# EDITORIAL COMMENT

## GOVERNING THE INTERNET

*By Kal Raustiala\**

In Giuseppe Tomasi di Lampedusa's classic 1958 Italian novel *The Leopard*, a central character famously declares: "If we want things to stay as they are, things will have to change."[1] Much the same can be said of the strategy of the United States with regard to governance of the Internet. The Internet began as a niche tool of a small number of U.S.-based engineers and academics, funded by the U.S. Department of Defense. Today, it is a massively popular and transformative global resource of the first order. Of the over three billion current users, the vast majority live outside the United States. That evolution, in turn, has raised many questions about why the United States—the uncontroverted birthplace of the Internet and base of many of the world's most powerful and creative information technology firms—still retains an outsized role in Internet governance. Governance in the Internet's early years was loosely exercised by an insular group of enthusiasts and experts. Later, as the Internet boomed in the 1990s, control was asserted more directly by the U.S. federal government, which then delegated significant power to a California nonprofit entity known as the Internet Corporation for Assigned Names and Numbers (ICANN). Since 1998, ICANN has operated pursuant to a contract with the U.S. Department of Commerce.

On June 9, 2016, the Department of Commerce formally approved ICANN's proposal to transition out of its long-standing contract and assume independent management of the critical "naming and numbering" function of the Internet.[2] ICANN—governed by a complex multistakeholder structure—will directly control what is essentially the address book of the Internet: the ability to generate and assign new top-level domain names; the means to ensure that when one types, say, www.asil.org that it goes to the right website; the power to designate who adjudicates disputes over website names; and so on. The U.S. executive branch's

[1] GIUSEPPE TOMASI DI LAMPEDUSA, THE LEOPARD 40 (Archibald Colquhoun trans., 1960).

[2] *See* Brian Fung, *The U.S. Just Took One Step Closer to Privatizing a Core Part of the Internet*, WASH. POST, June 9, 2016, *at* https://www.washingtonpost.com/news/the-switch/wp/2016/06/09/the-u-s-just-took-one-step-closer-to-privatizing-a-core-part-of-the-internet; Edward Wyatt, *U.S. to Cede Its Oversight of Addresses on the Internet*, N.Y. TIMES, Mar. 14, 2014, *at* http://www.nytimes.com/2014/03/15/technology/us-to-give-up-role-in-internet-domain-names.html?_r=0; Press Release, NTIA, NTIA Announces Intent to Transition Key Internet Domain Name Functions (Mar. 14, 2014), *at* https://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions [hereinafter NTIA Press Release]. Internet governance is more than the functions performed by ICANN, but these functions receive the lion's share of public attention. For simplicity, I use "Internet governance" to refer to these functions. Indeed, one can go far wider. *See* Joseph S. Nye Jr., *The Regime Complex for Managing Global Cyber Activities* (Global Comm'n on Internet Governance, Paper Series No. 1, May 2014), *available at* https://www.cigionline.org/sites/default/files/gcig_paper_no1.pdf.

announcement of this anticipated transition was not without controversy. Indeed, it has been denounced in Congress as a giveaway on par with President Jimmy Carter's transfer of the Panama Canal.[3] On Twitter, former speaker of the House of Representatives Newt Gingrich declared: "Every American should worry about Obama giving up control of the internet to an undefined group. This is very, very dangerous."[4] Despite these protests, the U.S. government has continued moving forward to formally divest itself of its special role. That makes it a propitious time to consider the implications for international law and global governance of this latest chapter in the evolution of the Internet, especially since, despite its global importance, the Internet remains little studied by international lawyers.

In this essay, I argue that the U.S. strategy toward Internet governance is aimed, consistent with Tomasi di Lampedusa's famous dictum, at changing some valued things in order to preserve some other, even more valued, things. What will be changed is the ostensible U.S. control over the naming and numbering function of the Internet.[5] What will be preserved are the features of the Internet that successive U.S. administrations—and many users—value highly: its high degree of openness, its diversity, its completeness, and its fundamental resilience. Those features have been a product of, and have also helped produce, the elaborate multistakeholder governance structure that exists today. By delegating more autonomy to ICANN, the United States will strengthen multistakeholderism still further, not just for ICANN, but as a broader principle of global governance. Just as importantly, the transition will help to forestall efforts to multilateralize Internet governance. Indeed, it is not too much of a stretch to say that the Internet has been, over the past two decades, a central site of struggle between multilateralism and multistakeholderism.

By relinquishing its role as *primus inter pares* among states, the United States seemingly will lose an important source of power and control over the Internet. And yet even as its *power* is diminished, the achievement of its *preferences* will be strengthened. This somewhat paradoxical story has important lessons not only for the exercise of state power over the Internet but also for the evolution of global governance in a time when increasing numbers of nonstate actors across a range of international issues have sought—and have often achieved—substantial participatory roles.[6]

## I.

The Internet was originally designed neither for mass use nor for commercial application. It was a tiny system with only a few nodes, then a U.S. Department of Defense-funded project known as the ARPANET (Advanced Research Projects Agency Network).[7] All the nodes were

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[3] Jonathan Zittrain, *No, Barack Obama Isn't Handing Control of the Internet Over to China*, NEW REPUBLIC, Mar. 24, 2014, *at* https://newrepublic.com/article/117093/us-withdraws-ICANN-why-its-no-big-deal.

