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Engaging Government, Business, and Nonprofits

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Governing the Internet

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Zoë Baird

The rapid growth of the Internet has led to a worldwide crisis of governance. In the early years of Internet development, the prevailing view was that government should stay out of Internet governance; market forces and self-regulation would suffice to create order and enforce standards of behavior. But this view has proven inadequate as the Internet has become mainstream. A reliance on markets and self-policing has failed to address adequately the important interests of Internet users such as privacy protection, security, and access to diverse content. And as the number of users has grown worldwide, so have calls for protection of these important public and consumer interests. It is time we accept this emerging reality and recognize the need for a significant role for government on key Internet policy issues.

To do so without stifling innovation will require government to operate in unfamiliar ways, sharing power with experts in the information technology (IT) community, with business, and with nonprofit organizations. The first-mover advantage exists in policymaking as well as in business, and some commercial

interests are moving as fast as they can to define Internet rules to their benefit without regard for the public interest. To achieve an Internet that reflects a commitment to public good as well as to commercial interests, we have to create more pluralistic models for Internet governance, models in which governments, industry, and nonprofit organizations craft policy—balancing each other and working together in transparent processes that earn the public’s trust.

Many of the initial Internet oversight bodies emphasized self-regulation, bottom-up control, decentralization, and privatization, reflecting a conviction that government would never “get it” or move fast enough to keep pace with technological change. Often, engineers set the standards and industry set the consumer models largely outside of the public eye. As one Internet innovator, John Perry Barlow, wrote in his “Declaration of the Independence of Cyberspace,” “Governments of the Industrial World, you weary giants of flesh and steel . . . On behalf of the future, I ask you of the past to leave us alone. . . . You do not

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know our culture, our ethics, or the unwritten codes that already provide our society more order than could be obtained by any of your impositions.”

The loose and creative work of cyberspace pioneers served the Internet superbly as it was being formed and into its early maturation. But now some previously vaunted notions of efficient, private, speedy self-governance are failing to meet expectations. Tensions have arisen over such issues as whether a country has jurisdiction over Internet activities originating in other countries, whether regulation of content such as hate speech and pornography is appropriate, how different privacy protections should apply, and who gets space on prime virtual real estate such as dot-com. In addition, post-September 11 concerns about security in a networked world call into question the wisdom of keeping government off to the shoulder of the information superhighway.

A NEW MODEL OF GOVERNANCE

The reality is that government participation in regulating the Internet is necessary. Given the new economic and geopolitical environment, finding the right balance between an open, networked system and the security of a more closed environment requires significant participation by government. Although governments do not all share the same values, they are the only institutions that can provide stability and a place for debate over what public values need to be protected. These issues are significant policy questions that require democratic resolution, not just technical matters that can be left to experts. As Stanford University Law School Professor Lawrence Lessig has argued, in the digital age software code is

law because software developers can shape the Internet's technical architecture in ways that guide or restrict users' experiences.

Indeed, despite some wariness, the American public indicates a clear preference for government involvement. In a study conducted by the Markle Foundation and Greenberg Quinlan Rosner Research in 2001 (prior to September 11), respondents said by a two-to-one margin that “the government should develop rules to protect people when they are on the Internet, even if it requires some regulation of the Internet.” Thus the goal should no longer be keeping government out of cyberspace, but finding a way to make governmental oversight and intervention as speedy, agile, and technologically savvy as the medium demands.

The borderless nature of the Internet makes effective Internet governance even more challenging. Establishing the proper role for government inevitably means discerning the parts to be played by different countries and also the multilateral organizations they have formed. International forums on IT will play a critical role in writing the rules of the game for the next phase of world economic, political, and cultural history. However, to be legitimate, global governance forums will also need improved democratic processes.

International institutions engaged in Internet governance will have to confront three significant challenges if they are to achieve legitimacy: increasing participation by developing countries, providing access to nonprofit organizations, and ensuring democratic accountability.

Developing countries face some major barriers to participation. A recent study conducted under the auspices of the Digital Opportunity Task Force of the G-8 group

of highly industrialized nations found that developing countries often lack the financial and human resources necessary to take part effectively in important venues. Moreover, complicated policy processes and decision-making arrangements leave poorer countries at a disadvantage within individual institutions. The multiplicity of institutions addressing IT policy also makes it hard for developing nations to contribute. These barriers are further raised by the intrinsic complexity of new technologies, by the difficulty of keeping pace with industry and consumer economic priorities, by a dearth of effective models for inclusive policymaking, and by the lack of financial resources for experts and travel.

