

Statement of

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The logo for NetChoice, featuring the word "NetChoice" in a blue, sans-serif font. The "Net" is in a darker blue, and "Choice" is in a lighter blue. The logo is centered on the page.

Testimony before the

U.S. Senate
Committee on Commerce, Science, and & Transportation

May 24, 2016

*Examining the Multistakeholder Plan for
Transitioning the Internet Assigned Number Authority*

I am Executive Director of NetChoice, an association of leading online businesses.¹ At state, federal, and international fora, NetChoice promotes the integrity and availability of the Internet. We've attended 32 ICANN meetings and I'm serving a 6th term as policy chair for ICANN's Business Constituency. I've attended 9 Internet Governance Forum (IGF) meetings and testified in 8 Congressional hearings on ICANN and Internet governance, including 3 hearings specifically on the IANA transition and ICANN Accountability.

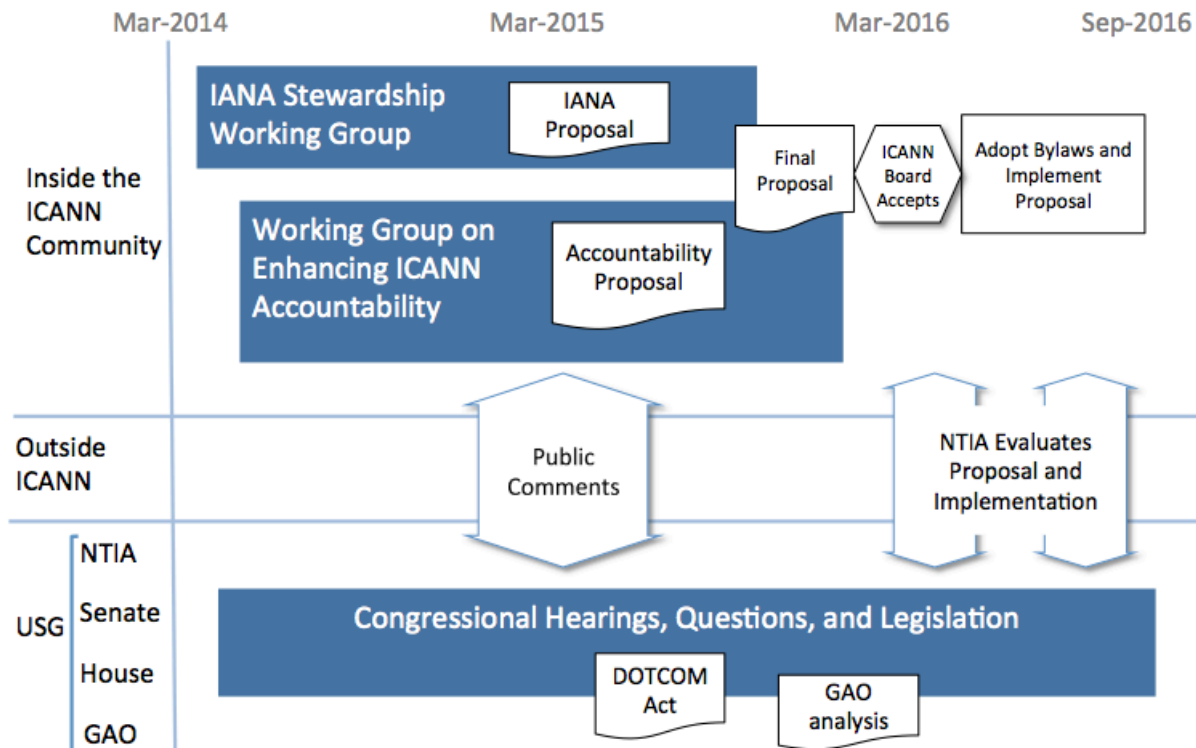
NetChoice members depend upon a secure Internet address system that's resilient to cyber attacks and abuse. We need an Internet that works around the globe – free from censorship, discriminatory regulation, and taxation. We need policies that are predictable and enforceable, facilitating innovation and creativity while protecting consumers. I will focus on three points today:

1. Over 18 years and three administrations, the US government has used light-touch oversight over ICANN. However, it is neither sustainable nor necessary for the US to retain its unique role forever. In fact, retaining this unique role increases the risk of Internet fragmentation and government overreach. At NTIA's request, the Internet community created proposals to let ICANN loosen ties to the US government and strengthen its accountability to the global Internet user community and keeping core Internet functions free from governmental control.
2. NTIA's requirements for this transition guided the design of new mechanisms to: manage core Internet functions; hold ICANN accountable; and prevent government capture *after* the transition. Congress' role in this transition began with questions about accountability and stress tests, such as the guidance provided by this committee in your Feb-2015 hearing. Your committee backed the community with the DOTCOM Act, insisting that NTIA require ICANN to adopt the multistakeholder proposals *as a condition of the transition*.
3. The community's proposal meets NTIA requirements and reduces governments' ability to override community consensus with its advice to ICANN's board. While we have nearly completed ICANN Bylaws to implement the proposal, a few implementation tasks need to be finished in the months ahead. This transition will for the first time make ICANN accountable to the technologists, businesses, civil society, and users who depend upon the Internet to drive economic growth and social evolution around the world. This is a significant improvement on the ICANN accountability we have today.

¹ See <http://www.NetChoice.org>. This statement reflects the view of NetChoice and does not necessarily represent the views of any individual member company.

1. Where are we in this transition process for ICANN and IANA?

This committee has led Senate oversight of NTIA's transition plan, which can be visualized with this timeline:



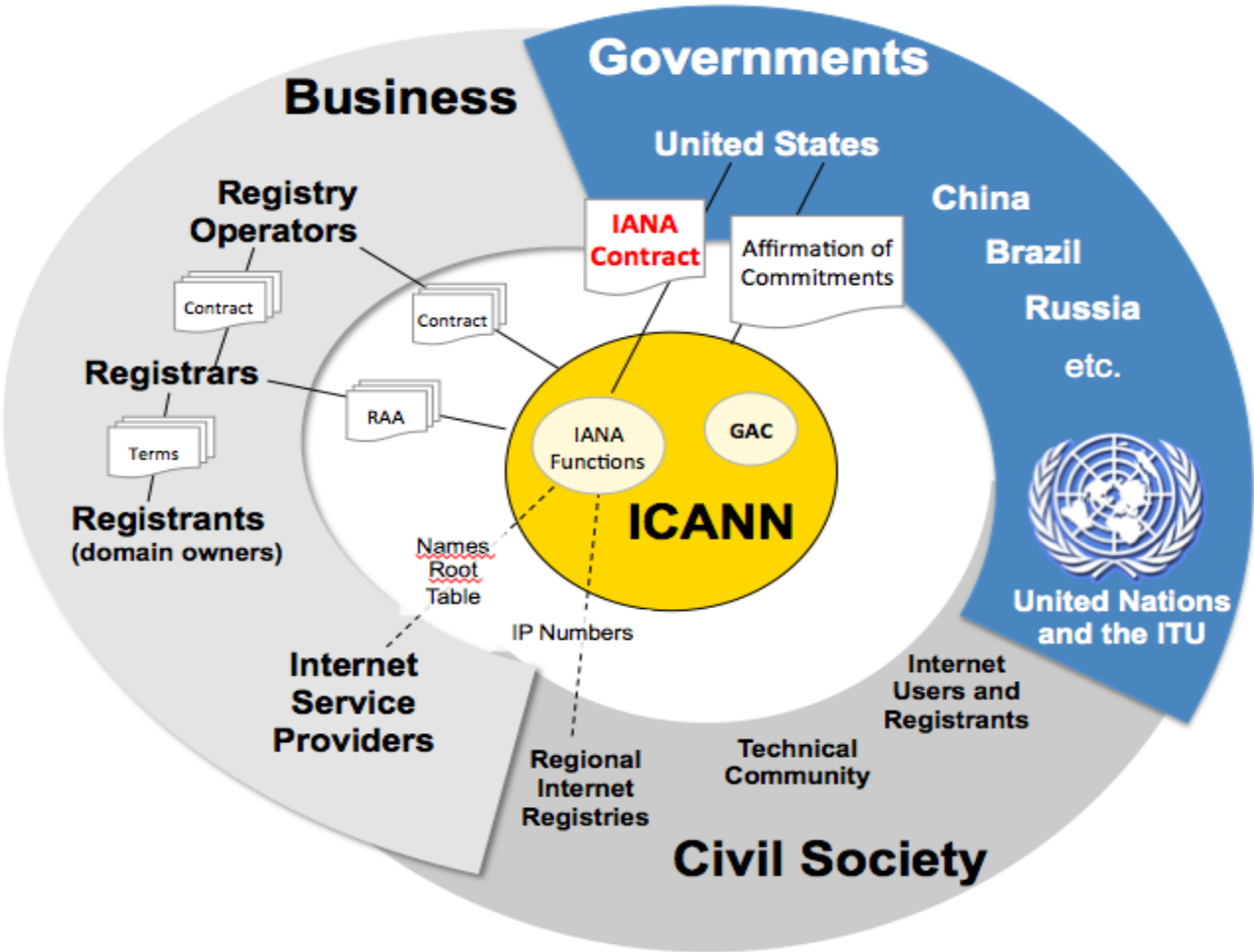
When ICANN's board accepted our transition proposals and forwarded them to NTIA in March, the timeline leading up to the IANA contract expiration date on 30-Sep was tight, but doable:

- 20-Apr: Draft new bylaws posted for public comment period of 30 days.
- Late May: Evaluate public comments and ICANN board approves new bylaws.
- 10-Jun: NTIA evaluates adopted bylaws and reports to Congress in time for review before recess in mid-July. Berkman Center review expected to be part of this report.
- 15-Aug: NTIA evaluates *implementation* of community proposals, since this is the 45-day notice period for NTIA to extend the IANA contract, if needed.

The new bylaws will give the community powers to ensure these measures can be implemented—even if ICANN's board and management were to object. Next month, the ICANN community will begin designing *Work Stream 2* accountability measures, addressing transparency, diversity, and human rights.

2. How did we get to this point?

In the Annex to this statement we have summarized key events in the 18-year evolution of ICANN. We chronicle the escalating resentment of other governments over the unique role retained by the US, leading to the 2009 termination of US oversight agreements and replacement with the *Affirmation of Commitments*. The diagram below shows today’s multiple contractual ties and connections between ICANN and its global stakeholders.



The present arrangement reflects growing independence for ICANN, despite its two bilateral agreements with NTIA – the IANA Contract and Affirmation of Commitments (see above). Then, the 2013 Snowden revelations – though not unique to the US and entirely unrelated to the stewardship of the IANA functions – stoked international concerns that led to the administration’s decision to relinquish the legacy link between ICANN and the US government – the IANA functions contract.

3. NTIA's announced transition for IANA functions and ICANN accountability

In March 2014, the Commerce Department announced that it would transition its stewardship of the Internet Assigned Numbers Authority (IANA) functions to the global multistakeholder community. Positive global response was immediate, signaling that this move, at this time, might relieve some pressure from foreign governments that were demanding the US end its unique US role and give governments and the UN a greater role in IANA and ICANN oversight.

NTIA asked ICANN to develop a transition plan to shift stewardship of IANA functions to “the global multistakeholder community,” saying the transition proposal must have broad community support and satisfy four principles in replacing NTIA's role²:

- Support and enhance the multistakeholder model
- Maintain the security, stability, and resiliency of the Internet DNS
- Meet the needs and expectation of the global customers and partners of IANA services
- Maintain the openness of the Internet

NTIA also added a statement that it would not give up IANA control if the plan developed by ICANN would place other governments in the legacy role of the US. With the experience of the last 18 years, it's appropriate for the US to impose these principles and to prevent any government-led organization from replacing the former US role *after* the transition.

At the same time, NTIA and most stakeholders recognized that NTIA's existing IANA contract provides a broader accountability framework for ICANN, and that accountability enhancements should be developed and adopted in parallel with the transition. After NTIA's 2014 announcement, the Internet community and ICANN developed two tracks to respond to the challenge (as shown on the timeline on page 2):

IANA Stewardship track: Placing the global Internet community in the role historically held by NTIA in the IANA contract with ICANN.

ICANN Accountability track: Giving the global Internet community more power to hold the ICANN corporation accountable because NTIA will lose the leverage associated with the IANA contract once it expires.

² Press Release, “NTIA Announces Intent to Transition Key Internet Domain Name Functions”, March 14, 2014, at <http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>

On each track, the community is comprised of representatives of ICANN's recognized Advisory Committees and Stakeholder Organizations, including business; governments; and civil society.

The IANA Stewardship Track: ICANN structured the IANA track to have community groups with customers of the numbers, protocol parameters, and naming functions. They began meeting in Oct-2014 and published a final proposal in Oct-2015, with these elements:

- Create a new legal entity to contract with ICANN to operate IANA naming functions
- Establish a customer committee to monitor the performance of IANA functions
- Establish a periodic review of the IANA Functions, embedded in ICANN bylaws
- Empower the community select a new operator for the IANA Functions, if needed

Notably, the IANA naming proposal relies upon enhanced community powers in the ICANN Accountability Track to hold ICANN to its new obligations.