[4] Newt Gingrich (@newtgingrich), TWITTER (Mar. 14, 2014, 2:55 PM), *at* https://twitter.com/newtgingrich/status/444592735983390720.

[5] I discuss the relatively weak basis of federal government assertions of control below.

[6] *See, e.g.*, JONAS TALLBERG, THOMAS SOMMERER, THERESA SQUATRITO & CHRISTER JÖNSSON, THE OPENING UP OF INTERNATIONAL ORGANIZATION: TRANSNATIONAL ACCESS IN GLOBAL GOVERNANCE (2013); Kal Raustiala, *The Role of NGOs in Treaty-Making*, *in* THE OXFORD GUIDE TO TREATIES 150 (2012); Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AJIL 348 (2006).

[7] Nye, *supra* note 2, at 5.

located in the continental United States. The first use of the Internet as a communications platform was a message sent from UCLA to Stanford on October 29, 1969.[8] From the beginning, the Internet was a public-private partnership, the U.S. government had an outsized role, and California was the source of many key players. All three of these characteristics remain true today, though on a vastly different scale and in a world with not just a handful of Internet users but instead around 3.2 billion.[9]

Today's Internet has taken the protocols of the old ARPANET to become a global network of many interconnected networks.[10] Perhaps surprisingly, as discussed further below, no clear governance structure for this vast apparatus exists, and, indeed, considerable confusion has arisen over who owns and controls some of the most vital aspects. Yet governance is essential for the continuing efficacy of the Internet as we know it. For example, domain names (.edu, .gov, .com) and Internet Protocol (IP) addresses must be standardized and uniform for the Internet to work effectively. And control over these processes, while technical at some level, has very important political and legal implications. To see these issues, consider domains like .crimea, .isis, or .palestine, or even .xxx. Domain names can have great political and economic value, and powerful states have an interest in using, or suppressing, certain domain names. Websites are similar. Access to specific websites can be blocked within states, as China does with its so-called Great Firewall where not only the *New York Times* is blocked, but also Twitter and YouTube.[11] But in the absence of control over the global assigning of names and numbers (what is known as the "root zone" or "root file"), comprehensive censorship of the Internet as a whole is inhibited.

Governance of these crucial naming functions, which insiders call the "Internet Assigned Numbers Authority," or "IANA function," has evolved in unusual ways since the Internet's birth in the late 1960s.[12] The early Internet was dominated by a small coterie of mostly American computer scientists and engineers; intellectual property rights, legal claims, and commerce were not high priorities. Governance was loose and informal and, until it began to become clear

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[8] JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET—AND HOW TO STOP IT 27 (2008) ("The UCLA programmers typed "log" to begin logging in to the Stanford computer. The Stanford computer crashed after the second letter, making "Lo" the first Internet message.").

[9] Int'l Telecomm. Union [ITU], *[Information and Communications Technology (ICT)] Facts & Figures: The World in 2015* (2016), *at* http://www.itu.int/en/ITU-D/Statistics/Pages/facts/default.aspx. To learn more about the key role of California and its culture, see generally SCOTT MALCOMSON, SPLINTERNET: HOW GEOPOLITICS AND COMMERCE ARE FRAGMENTING THE WORLD WIDE WEB 71–137 (2016).

[10] *See* ICANN, ICANN Strategic Plan July 2010 –June 2013, at i (Feb. 19, 2010), *available at* https://www.icann.org/en/system/files/files/strategic-plan-2010-2013-19feb10-en.pdf (noting that "ICANN's community-developed policies govern over 180 million domain names, the allocation of more than four and a quarter billion network addresses, and support a trillion daily [domain name system (DNS)] look-ups across 240 countries and territories, connecting billions of computers, phones, and other devices, across the Internet"); ICANN, ICANN Strategic Plan for Fiscal Years 2016 –2020, at 7 (Oct. 10, 2014), *available at* https://www.icann.org/en/system/files/files/strategic-plan-2016-2020-10oct14-en.pdf ("In 2013, 35 percent of the world's population was online, with almost half in Asia. There are over 635 million websites accessed through more than 200 million domain names. . . . By the time ICANN's Five-Year Strategic Plan is complete in FY2020, it is estimated that 63 percent of the world's population will be online (five billion users) . . . .").

[11] *See, e.g.*, *The Great Firewall: The Art of Concealment*, ECONOMIST, Apr. 6, 2013, *at* http://www.economist.com/news/special-report/21574631-chinese-screening-online-material-abroad-becoming-ever-more-sophisticated.