If left unaddressed, this situation can devolve into a downward spiral in which stakeholders who feel shut out either obstruct or ignore IT policy efforts. A major obstacle to the success of governance institutions will exist as long as developing countries feel they do not have the expertise or the resources to understand whether the actions of these bodies are in their interest—and thus will often prefer to block action rather than accede to initiatives.

Barriers also exist to the participation of nonprofit organizations in global Internet governance. Principally, these barriers arise because of a lack of recognition that Internet policy issues need to be decided in governance institutions that involve representation not only from governments and businesses, but also from broader constituencies representing the public interest. As public protests surrounding meetings of the World Trade Organization (WTO), the International Monetary Fund, and the World Bank have made clear, economic globalization and accelerating

technological change raise significant public policy questions. The debates over global governance that arose in those venues are now also taking place in the IT world, where questions about participation, accountability, and transparency are becoming increasingly urgent. Nonprofits can contribute to the governance process by developing, articulating, and synthesizing noncommercial views, and also by providing leadership, resources, and public-spiritedness.

The voices of developing nations and civil society need to be heard, and they must be able to participate with equal dignity in global Internet governance if they are to successfully influence Internet policies or, if not, at least accept those policies as legitimate. All three sectors—government, business, and nonprofit—from both developing and developed countries need to have seats at the table when Internet policy is made. Democratic governments provide public accountability and possess enforcement and oversight capabilities; the private sector offers technological expertise and a driving culture of innovation; and nonprofit organizations, which are less bureaucratic than governments and less commercially motivated than businesses, provide their own expertise and inspire confidence through their focus on the public interest. No single institution or sector is equipped to handle the task on its own.

Finally, Internet governance structures must usher in improved openness and accountability. Nontraditional bodies (such as the Internet Corporation for Assigned Names and Numbers [ICANN], the World Wide Web Consortium, or TRUSTe) that engage in Internet regulation and oversight have arisen in recent years, but their

decision-making processes are too often both inaccessible and unaccountable to those most affected.

Ultimately, achieving transparency and accountability is in an institution's own self-interest. Establishing clearly the scope of authority of a governance organization and the rationale for its actions increases its effectiveness and bolsters its credibility.

I THINK ICANN

The current debates about ICANN are a harbinger of future dilemmas of Internet governance. ICANN remains the frontier institution and the test case for global governance in the IT sector.

The U.S. government created ICANN in 1998 as a private, nonprofit corporation to regulate the Internet's unique identifier systems, including the domain name system (DNS). This may sound like an arcane topic, but the DNS is vital to the Internet's operation. It is an instructive example of the kind of seemingly technical issues that have major economic and policy implications needing to be addressed through effective governance models. For example, whoever controls the DNS will determine what new suffixes, such as "com" or "org" (known as top-level domain names, or TLDS), can come after the "dot" in Internet addresses. ICANN is also slated to take control of the root-server system, the authoritative database of all TLDS and the means by which individual computers are able to "find" Web sites or Internet addresses. In the words of ICANN's Committee on Evolution and Reform, "ICANN serves as the global Internet community's open policy-making forum" for these general-purpose TLDS and therefore offers "dispute resolution, business models, and mechanisms for local community participation and policymaking."

When ICANN recently chose new TLDS, however, it never explained or documented its decision-making process. Representative Edward Markey (D-Mass.) of the House Telecommunications and Internet Subcommittee complained, "Events at the Vatican are shrouded in less mystery than how ICANN chooses new domain names."

Although ICANN was created by the U.S. government, no government official from any country has a seat on the organization's board; governments play, at best, only an advisory role. Recognizing the wide spectrum of groups with a stake in the Internet, ICANN has created a decentralized structure of supporting organizations, advisory committees, working groups, and task forces from which it aims to distill agreement about the Internet's future direction. It was also called on to involve ordinary users in its work in an unprecedented manner. In 2000 ICANN held direct elections for almost half its board of directors, theoretically allowing anyone in the world with an e-mail address to vote. As the first election of its kind, it was not particularly successful because it had severely limited resources and because there was little consideration of what constituted a legitimate constituency or adequate representation. In fact, the ICANN election demonstrated the impossibility of securing genuinely global representation through direct elections. But, importantly, it did succeed in establishing that there are public policy implications of ICANN decisions and that adequate representation of the public interest is needed.