The ICANN Accountability Track: Beginning in Dec-2014, ICANN stakeholders named representatives to a cross-community working group (CCWG) representing the companies, technical experts, civil society activists, and users that are driving the Internet's growth and depend on the free and open Internet. (I serve as the representative of Commercial Stakeholders on the CCWG). After more than 200 meetings and calls, and over 12,000 emails over 14 months, the 200 participants in CCWG published a final proposal in Feb-2016 giving the community new powers to ensure ICANN was answerable to more than just itself.³ New powers for the community include the ability to:

- Inspect ICANN's internal documents and records
- Challenge board actions via Independent Review Panels whose decisions are binding
- Veto bylaw changes proposed by the ICANN board
- Approve any changes to ICANN Fundamental Bylaws (deemed core to ICANN's governance structure) and Articles of Incorporation
- Veto strategic plans and budgets proposed by the ICANN board
- Control the periodic reviews required by the *Affirmation of Commitments*
- Remove individual ICANN board directors
- Recall the entire ICANN board, as a last-resort measure

³ Final Accountability Proposal, at <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>

ICANN's lawyers and the community's independent legal counsel jointly drafted new ICANN bylaws, which the CCWG reviewed and published for comment on 20-Apr-2016. (NetChoice supports the draft bylaws, subject to a few minor refinements.) The comment period closed 21-May, after which the bylaws may be revised to reflect comments, and then to the ICANN board for formal acceptance.

In the next section we summarize questions and concerns raised by members of this committee as well as hearings and legislation handled by the committee, regarding the announced transition of IANA and enhancing ICANN accountability.

4. Transition and accountability concerns raised by members of this committee

This committee and its members have engaged early and often in transition discussions, with letters and hearings that have shaped the process, as summarized below:

- Ten present members of this committee were among 35 Senators who wrote NTIA in Apr-2014 to reiterate the 2012 joint congressional resolution supporting the multi-stakeholder model, and to ask tough questions about this transition: *why, by what authority, when, how, and what about potential risks?*⁴
- In May-2014 Senator Rubio was joined by 7 committee members calling for a hearing on NTIA's transition decision⁵.
- In Jul-2014 Senators Thune and Rubio wrote to ICANN chairman Stephen Crocker, recommending several reforms at ICANN:⁶
 1. The transition should not allow governments to increase their influence
 2. Keep policy development separate from technical IANA functions
 3. Increase threshold for board decisions to 4/5 of voting directors
 4. Give the community additional transparency and oversight tools
 5. Improve the independent dispute resolution process (IRP)

⁴ 2-Apr-2014, "Thune, Rubio Demand Answers from Administration on Internet Transition", at <http://www.thune.senate.gov/public/index.cfm/2014/4/thune-rubio-demand-answers-from-administration-on-internet-transition>

⁵ 22-May-2014, "Rubio, Commerce Republicans Seek Answers On Future Of Internet Governance", at <http://www.rubio.senate.gov/public/index.cfm/press-releases?ID=23503316-cea1-4bce-a4e6-af02ea864470>

⁶ 31-Jul-2014, Letter from Senators Thune and Rubio to ICANN Chairman Stephen Crocker, at <https://www.icann.org/en/system/files/correspondence/thune-rubio-to-crocker-31jul14-en.pdf>

6. Bylaws should enshrine ICANN's obligations under the *Affirmation of Commitments*
- This committee held a critical hearing in Feb-2015, where members pressed ICANN's CEO Fadi Chehade and NTIA's Larry Strickling on several points:⁷
 1. Sen. Thune emphasized that the historical US role must not be replaced by a government-led structure.
 2. Senators Thune and Blunt queried ICANN's commitment to retain its US headquarters.
 3. Sen. Fischer questioned Chehade on threshold for board rejection of government advice
 4. Sen. Thune and others suggested that the Affirmation of Commitments be made permanent by incorporating its reviews in the ICANN bylaws.
 - On 25-Jun-2015, this committee favorably reported S. 1551, the DOTCOM Act that passed the House two days earlier by an overwhelming margin of 378 to 25.⁸ This legislation would require ICANN to adopt the multistakeholder community proposals before NTIA could complete the IANA transition.
 - In Sep-2015 Senator Cruz led a bicameral request for GAO to determine whether the administration has the power to relinquish IANA functions.⁹
 - In Feb-2016 Senators Cruz, Lankford, and Lee wrote to ICANN, objecting to actions they believe supported Chinese Internet censorship.¹⁰ ICANN's response¹¹ was then followed by another letter from the same Senators on 3-Mar-2016, referring to China's latest regulations for Internet domain registrations.¹²