[12] ICANN, The IANA Functions: An Introduction to the Internet Assigned Numbers Authority (IANA) Functions (Dec. 2015), *available at* https://www.ICANN.org/en/system/files/files/iana-functions-18dec15-en.pdf.

that domain names had real value, relatively uncontested. The birth of groups such as the Internet Engineering Task Force, founded in 1986, and the Internet Society, founded in 1992, reflected the fact that during this era the Internet was rapidly evolving and that a more elaborate organizational structure was needed. But change was slow. Prior to 1998, the initial work of awarding IP addresses and domain names was, under a Department of Defense contract,[13] largely handled by one person: Dr. Jon Postel, a researcher first based at UCLA and later at the University of Southern California. Postel enjoyed a unique power and position over the IANA function, one so central that in 1997 *The Economist* declared that "if the Net does have a god, he is probably Jon Postel."[14]

Yet, by the mid 1990s, it was becoming clear that the Internet had substantial commercial value, beyond its research value, and that domain names were in turn a valuable form of property. Myriad ownership claims and disputes ensued, including not only questions of who owned a given domain name, but also—and most importantly—who controlled the right to award such a domain name.[15] Struggles between the Internet Society and other groups reflected the growing sense that a more formal governance structure was required. Yet, because the Internet had evolved organically, with little thought that it could or would become a major economic and political resource, basic questions of ownership were surprisingly hard to answer. Indeed, in response to a 1995 Internet Society proposal to revamp the awarding of domain names, a U.S. government official responded by asking, "Is [the Internet Society] claiming that it has jurisdiction and overall responsibility for the top-level address and name space? If yes, how did [it] obtain this responsibility; *if no, then who does own it?*"[16]

These were excellent questions. With use of the Internet growing explosively, in 1995 the National Science Foundation called a conference to try to get to the bottom of the matter. The assembled stakeholders swiftly discovered that they had wildly divergent views. A Department of Defense participant, however, made clear one very important view. The Department of Defense had funded the creation of the original ARPANET and still funded Postel's operation; therefore, the participant asserted, the Department of Defense owned the name and address space.[17] This position was reinforced by a high-level U.S. government adviser, who publicly stated that "any attempt to manipulate the root without the U.S. government's permission would be prosecuted as a criminal offense."[18] Underlying all these claims "was a belief that, in the end, the United States and no one else possessed ultimate authority over the Internet's deep structure, including naming and numbering authority."[19]

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[13] Letter from Robert P. Murphy, General Counsel, U.S. General Accounting Office, to Judd Gregg, Ranking Minority Member, Subcommittee on Commerce, Justice, State, and the Judiciary, and Harold Rogers, Ranking Minority Member, Subcommittee on Commerce, Justice, State, and the Judiciary, and Related Agencies, Committee on Appropriations, U.S. Senate, B-284206, at 17–18 (July 7, 2000), *available at* http://www.gao.gov/assets/90/89949.pdf [hereinafter GAO Summary].

[14] *Postel Disputes*, ECONOMIST, Aug. 2, 1997, at 88 (citing NETWORKER (Summer 1997)).

[15] For brevity, I leave out the role of Network Solutions, a Virginia-based firm that for several key years in the 1990s was awarded the contract to administer the Internet's name registry.

[16] MILTON L. MUELLER, RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE 136 (2002) (emphasis added).

[17] *Id.* at 137.

[18] *Id.* at 162.

[19] JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD 41 (2006).

Yet what was the source of this ultimate authority? The legal foundation of such a claim is surprisingly weak, and the U.S. government—though plainly a funder and progenitor of much of the early Internet—does not appear in any sense to possess something like title over the Internet.[20] While the precise scope of U.S. authority was uncertain, many believed that the United States continued to be substantively entitled to wield a special power over the Internet. A 2015 Congressional Research Service report reflects this view, arguing that the existing contract between the U.S. government and ICANN confers upon the U.S. government a "stewardship" role over naming and numbering.[21] This stewardship role

> does not mean that the [United States] controls ICANN or has the authority to approve or disapprove ICANN policy decisions. Rather, the U.S. government's authority over the IANA functions has been viewed by the Internet community as a "backstop" that serves to reassure Internet users that the U.S. government is prepared and positioned to constitute a check on ICANN under extreme circumstances . . . .[22]

Regardless of the legal basis or precise nature of U.S. authority, as the Internet rapidly expanded across the world, the notion that such an invaluable global resource should be largely controlled by a single state struck many as untenable.[23] And soon more international voices were weighing in, including, most significantly, that of the International Telecommunication Union (ITU). The ITU was critical of what it saw as the Internet's amateurish and unsophisticated governance arrangements, such as the central and idiosyncratic role played by Postel. Moreover, as Milton Mueller, a leading historian of the Internet, explains,

> A deeper agenda underlay the ITU's interest in domain name issues. As the intergovernmental organization that had presided for decades over a regime of state-owned telephone monopolies, the ITU was uncertain of its role and status in a new, liberalized order. With the Internet on the rise, private-sector-led standards forums proliferating, and the days of traditional, circuit-switched telephone service seemingly numbered, the ITU needed to assert a role for itself in Internet governance . . . . The governance debates presented it with an opportunity to establish itself as an actor in that arena.[24]

## II.

For the ITU, and many others in the international community, the Internet was simply a new communications medium that ought to be governed collectively via the traditional tools of international law and international organization. The ITU saw itself as the natural home for

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[20] *See* Zittrain, *supra* note 3. A U.S. General Accounting Office (GAO) report from 2000 noted the substantial ambiguity over these questions. As it reported, "Determining whether there is government property may be difficult. To the extent that transition of the management control to a private entity [ICANN] would involve the transfer of government property, it is unclear if the Department [of Commerce] has the requisite authority to effect such a transfer." GAO Summary, *supra* note 13, at 4.