In February 2002, ICANN's own president, Stuart Lynn, joined the chorus of critics who complained that the organization was not sufficiently open or accountable

to the vast global public it serves. Lynn declared that ICANN was overburdened with process, lacked necessary funding and participation from crucial stakeholders, and was in danger of failing its mission if it kept to its present course. Lynn proposed shrinking the size of the ICANN board, increasing its authority, and scrapping direct elections in favor of government representatives—prompting long-time ICANN critic Professor Michael Fromkin to gibe, “It is strange that ICANN, which was created to save the Internet from governments, is now turning to governments to save it from the Internet.” The review process following Lynn’s proposal—including congressional hearings, the ICANN Committee on Evolution and Reform, and the actions of the board itself—illustrates the challenges in moving toward a more accountable governance structure that will represent all stakeholders. The process to date has moved slowly, produced thin results, and emphasizes the need for greater attention to the course of the transition to better Internet governance.

ICANN’s credibility as a global manager of critical parts of the Internet’s infrastructure depends on the board’s ability to ensure that all the various private and public interests are represented. Government involvement is one step toward providing public-interest representation but is insufficient on its own. Only with truly broad representation on its board—including nonprofit organizations—can ICANN adequately address the crisis of legitimacy that plagues it. As most observers would agree, ICANN, in spite of being organized as a private, nonprofit corporation, still performs “public trust” functions. If ICANN is not to become a

governmental entity, then it must implement a better system of decision-making and must not abandon the goal of ensuring public representation.

Furthermore, ICANN must take steps to bolster transparency and accountability. These steps should include some kind of public oversight by politically accountable officials; development of due-process principles and clear, publicly available procedures for the resolution of complaints; public disclosure of its funding sources and budgets; staff and board members who are held accountable to a clear set of professional norms and standards; open meetings; and documentation of the rationale for ICANN’s policy decisions and actions.

These challenges were recognized in the amended September 2002 memorandum of understanding (MOU) between the U.S. Department of Commerce and ICANN. The MOU extends ICANN’s mandate for one year and provides for heightened scrutiny of its accountability, transparency, and responsiveness to Internet stakeholders. Over the next year, ICANN will need to show substantial progress if it is to gain the confidence of the Internet community and warrant its continued role in IT governance.

THE ROAD AHEAD

Any organization that attempts to make global IT policy must encourage worldwide public participation. Some international policymaking bodies have begun trying to engage broader constituencies. The World Intellectual Property Organization, for example, has assisted stakeholders that have limited or no means of participation, providing them with training, information, equipment, and support.

The WTO helps promote developing-country participation in governance through regular training sessions on trade policy in Geneva; technical cooperation activities, including seminars and workshops in various countries; and Trade Reference Centers for more than 75 poor countries, which provide trade ministries with the IT required to access the WTO Internet site and other trade-related sites, including electronic databases. Whereas there was little possibility for direct public involvement in WTO proceedings prior to the 1999 Seattle protests, today the organization is trying to broaden participation through explicit outreach to individuals, including more transparency and more information posted on the Web. In addition, interested parties may now submit comments to the WTO.

These developments are a welcome start, yet much remains to be done. Take TRUSTE, a nonprofit entity substituting for government in certifying Web sites' privacy policies. When Yahoo abruptly changed its privacy preferences for customers without their consent, TRUSTE allowed Yahoo to continue to carry its "trustmark" without being held accountable to users who relied on the seal's integrity.

In contrast, under the safe-harbor provisions negotiated between the United States and the European Union, the self-regulation of corporations will be backed by the enforcement powers of governments. These safe-harbor provisions were drafted to bridge the gap between divergent U.S. and European approaches to privacy protection.

It is too soon to tell which system, that exemplified by TRUSTE or one based on the safe-harbor provisions, will be most effective. The bottom line, however,

is clear: increasing the perceived legitimacy of international governance institutions and regimes demands greater accountability and transparency.

The Internet has become part of the mainstream, and therefore mainstream governmental institutions will be expected to step in to protect people from harm and encourage innovation. But government cannot do this alone without the know-how and creativity of both the business world and civil society. A pluralistic and broad-based model is needed. It will be difficult to create the norms and institutions required for different sectors to work together in equal partnership, yet experiments such as the G-8 Digital Opportunity Task Force and the UN Information and Communications Technologies Task Force already show promise. Both were set up by governments but are led by a mix of government, business, and non-profit organizations from the developed and developing worlds.

Making fair and effective public policy in our networked society is an enormous challenge, and one that will not be overcome simply by recognizing the inherent complexities of the process. The road ahead may not be easy, but keeping the global public interest at the forefront will steer Internet governance in the right direction. 🌐