⁷ 25-Feb-2015, Senate Commerce Committee hearing on M-S model of Internet Governance, video and statements at <http://www.commerce.senate.gov/public/index.cfm/hearings?ID=683924AE-83D7-4BF4-922A-CDECB9556BA9> , hearing transcript at <https://www.gpo.gov/fdsys/pkg/CHRG-114shrg98129/html/CHRG-114shrg98129.htm>

⁸ 23-Jun-2015, Roll call vote on HR 805, at <http://clerk.house.gov/evs/2015/roll377.xml>

⁹ 28-Sep-2015, Sen. Cruz Leads Bicameral Letter Asking GAO to Determine Whether Obama Administration Has Power to Give Away the Internet, at http://www.cruz.senate.gov/?p=press_release&id=2453

¹⁰ 4-Feb-2016, Letter to ICANN CEO, at <https://www.icann.org/en/system/files/correspondence/cruz-et-al-to-chehade-04feb16-en.pdf>

¹¹ 19-Feb-2016, ICANN CEO response letter, at <https://www.icann.org/en/system/files/correspondence/chehade-to-cruz-et-al-19feb16-en.pdf>

¹² 3-Mar-2016, Follow-up letter from Senators Cruz, Lankford and Lee to ICANN CEO, at <https://www.icann.org/en/system/files/correspondence/cruz-et-al-to-crocker-03mar16-en.pdf>

- On 4-Apr-2016, Senators Cruz, Lankford, and Lee wrote to ICANN demanding answers to questions they had raised in their previous letter.¹³
- Last week, on 18-May-2016, Senator Rubio reportedly circulated a letter to NTIA suggesting that some period of delay in the IANA transition was necessary in order to ensure satisfactory implementation of the proposal.¹⁴
- On 19-May-2016, Senators Cruz, Lankford, and Lee wrote to Commerce Secretary Pritzker and NTIA Assistant Secretary Strickling, giving reasons they believe NTIA should extend the IANA contract:¹⁵
 1. They believe the proposal “significantly increases the power of foreign governments”
 2. An undefined commitment to respect human rights
 3. The IANA transition might imply a transfer of government property
 4. ICANN may move its headquarters outside the US
 5. The proposal will embolden an unaccountable ICANN board

Below, I address the major points raised by committee members, drawing on my hands-on experience with the ICANN accountability and transition planning process, where I have represented commercial stakeholders since the transition process began in 2014.

5. The accountability enhancements and transition plan address committee concerns

At the same time committee members were raising questions about the transition, the CCWG was also pursuing a structured way to assess how a post-transition ICANN could be held accountable in the face of internal and external threats. The month after NTIA announced the transition, I testified before the House Commerce Committee about *stress tests* to inform and evaluate accountability proposals.¹⁶ I led the working group that applied these stress tests to the accountability proposal, and we ultimately determined that *proposed new accountability*

¹³ 4-Apr-2016, Letter from Senators Cruz, Lankford, and Lee to ICANN, at

<https://www.icann.org/en/system/files/correspondence/cruz-lankford-lee-to-crocker-04apr16-en.pdf>

¹⁴ 18-May-2016, Mario Trujillo in The Hill, “Republicans renew attempts to delay internet domain handoff”, at

<http://thehill.com/policy/technology/280354-republicans-continue-attempts-to-delay-internet-domain-handoff>

¹⁵ 19-May-2016, Letter from Senators Cruz, Lankford, and Lee to Secretary Pritzker and Assistant Secretary Strickling, at http://www.cruz.senate.gov/files/documents/Letters/20160519_ICANNLetter.pdf

¹⁶ See Stress Tests, pages 7-10 at [NetChoice Testimony before the House Energy & Commerce Committee, Subcommittee on Communications and Technology – Ensuring the Security, Stability, Resilience, and Freedom of the Global Internet](#), 2-Apr-2014

measures were a significant improvement over existing measures, and would give the community adequate powers to challenge ICANN's actions.

