wrong Turn* at 126-29.

<sup>88</sup>S&B at pp. 17-19.

<sup>89</sup>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 DoC. Whichever it was, the proceeding was a 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 there is suggestive language in *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 54 (1999); cf. *Wrong Turn* at 116 n.430.

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 DoC's instructions regarding the creation of new gTLDs. It has, from an early date disclaimed the power to create new TLDs, and has never claimed the power to regulate other registries or, modulo some tough near-monopolistic business practices, 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.<sup>90</sup>

ICANN is completely different. It provides no product to the government or to third parties other than regulatory services. S&B's attempt to shelter behind the NSI cases flounders on the obvious fact that NSI's function was to act as registry and registrar. ICANN does neither, indeed is prohibited from doing so by its by-laws.<sup>91</sup> Rather, ICANN generates rules that are binding on all registries, registrars, and all 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 it without consultation with the U.S. government, and without any formal or informal instructions from it. ICANN could never make such a claim since 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 for which ICANN was created and for which the US 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." 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 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"<sup>92</sup> but only where a "traditional public function" is at stake. The case for calling the

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<sup>90</sup>For example, in *Island Online Inc. v. Network Solutions, Inc.*, 119 F.Supp.2d 289 (E.D.N.Y.,2000), there was no suggestion that NSF had ordered -- or even hinted a desire for -- NSI's policy rejecting obscene domain names. Indeed, it was obvious that the government had not imposed this requirement, since the names were registerable via other registrars.

<sup>91</sup>See ICANN By-laws at Art. IV(1)(b), <http://www.icann.org/general/bylaws.htm#IV>.

<sup>92</sup>*Barrios-Velazquez v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico*, 84 F.3d 487, 493 (1<sup>st</sup> Cir. 1996) (quoting *Rockwell*, 26 F.3d at 258).

management of the DNS a "traditional public function" is neither negligible nor iron-clad<sup>93</sup> but while that matters greatly for a determination of NSI's status it is of little relevance to ICANN's status, since the function that ICANN performs for DoC is that of regulation -- and regulation, without a doubt, *is* a traditional government function.<sup>94</sup>

In any case, while ICANN may have some degree of autonomy from the US government -- our knowledge of exactly how much must await the key actors' depositions<sup>95</sup> -- ICANN's major

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<sup>93</sup>See *Wrong Turn* at 118.

<sup>94</sup>See *Wrong Turn* 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 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 only a statement of policy 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 it because they found this logical leap as unconvincing as I do.

Cases relating to government-sponsored enterprises of some limited relevance. It seems fairly clear that ICANN is not a federal "agency" for purposes of FOIA or the Government Corporation Control Act (GCCA) because it is neither a "government controlled corporation" as contemplated by the GCCA nor some "or other establishment *in* the executive branch of the Government." 5 U.S.C. s 552(e); cf. A. Michael Froomkin, *Reinventing the Government Corporation* 1995 Ill. L. Rev. 543, available online <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.

A slightly 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. See 5 U.S.C. § 551(1); 5 U.S.C. § 701(b)(1). 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 DoC's often unquestioning reliance on ICANN's decisions.

<sup>95</sup>Take, for example, S&B's assertion that ICANN "neither sought nor received approval" of the UDRP from the U.S. government. Even if there was no official communication are we seriously expected to believe that ICANN staff never discussed this with Becky Burr, or 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 *Wrong Turn* at 24-25, 69-70, 96, 110; ICANN Status Report to the Department of Commerce, §

decisions taken to date 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, it could in theory act independently. But the real issue for state/federal actor cases isn't the form, it's the substance.

### 3. Non-delegation argument

In advancing a non-delegation argument in *Wrong Turn*, I was much concerned to prove that ICANN "regulates" rather than engaging in mere "standard-setting". If ICANN were limited to standard-setting, as it used to argue, there likely would be no non-delegation issue.<sup>96</sup> It is refreshing to see S&B admit what has, in any case, become obvious, that ICANN "makes policy decisions relating to" the DNS.<sup>97</sup>

*Wrong Turn* argued that if I was wrong about DoC being required to use APA procedures when contracting out for regulatory services, then there was instead a *Carter Coal* issue about 'non-delegation' to a private group. S&B attempt to trash this argument by saying that since there is no Congressional action delegating power to manage the DNS to DoC, much less allowing sub-delegation to ICANN, there can't possibly be a non-delegation issue since the doctrine "prohibits only Congress from delegating its legislative power to any other entity".<sup>98</sup> S&B should go back and read the cases I relied on. This argument might work if I were relying on the traditional non-delegation doctrine of *Schechter Poultry* (although it would then raise a serious *ultra vires* question). The single term 'non-delegation' actually refers to two quite different ideas, and I relied on the other one, the one in *Carter Coal*. That 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 their challenge. It is indeed somewhat odd to speak of a sub-delegation of power from DoC to a private party as violating even *Carter Coal* non-delegation in the absence of legislation clearly allowing it. One would

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I at <http://www.icann.org/statusreport-15june99.htm> (June 15, 1999). That ICANN in fact did what the U.S. government told it to do is not the greatest evidence of its independence.