[21] LENNARD G. KRUGER, CONG. RESEARCH SERV., R44022, THE FUTURE OF INTERNET GOVERNANCE: SHOULD THE UNITED STATES RELINQUISH ITS AUTHORITY OVER ICANN? 2 (2016), *available at* https://www.fas.org/sgp/crs/misc/R44022.pdf.

[22] *Id.*

[23] Samantha Bradshaw, Laura DeNardis, Fen Osler Hampson, Eric Jardine & Mark Raymond, *The Emergence of Contention in Global Internet Governance* 3 (Global Comm'n on Internet Governance, Paper Series No. 17, July 2015), *at* https://www.cigionline.org/sites/default/files/no17.pdf.

[24] MUELLER, *supra* note 16, at 138 (citation omitted).

such multilateral governance. On the other side was the nonstate actor-led and informal multistakeholder tradition that had in practice managed the Internet since its birth. Proponents of informal multistakeholderism believed that interested parties—generally understood as engineers, computer scientists, network operators, Internet users, and the like, as well as government regulators—could and should govern the Internet collectively. And rather than legal rules and formal procedures, they preferred inclusive deliberation and rough consensus. The problem was that little agreement existed within this community over who ought to wield what power when consensus proved elusive. While the loose methods of the past worked when the Internet was a small resource populated by generally like-minded users, the Internet had, by the 1990s, long since become something quite different.

In 1996, a group of actors—including the Internet Society, the World Intellectual Property Organization (WIPO), the ITU, and the International Trademark Association—tried to create an encompassing framework that would rationalize governance of the Internet. These various groups negotiated a nonlegally binding agreement on "generic Top Level Domains" (gTLDs), such as .com or .edu. The agreement was known as the "gTLD-Memorandum of Understanding" (gTLD-MOU). As Daniel Drezner recounts, "The gTLD-MOU proposed assigning governance functions to an entity housed in the ITU, with representation from business interests, [intergovernmental organizations (IGOs)], and [the Internet Society]. The ITU arranged a 'formal' signing ceremony in Geneva in March 1997 to give the agreement the trappings of an international treaty."[25] In a keynote address at this unusual conclave, the ITU secretary-general, Pekka Tarjanne, hailed the gTLD-MOU as a shining example of what he called "*voluntary multilateralism*."[26] Tarjanne pointed to the many faults in the existing informal system of Internet governance:

- It is too dependent on the goodwill of a small group of people who are doing the job largely by historical accident, because they were in the right place at the right time;

- The most popular gTLDs are handled by an organization which holds a monopoly over the registration and award of those domain names. As Adam Smith pointed out, a private monopoly is potentially worse than a public one;

- The current system is dominated by actors in just one country, the United States, to the exclusion of others;

- It does not give adequate attention to the protection of trademarks and other intellectual property;

- It lacks formal structure and legitimization.[27]

The ITU secretary-general closed his address to the assembled Internet enthusiasts with the case for multilateralism—specifically, ITU-style multilateralism. "I am fully aware," Tarjanne

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[25] Daniel W. Drezner, *The Global Governance of the Internet: Bringing the State Back In*, POL. SCI. Q., Fall 2004, at 477, 494; *see also* GOLDSMITH & WU, *supra* note 19, at 37–39.

[26] Pekka Tarjanne, ITU Secretary-General, Keynote Address at the Internet Domain Names Information Session at the Meeting of Signatories and Potential Signatories of the Generic Top Level Domain Memorandum of Understanding: Internet Governance—Towards Voluntary Multilateralism (Apr. 29, 1997), *available at* https://www.itu.int/newsarchive/projects/dns-meet/KeynoteAddress.html.

[27] *Id.*

declared, "that ITU cannot expect to be awarded this responsibility by right but must be seen to earn it by undertaking the tasks efficiently. I intend to ensure that we do."[28]

The unusual gTLD-MOU ceremony in Geneva came as a surprise to many governments. Some saw it as a naked power grab by an increasingly moribund ITU. It sparked substantial pushback from the Clinton administration, which believed itself to be the ultimate arbiter of the Internet's future. Secretary of State Madeleine Albright blasted the ITU secretariat "for acting 'without authorization of member governments' to hold . . . 'a global meeting involving an unauthorized expenditure of resources and concluding with a quote international agreement unquote.'"[29] The United States had developed neither a position on the gTLD-MOU, Albright noted, "nor on the appropriate role, if any, of the ITU, WIPO or other international organizations in the administration of the Internet."[30] Still, however dubious the legal significance of the gTLD-MOU, the writing was on the wall. The Internet had outgrown its original governance structure; leading international actors were jockeying for position. The Clinton administration decided to take matters into its own hands.

The White House believed that the private sector ought to be deeply represented in governing the chief functions of the Internet, which they rightly foresaw was rapidly becoming a fundamental economic platform. The key question was whether governance of crucial features, such as the IANA function, would be managed within a traditional multilateral organization, such as the ITU, in which the United States would have but one vote among the many member states or, instead, within a new and unique organization in which diverse stakeholders—public as well as private—would share power. Unsurprisingly, the United States did not favor multilateral governance. But the U.S. government also recognized that its claim to control the IANA function was increasingly untenable as the Internet rapidly globalized. Something had to change.