Several stress tests led CCWG to address concerns also raised by committee members, starting with the risks of having ICANN quit the *Affirmation of Commitments* and eliminate its legal presence in the United States, as discussed below.

5.1 ICANN will maintain its legal presence in the United States

Your Feb-2015 hearing touched on *Affirmation of Commitments* section 8b, which commits ICANN to “remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community.” In your Feb-2015 hearing, ICANN CEO Chehade repeated this commitment, saying, “ICANN shall remain in the United States of America, and we stand by this.”¹⁷

Many in the CCWG were not content to rely upon a verbal promise made by a CEO, so we sought further assurance of a continued US presence in ICANN's bylaws and articles of incorporation. We noted this commitment is already part of ICANN bylaws Article XVIII:

“OFFICES. The principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California, United States of America. ICANN may also have an additional office or offices within or outside the United States of America as it may from time to time establish.”

While ICANN's board *could* propose a change to this bylaws provision, the empowered community could block the proposed change, using one of its new community powers. In addition, ICANN's Articles of Incorporation already state that ICANN “is organized under California Nonprofit Public Benefit Corporation Law”¹⁸. The CCWG proposal amends ICANN's Articles of Incorporation such that any change would require a 75% majority of the empowered community.

These two foundational documents are sufficient assurance that ICANN will continue to maintain principal offices and a legal presence in the US.

5.2 The post-transition ICANN will not see an increase in the power of governments

Governments have influence on ICANN policy development and contract compliance via

¹⁷ 23-Jun-2015, Roll call vote on HR 805, at <http://clerk.house.gov/evs/2015/roll377.xml>

¹⁸ Section 3 of ICANN Articles of Incorporation, at <https://www.icann.org/resources/pages/governance/articles-en>

their collective participation in the Governmental Advisory Committee (GAC). The GAC was established when the US Commerce Department and American private sector interests first created ICANN in 1998:¹⁹

The Governmental Advisory Committee should consider and provide advice on the activities of the Corporation as they relate to concerns of governments, particularly matters where there may be an interaction between the Corporation's policies and various laws, and international agreements.

The GAC has gradually grown in its effectiveness to and its advice to ICANN has grown in importance, as seen with policies adopted for the latest expansion of new top-level domains.

In our previous Congressional testimony, I described a stress test where governments could significantly raise their influence via GAC formal advice:²⁰

Stress Test #18 is related to a scenario where ICANN's GAC would amend its operating procedures to change from consensus decisions to majority voting for advice to the ICANN Board.

Since the ICANN Board must seek a mutually acceptable solution if it rejects GAC advice, concerns were raised that the Board could be forced to arbitrate among sovereign governments if they were divided in their support for the GAC advice. In addition, if the GAC lowered its decision threshold while also participating in the Empowered Community, some stakeholders believe this could inappropriately increase government influence over ICANN.²¹

Several governments had previously voiced dissatisfaction with the present consensus rule for GAC decisions, so it is plausible that the GAC could change its method of approving advice at some point, such that a majority could prevail over a significant minority of governments. Early on, NTIA said that addressing Stress Test 18 was required for the transition:²²

As a threshold matter, the USG considers the stress test both appropriate and necessary to meet the requirement that the IANA transition should not yield a government-led or an intergovernmental replacement for NTIA's current stewardship role.

Finally, we interpret the proposed stress test as capturing this important distinction in GAC advice, with an appropriate remedy in the form of a Bylaws amendment to reinforce the ICANN community's expectation that anything less than consensus is not advice that triggers the Bylaw provisions.

In response, the new bylaws would enshrine the GAC's present full-consensus rule as the only way to trigger the board's obligation to "try and find a mutually acceptable solution." Several

¹⁹ 6-Nov-1998, Bylaws for ICANN, at <https://www.icann.org/resources/unthemed-pages/bylaws-1998-11-06-en>

²⁰ See Stress Tests 6 & 7, on p. 9 at [NetChoice Testimony before the House Energy & Commerce Committee – Ensuring the Security, Stability, Resilience, and Freedom of the Global Internet](#), 2-Apr-2014

²¹ pp. 2-3, Annex 11 - Recommendation #11: Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test #18), at <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>

²² Email from Suzanne Radell, Senior Policy Advisor, NTIA, 19-Mar-2015, at <http://mm.icann.org/pipermail/accountability-cross-community/2015-March/001711.html>

GAC members fiercely resisted this change, saying it interfered with government decision-making and reduced the role of governments. To overcome some of that resistance, we raised the threshold for ICANN's board to reject GAC's full-consensus advice, from today's simple majority (9 votes) to 60% (10 votes).