<sup>96</sup>See *Wrong Turn* at -.

<sup>97</sup>S&B at p. 1.

<sup>98</sup>S&B at p. 3. 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.

devoutly wish for a statute to put 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, validly exercising only the powers delegated to them by Congress. It's equally axiomatic that the Due Process clause applies to all three branches of our government. In light of those 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 DoC's activities.

S&B advance the obvious doctrinal rejoinder to my claim, the counter-assertion that the non-delegation doctrine is dead, *Carter Coal* a dead letter. As noted in *Wrong Turn*, in light of the case law since the New Deal, this argument has more than a little force. Academic authorities tend to be divided between seeing non-delegation as a residual doctrine deployed to justify limiting constructions of potentially over-broad statutes<sup>99</sup> and a historical relic. Recognizing this, I also argued that the ICANN facts are so egregious, the self-dealing so like the facts that prompted *Carter Coal*, itself by far the least obnoxious of the three anti-New Deal 'non-delegation' cases, that it makes a case for why the doctrine, even if thought to 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.<sup>100</sup> Yet, in this sort of case the policy strand is inseparable from the doctrinal one.<sup>101</sup> 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.<sup>102</sup>

#### 4. Factual foundation of USGs authority over the root

The question of the nature of DoC's authority over the root is an interesting one, and in their article S&B advance a novel theory of it. As noted above, part of S&B's argument for why

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<sup>99</sup>See eg Gellhorn casebook.

<sup>100</sup>S&B at 35.

<sup>101</sup>Then again, "Counting published cases ... is meaningless in resolving a fact-intensive question.... Rather, the proper question is which case is most analogous." *Pabst v. Oklahoma Gas & Electric*, 228 F.3d 1128, 1134 (10th Cir. 2000). Here, that is *Carter Coal* and *Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454 (Tex. 1994) .

<sup>102</sup>See, e.g., Steven L. Schooner, *Fear of Oversight: the Fundamental Failure of Businesslike Government*, 50 Am. U.L. Rev. 627 (2001); 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); Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation*, 71 U. Col. L. Rev. 1263 (2000).

ICANN receives no delegated authority from DoC is that DoC has no authority over the DNS to delegate. Here is how they characterize DoC's pre-ICANN role:

the USG, pre-ICANN, depended on the voluntary cooperation of other governments and 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" the USG had available for transfer to ICANN was the administrative responsibility for determining global consensus. This is not governmental power.<sup>103</sup>

S&B provide no support for this extraordinary suggestion that the DoC lacked the legal or practical authority to make changes in the root without the approval of others. And in fact it is not true and flies directly in the face of the posture that DoC has taken in all of its statements to Congress. It is true that both before and after ICANN the U.S. government, perhaps wisely or perhaps because of its thrall to trademark interests, has decided that in most cases discretion was the better part of valor. Even so, in the .us delegation, carried out single-handedly by the US without recourse to the ICANN process, we recently witnessed a clear reminder of the U.S. government's power.<sup>104</sup>

To see just how credible the S&B theory of zero US 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 and/or DoC were to issue a legislative rule, these actions would violate national or international law or somehow exceed the US governments "power"? Second, why is it that both ICANN and some foreign governments keep insisting that the US 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 US government issues an instruction regarding the root file to VeriSign/NSI it would fail to implement it regardless of the presence of absence of dissenting views abroad? Or if the U.S. government were to exercise its right to replace ICANN with some other entity,<sup>105</sup> it would be acting illegally?

Whatever the justice of the matter – and that is debatable – the U.S. has the power to determine outcomes relating to the DNS.<sup>106</sup> At some very extreme point, were the U.S. to abuse

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<sup>103</sup>S&B at 13 (footnote omitted).

<sup>104</sup>See ICANN, Announcement: Redefinition of .us Country-Code Top-Level Domain (Nov. 19, 2001), <http://www.icann.org/announcements/announcement-19nov01.htm> (admitting that "redefinition occurred before the completion of the normal IANA requirements").

<sup>105</sup>See supra note 6.