Less than four months after the ITU signing ceremony, Clinton directed Secretary of Commerce William Daley to privatize the domain name system "in a manner that increases competition and facilitates international participation in its management."[31] In a subsequent white paper, the Department of Commerce laid out the rationale for a new mode of governance:

> From its origins as a U.S.-based research vehicle, the Internet is rapidly becoming an international medium for commerce, education and communication. The traditional means of organizing its technical functions need to evolve as well. The pressures for change are coming from many different quarters: . . .
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> — Many commercial interests, staking their future on the successful growth of the Internet, are calling for a more formal and robust management structure.
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> — An increasing percentage of Internet users reside outside of the U.S., and those stakeholders want to participate in Internet coordination.

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[28] *Id.*

[29] Milton Mueller, *ICANN and Internet Governance: Sorting Through the Debris of 'Self-Regulation,'* INFO: J. POL'Y, REG. & STRATEGY FOR TELECOMM. INFO. & MEDIA, Dec. 1999, at 497, 502 n.17, *available at* http://home.uchicago.edu/mferzige/muell.pdf (quoting memo from U.S. Secretary of State Madeleine Albright to the ITU (Apr. 1997)).

[30] Andy Sernovitz, *The U.S. Govt. Is Not Supportive of gTLD-MoU* (July 27, 1997), *available at* https://web.archive.org/web/19980707070210/http://www.gtld-mou.org/gtld-discuss/mail-archive/04644.html (including copy of memorandum from U.S. Secretary of State Madeleine Albright to the ITU (Apr. 1997)).

[31] Management of Internet Names and Addresses, 63 Fed. Reg. 31,741 (June 10, 1998) (noting Clinton administration directive of July 1, 1997).

— As Internet names increasingly have commercial value, the decision to add new top-level domains cannot be made on an *ad hoc* basis by entities or individuals that are not formally accountable to the Internet community.

— As the Internet becomes commercial, it becomes less appropriate for U.S. research agencies to direct and fund these functions.[32]

The bold "signing" of the gTLD-MOU ultimately failed. But, as the white paper suggested, the old ways of managing the Internet were not sustainable. The Clinton administration's choice was to embrace even more firmly the existing, if somewhat ad hoc, tradition of multistakeholder governance—which, not coincidentally, was dominated by American technology companies, American academics, and American civil society groups. As adviser to the Clinton administration Ira Magaziner stated at the time, "As the Internet grows up and becomes more international, these technical management questions should be privatized, and there should be a *stakeholder-based, private international organization* set up for that technical management."[33] What the White House sought to create was a more formalized, inclusive, and robust version of multistakeholderism—in which the United States would continue to play a special role. After issuing a call for proposals, the result was the creation of ICANN.[34] Ever since, ICANN has operated pursuant to a contract issued by the National Telecommunications and Information Administration of the Department of Commerce (NTIA).[35] This contract, initiated by the executive branch, has never been memorialized in any statute or international agreement.

This arrangement was the status quo for nearly two decades. During this period, the Internet grew dramatically, and attention to its political, economic, and social dimensions correspondingly grew. The ICANN model was tweaked in various ways but remained essentially intact and largely successful. ICANN has a highly articulated system of governance in which nonstate actors are numerous, policy proposals are open for public comment, and government preferences, while incorporated via ICANN's Governmental Advisory Committee, are not determinative but "must be duly taken into account" in ICANN's decision making.[36] ICANN stakeholders are many and varied, and they include regional Internet registries, Internet service providers, the Internet Engineering Task Force, an at-large committee of users, and numerous others.[37] ICANN public meetings are frequent and held around the world, usually three times a year; the most recent, in June 2016, took place in Helsinki, Finland. In 2009, ICANN entered into an "Affirmation of Commitments" with the U.S. government, in which ICANN pledged to maintain and improve "robust mechanisms for

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[32] *Id.* at 31,742. The white paper elicited substantial concern from gTLD-MOU proponents.

[33] Ira C. Magaziner, *Creating a Framework for Global Electronic Commerce*, PROGRESS & FREEDOM FOUND. (July 1999) (emphasis added), *at* http://www.pff.org/issues-pubs/futureinsights/fi6.1globaleconomiccommerce.html.

[34] Reflecting the Internet's roots, ICANN today is a nonprofit organization incorporated in California, under California law, and based in an unobtrusive glass-curtained office building not far from where Postel worked in Los Angeles.

[35] Contract Between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers (Oct. 1, 2012), *available at* https://www.ntia.doc.gov/files/ntia/publications/sf_26_pg_1-2-final_award_and_sacs.pdf.

[36] ICANN, About the GAC: Introducing ICANN's Governmental Advisory Committee (GAC) (2016), *at* https://gacweb.ICANN.org/display/gacweb/About+The+GAC.

[37] For more detail, see ICANN, BEGINNER'S GUIDE TO PARTICIPATING IN ICANN (2013), *at* https://www.ICANN.org/en/system/files/files/participating-08nov13-en.pdf.

public input, accountability, and transparency so as to ensure that the outcomes of its decision making will reflect the public interest and be accountable to all stakeholders," and also to remain headquartered in the United States.[38] ICANN's complex multistakeholder approach is not without criticism.[39] But—like Winston Churchill reportedly said about democracy itself—it is probably the worst form of governance, except for all the others.