<sup>106</sup>According to DoC in 1999, "[t]he authoritative root is operated by NSI under the direction of the U.S government." See Courtney Macavinta, C-NET.com, ICANN to control

that power, 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 such acts will only be take on the most extreme provocation.<sup>107</sup>

## 5. 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 accounts for a good deal of its current support. S&B advance a version of this line, suggesting that "if this experiment is not successful, the only practical alternative is some form of multi-national agency or authority."<sup>108</sup> Personally, I don't 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 instead engaged in recapitulating the early procedural errors of federal administrative agencies such as the Federal Communications Commission (FCC).<sup>109</sup>

### What real standard-making would look like

A standard-based (or, at least, standardized) approach to gTLD creation would required 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, or experience. All applicants meeting that standard would be accepted, unless there were so many that the number threatened to destabilize the Internet.<sup>110</sup> ICANN might also put in reasonable limits on the number of TLDs per applicant, and on sequencing, in order to keep all of them going online the same day, week, or

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domain name server (June 30, 1999), <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 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.

<sup>107</sup>See supra text at notes – (discussion of fear of 'breaking the root').

<sup>108</sup>S&B p. 14.

<sup>109</sup>See Jonathan Weinberg (forthcoming).

<sup>110</sup>If there is such a number, it is likely to be very large. See *Wrong Turn* at 22 n.12.

month or even year.

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

- What is the minimum standard of competence (technical, financial, whatever) to be found qualified 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?
- 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 the 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 Department of Commerce's "legacy" root and the so-called "alternate" roots.

### **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, who would be drawn from a wide variety of institutions including NGO's, corporations, inter-governmental and regional bodies, and professional societies.<sup>111</sup> ICANN's functions would be:

- (1) to keep a master list of TLDs;

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<sup>111</sup>The list is illustrative, not exhaustive.

- (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;
- (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.

Each of ICANN's policy partners would be assigned one or more draft choices, and then ICANN would randomly (or, perhaps, otherwise) 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.

While I think this alternate solution would best achieve the ends of internationalization, competition, and diversity, it might well require legislation since it is unclear if the Department of Commerce has the will (or the authority) to implement 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.

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, and the very crabbed and limited proposals that ICANN is prepared to approve are substantially unequal to the task. Furthermore, representation structures that increase legitimacy for ICANN's new functions 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 entrenched, as they now are, the very non-representative structures that enable function creep can be used to block representation.

## Conclusion

Despite S&B's attention to straw men, the main issue from an administrative and public law perspective is not ICANN but DoC's reliance on ICANN. DoC relies on ICANN to advise it, and to take sets of decisions that the White Paper suggested DoC desires, but that DoC does not choose to take directly. When DoC allows ICANN's decisions to go forward without countermand, and most clearly when DoC itself acts on ICANN's advice, DoC commits the sort of agency action that the APA and the Constitution exist to constrain. And if 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 non-delegation-to-private-parties doctrine, or at least to embark on an open discussion of the implications for democratic accountability in the modern administrative state if we allow agencies to contract with ICANN-like bodies to make de facto regulations for them.<sup>112</sup>

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. Nor does it seem likely that public law is a tool that can compel this result.<sup>113</sup> ICANN, a formally private California non-profit organization, has no legal obligation to be democratically accountable -- even if it is a federal actor, its duties run to due process not representation or decentralization. Nor, despite the title of S&B's article, does *Wrong Turn* argue that the APA applies directly to ICANN.

The US government could have chosen a different relationship with ICANN. We have available workable and clearly constitutional models of how an agency interacts with a self-regulatory organization (SRO). The SEC's relationship with 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, and for this neither the Clinton administration, nor ICANN at any time, had any desire.

In choosing how to decide any APA or public-law controversy spawned by DoC's reliance on ICANN, a reviewing court will almost inevitably be forced to navigate between form and

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<sup>112</sup>Cf. Kenneth Culp 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").

<sup>113</sup>Some small gains may be possible via private law. See Froomkin & Lemley, *supra* note -.

substance. Leaving aside their exaggerations and misrepresentations, S&B's 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. DoC's relationship with ICANN is one of contract. And the contracts don't seem to say much. Third parties are not in privity with, are not involved in, issues of power over the root. Indeed, that power itself is chimeral since 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.<sup>114</sup> But it would be an avoidable error. As I sought to detail in *Wrong Turn*, and to suggest in this essay, one need not look very far underneath the surface to discover that the substance of DoC 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 DoC can and on occasion does exercise control over the root, the extent to which DoC keeps ICANN on a short leash, and the consequences that would flow were DoC to de-recognize ICANN and instead recognize another body in its place, and you begin to see things to which Joe Sims and Cynthia L. Bauerly seem to have closed their eyes very tightly indeed.

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<sup>114</sup>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). See supra note 94.