On March 14, 2014, the Obama administration announced its proposed transition toward full autonomy for ICANN and the multistakeholder community. In a press release, the administration stated:

> To support and enhance the multistakeholder model of Internet policymaking and governance, [NTIA] today announces its intent to transition key Internet domain name functions to the global multistakeholder community . . . . Transitioning NTIA out of its role marks the final phase of the privatization of the [domain name system] as outlined by the U.S. Government in 1997 . . . . NTIA has communicated to ICANN that the transition proposal must have broad community support and address the following four principles:
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> - Support and enhance the multistakeholder model;
> - Maintain the security, stability, and resiliency of the Internet [domain name system];
> - Meet the needs and expectation of the global customers and partners of the IANA services; and,
> - Maintain the openness of the Internet.[40]

The announcement of the proposed transition included one additional, very important criterion: "NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution."[41]

The Obama administration's decision to effectively hand ICANN the keys to the Internet was not universally lauded, especially by the right. The *Wall Street Journal* referred to "Obama's Internet surrender."[42] In Congress, some saw the decision as a grave mistake that imperiled a valued U.S. resource. Efforts to halt the transition ensued.[43] One of the most prominent critics, Senator Ted Cruz, recently declared:

> The Obama administration does not have authorization from Congress . . . . And yet they are endeavoring to give away this valuable, critical property . . . . We built the internet

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[38] ICANN, Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers (2009), *at* https://www.ICANN.org/resources/pages/affirmation-of-commitments-2009-09-30-en.

[39] *See, e.g.*, JEREMY MALCOLM, MULTISTAKEHOLDER GOVERNANCE AND THE INTERNET GOVERNANCE FORUM 48–49 (2008).

[40] NTIA Press Release, *supra* note 2.

[41] *Id.*

[42] L. Gordon Crovitz, *The Battle Over Obama's Internet Surrender*, WALL ST. J., June 13, 2016, *at* http://www.wsj.com/articles/the-battle-over-obamas-internet-surrender-1465770111. Crovitz explained: "It's make or break for the internet as we know it. Unless Congress acts this summer, the Obama administration will end U.S. protection of the internet, handing authoritarian regimes the power they have long sought to censor the web globally, including in the U.S."

[43] *See* DOTCOM Act of 2014, H.R. 4342, 113th Cong. (2014).

and America maintains it as free for all. We don't use it in an imperialist manner to impose our views on others. We maintain it as an oasis of freedom.[44]

Yet the decision to end the contract reflects a long-standing and largely bipartisan preference in the United States for a strong private-sector role in Internet governance. Multistakeholderism in this domain tapped interestingly into the preferences of both parties. Republicans generally liked the private-sector orientation and often saw multistakeholderism as an attractive alternative to traditional government regulation. Democrats saw multistakeholderism as a progressive form of governance that incorporated all (or most) affected interests and featured extensive public input and deliberation. Both liked that American companies, and Silicon Valley generally, were highly dominant players worldwide. But clearly important too were continuing efforts to multilateralize Internet governance. The audacious (and naïve) gTLD-MOU, while ultimately successful only at prodding the United States to initiate the creation of ICANN, was merely the first of several international efforts to impose greater state control over the Internet.

For example, at the 2012 World Conference on International Telecommunications in Dubai, convened by the ITU, many governments, led by Russia, China, and several Gulf states, sought to negotiate an accord that would move Internet governance toward greater multilateralism. Congressional hearings in advance of the conference were hostile to this effort.[45] Congressman Greg Walden, a Republican, noted that the "Internet has prospered under a multistakeholder model absent the heavy-hand of government regulation."[46] "If we are not vigilant," he declared, "[n]ations from across the globe . . . just might break the Internet by subjecting it to an international regulatory regime designed for old-fashioned telephone service."[47] This view was not limited to Congress. At the same hearing, Vinton Cerf, one of the most influential early creators of the Internet and "Chief Internet Evangelist" for Google, declared the prospect of ITU control profound and "potentially hazardous."[48]

In Dubai, the United States, along with fifty-four other states, including Australia, Chile, India, Israel, Japan, and most of Europe, unsurprisingly refused to sign the proposed accord. The United States and its allies feared that authoritarian regimes, already heavily censoring the Internet for political purposes, would seek greater control over the Internet in order to do so more effectively. Terry Kramer, the head of the U.S. delegation, declared in the wake of the Dubai conference that the United States could not support a treaty "that is not supportive of the multistakeholder model of Internet governance."[49] Opposition to multilateral governance continued to be repeated by high-level U.S. officials. Discussing the proposed transition in a

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[44] Kyle Stewart, *Ted Cruz's Fight to Protect the Internet from Authoritarian Regimes*, DAILY SIGNAL, July 7, 2016, *at* http://dailysignal.com/2016/07/07/ted-cruzs-fight-to-protect-the-internet-from-authoritarian-regimes.

[45] *See* John R. Crook, Contemporary Practice of the United States, 107 AJIL 431, 444–45 (2013).

[46] Greg Walden, Opening Statement for the Subcommittee on Communications and Technology Hearing on "International Proposals to Regulate the Internet" (May 31, 2012), *available at* https://energycommerce. house.gov/sites/republicans.energycommerce.house.gov/files/Hearings/CT/20120531/HHRG-112-IF16-MState-W000791-20120531.pdf.

[47] *Id.*

[48] *International Proposals to Regulate the Internet: Hearing Before the Subcomm. on Communications and Technology*, 112th Cong. 80 (2012), *available at* https://www.gpo.gov/fdsys/pkg/CHRG-112hhrg79558/pdf/CHRG-112hhrg79558.pdf (statement of Vinton Cerf, Vice President and Chief Internet Evangelist, Google Inc.).

[49] Eric Pfanner, *U.S. Rejects Telecommunications Treaty*, N.Y. TIMES, Dec. 13, 2012, *at* http://www.nytimes.com/2012/12/14/technology/14iht-treaty14.html?pagewanted=1&_r=0.

2014 public symposium, Assistant Secretary of Commerce Lawrence Strickling reiterated that the Obama administration has made it "crystal clear we would not accept a replacement for the United States that would be government-led or be an intergovernmental organization."[50]

Further impetus to reduce the U.S. government's special role came from an unexpected source: the incendiary materials released by Edward Snowden in the summer of 2013. Snowden's revelations about spying by the National Security Agency (NSA) had no direct connection to ICANN, or naming and numbering issues generally. But Snowden's disclosures shocked many around the world, raising hard questions about how much foreigners could trust American technologies and the U.S. government. Numerous commentators suggested that the Snowden affair nudged the United States to diminish its overt role in Internet governance still further, lest the revelations fuel the efforts of the ITU and other international organizations to assert multilateral control more strongly and effectively.[51]

## III.

What explains the very strong U.S. commitment to multistakeholder governance, a commitment so strong that the U.S. government is willingly relinquishing its unique position vis-à-vis ICANN? As every presidential administration since the birth of the modern Internet has appeared to understand, U.S. interests in the Internet have in fact been well served by multistakeholder governance. The long-standing preferences of the United States—an Internet that is broadly open and generally free of direct government control and censorship, in which private firms have a major say and in which the key actors are disproportionately U.S.-based or at least share these values—are best realized by multistakeholderism, not multilateralism.

Consequently, diminishing its role even further is, perhaps paradoxically, a rational strategy for the United States. Today's Internet is a truly global resource with a user base dominated by non-Americans. Questions about the legitimacy of the continuing "legacy authority" of the United States are only going to come to the fore more often and more forcibly over time as the Internet continues to add millions of users around the globe. If government control of the Internet is important, why limit that control to one government? The looming threat of greater multilateral regulation, whether through the ITU or through another international process, was a major motivating force for the Obama administration's decision to withdraw its direct link to ICANN. By stepping out of a direct contracting role with ICANN, the United States can better blunt a more overt multilateral challenge to the basic ideal of a free, open, and content-neutral Internet.[52]

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[50] *The Future of Internet Governance*, C-SPAN, at 13:17 (Apr. 4, 2014), *at* http://www.c-span.org/video/?318699-1/internet-governance&start=239 (panel held at the Hudson Institute in Washington, DC).

[51] *E.g.*, Tim Walker, *Edward Snowden: NSA Whistleblower's Leaks Prompt US to Make Control of Internet Truly Worldwide*, INDEPENDENT, Mar. 18, 2014, *at* http://www.independent.co.uk/life-style/gadgets-and-tech/news/edward-snowden-nsa-whistleblowers-leaks-prompt-us-to-make-control-of-internet-truly-worldwide-9200578.html; Bradshaw et al., *supra* note 23, at 2–3; Jack Goldsmith, *The Tricky Issue of Severing US "Control" over ICANN*, HOOVER INST.: THE BRIEFING (Feb. 24, 2015), *at* http://www.hoover.org/research/tricky-issue-severing-us-control-over-ICANN.

[52] One major exception to this paradigm exists: material deemed infringing of intellectual property rights is vigorously policed by the United States and nearly every other state in the system. Intellectual property protection is now a major feature of not only the many treaties under the auspices of WIPO but also the rules of the World Trade Organization and other major multilateral trade agreements and organizations.

Indeed, it is not too much of a stretch to say that the Obama administration's strategy of using multistakeholderism to lock in basic U.S. preferences with regard to governance of the Internet is a contemporary parallel to the broad contours of U.S. grand strategy after 1945. As John Ikenberry influentially asked, "Why would the United States, at the height of its hegemonic power after World War II, agree to limit that power?"[53] Ikenberry argued the United States did so because key policymakers recognized that a hegemonic power can best preserve its power over the long term by exercising "strategic restraint."[54] By providing public goods within multilateral settings, sacrificing some degree of policy autonomy, and offering participation to weaker (and perhaps rising) powers, an international order can be created that locks in a hegemon's power by sharing its power. Limiting power thus actually sustains power. Strategic restraint is a farsighted strategy for a superpower, one that often has the great virtue of converting "its 'might' into 'right' . . . [and] power into legitimate authority."[55]

The U.S. commitment to multistakeholder governance of the Internet follows this broad path. While Ikenberry described strategic restraint in terms of state power and multilateral structures, the fundamental logic is the same. In a domain in which private actors already play a major role, in which existing institutions and practices afford them important powers, and in which many of the private actors are U.S-based and share the basic values of the U.S. government with regard to Internet freedom and access, it makes sense for the U.S. government to pursue even more power-sharing within a well-articulated and broadly respected framework of multistakeholder governance. The key distinction is that such power-sharing is pursued primarily with civil society in its myriad of guises, rather than other states who may—and in this case clearly do— have often quite different agendas and values than does the United States. In short, multistakeholder governance over the Internet has triumphed in large part because it reflects hegemonic power, not in spite of it.

## IV.

The guiding principle of post-1945 global governance was multilateralism. As John Ruggie famously defined it, multilateralism "is an institutional form which coordinates relations among three or more states on the basis of 'generalized' principles of conduct."[56] From the grandest multilateral project—the United Nations—to the many other international organizations created in the wake of World War II, global governance followed a familiar template. States negotiated a multilateral constitutive treaty, which, in turn, created a formal international organization to govern a specified issue area. These organizations had buildings, staffs, and letterhead. And they exhibited many of the features of midcentury governance in the advanced industrial world generally: the belief in expertise, in scale, in centralized bureaucracy, and in legal foundations and process. While some member states clearly had more power than others within erstwhile multilateral institutions—whether the Permanent Five of the UN Security Council or the

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[53] G. John Ikenberry, *Institutions, Strategic Restraint, and the Persistence of American Postwar Order*, INT'L SEC., Winter 1998–99, at 43, 45.

[54] G. JOHN IKENBERRY, AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS 4 (2001).

[55] Stewart M. Patrick, *Summer Reading: Ikenberry's Liberal Leviathan*, COUNCIL ON FOREIGN REL.: THE INTERNATIONALIST ( June 3, 2011), *at* http://blogs.cfr.org/patrick/2011/06/03/summer-reading-ikenberry%E2%80%99s-liberal-leviathan.

[56] John Gerard Ruggie, *Multilateralism: The Anatomy of an Institution*, INT'L ORG., Summer 1992, at 561, 571.

skewed voting allocations in the World Bank and International Monetary Fund—the equality of sovereigns and the central role of states remained core guiding principles.

Post-Cold War global governance continues in significant part to reflect multilateral principles. But it has increasingly been characterized by flexible structures, greater tolerance for informality, and, most strikingly, an openness to public-private partnerships and an active role for a wide range of nonstate actors.[57] While the embrace of nonstate actors is not uniform— on this score, trade cooperation, for example, differs markedly from environmental cooperation—many international regimes now feature substantial participation by nonstate actors. To be sure, traditional multilateral governance remains alive and well. But it is increasingly supplemented, and, in some cases, perhaps even supplanted, by multistakeholder governance. Civil society, corporations, social and political groups, and the like are all potential stakeholders in many issue areas, and the move to meaningfully include them alongside governments in the sharing of power is one of the most striking trends in global governance.

This ongoing shift to multistakeholder governance raises a host of important questions. Is multistakeholderism more effective at achieving its ends than "mere" multilateralism? Is it more legitimate— or perceived as more legitimate— by the relevant players and by those who are affected by their decisions?[58] Is multistakeholderism efficient, and, if not, do its benefits outweigh its costs? How can it be improved across all these dimensions? At a more fundamental level, however, is a basic question: Why is the shift to multistakeholder governance happening? States remain the primary and most powerful actors in world politics, and, as organizations like the World Trade Organization and the UN Security Council show, states can readily cabin the role of private actors when they choose to do so.

The Internet is by no means the sole example of contemporary multistakeholderism.[59] But it is one of the most elaborate examples and one in which the drive to multistakeholderism has had special and perhaps unique causes. The strength of multistakeholder principles in this domain reflects a very particular status quo *ex ante*. The special role of the U.S. government in Internet governance was understandable and perhaps tolerable when the Internet was largely a U.S. phenomenon with very strong U.S. roots. Today it is not, and a special "stewardship role" for the United States simply invites other states to seek to multilateralize whatever aspects of Internet governance they can. Transitioning governance fully to ICANN's multistakeholder processes perhaps acknowledges (if implicitly) the uncertain legal basis of any asserted U.S. Internet hegemony. But, most notably, it helps to lock in a governing structure that serves long-standing U.S. preferences while giving voice to a wide and growing range of interested stakeholders around the world. Tomasi di Lampedusa could not have foreseen the Internet. But he identified a profound truth that applies across many domains: for things to remain the same, they sometimes have to change.

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[57] *See, e.g.*, Kenneth W. Abbott, Jessica F. Green & Robert O. Keohane, *Organizational Ecology and Institutional Change in Global Governance*, INT'L. ORG., Spring 2016, at 247; INFORMAL INTERNATIONAL LAWMAKING (Joost Pauwelyn, Ramses A. Wessel & Jan Wouters eds., 2012); TIM BÜTHE & WALTER MATTLI, THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY (2011). International organizations still retain considerable vitality. *See, e.g.*, JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2006).

[58] *See, e.g.*, Richard B. Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, 108 AJIL 211 (2014).

[59] *See, e.g.*, GEOFFREY ALLEN PIGMAN, THE WORLD ECONOMIC FORUM: A MULTI-STAKEHOLDER APPROACH TO GLOBAL GOVERNANCE (2007).