This brings to mind your Feb-2015 hearing, where Senator Fischer asked ICANN CEO Fadi Chehade about a proposal to raise the rejection threshold to 2/3 of board votes. Chehade replied, "The Board has looked at that matter and has pushed it back, so it is off the table." It's true that a standalone proposal to raise the GAC rejection threshold was broadly opposed and set aside in late 2014. However, the proposed bylaw to increase the rejection threshold to 60% (1 additional vote) is an entirely different arrangement, since it reserves the higher threshold *only* for GAC advice adopted "by general agreement in the absence of any formal objection". This requirement prevents the GAC from generating privileged advice based on anything less than consensus, and more than justifies the addition of 1 more vote to reject that advice.

If the board rejects GAC advice, it must still follow existing bylaws to "try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution." This is an obligation to "try" and does not oblige ICANN to find a solution that is acceptable to the GAC.

Another imposition on GAC advice is a requirement that advice "is communicated in a clear and unambiguous written statement, including the rationale for such advice."²³ And if ICANN's board accepted GAC advice that is inconsistent with ICANN Bylaws, the community can invoke the independent review process (IRP) to "ensure that ICANN does not exceed the scope of its limited technical Mission and otherwise complies with its Articles of Incorporation and Bylaws."²⁴

As one of the 7 Advisory Committees and Supporting Organizations that comprise the ICANN community, GAC was also invited to participate as a decisional participant of the Empowered Community. A few critics say that we should have excluded GAC from the community, but I cannot imagine that Congress or the Administration would accept an accountability structure where governments – including the US – have no seat at the table. National, state, and local governments maintain websites and services as domain name registrants, and many government employees are Internet users. Moreover, governments have

²³ 20-Apr-2016, Section 12.3 of Draft New ICANN Bylaws, at <https://www.icann.org/en/system/files/files/proposed-new-bylaws-20apr16-en.pdf>

²⁴ *Ibid*, Section 4.3 a

a role among all stakeholders in developing public policy and enforcing laws that are relevant to the Internet.

While GAC is rightfully an equal among ICANN stakeholders, the new bylaws ensure that governments could not block a community challenge of ICANN Board's implementation of GAC advice. In what is known as the "GAC Carve-out", the bylaws exclude the GAC from the community decision whether to challenge a board action based on GAC consensus advice. Several governments vigorously oppose these bylaws provisions to limit GAC influence and lock-in their consensus method of decision-making. In a statement issued Mar-2016, France's minister for digital economy complained about ICANN's new bylaws.²⁵

"Despite the continued efforts of civil society and many governments to reach a balanced compromise, elements of this reform project will marginalize States in the decision-making processes of ICANN, especially compared to the role of the private sector."

Unnamed French foreign ministry officials also told *Le Monde* they were unhappy with the end result, saying: "This is an unsatisfactory condition. The consensus requirement only produces warm water. And that does not put the GAC on the same footing as the other committees of ICANN."

The French official is right – the GAC is not on the same footing as other ICANN stakeholders. That, however, is by design. Notwithstanding criticism from certain governments, the full package of transition accountability measures sufficiently cabins governmental influence and fully meets NTIA's conditions for the transition.

5.3 The Affirmation of Commitments is being added to ICANN bylaws

The first stress test that we proposed to Congress was where ICANN decides to quit the *Affirmation of Commitments*, a bilateral agreement with the US that either party may terminate with 120 days notice.²⁶ Once the IANA contract is gone, ICANN could quit the *Affirmation* without fear of losing its control over IANA functions. Even if ICANN wanted to retain the *Affirmation* after transition, that agreement would be targeted for elimination by governments who resent the US having a unique, bilateral relationship with ICANN.

In your Feb-2015 hearing, members of this committee suggested making *Affirmation* obligations permanent. At the same time, the CCWG examined *Affirmation* items to determine

²⁵ 24-Mar-2016, "French scream sacré bleu! as US govt gives up the internet to ICANN", at http://www.theregister.co.uk/2016/03/24/france_slams_us_govt_internet_transition/

²⁶ See Stress Test 1, on page 8 at [NetChoice Testimony before the House Energy & Commerce Committee, Subcommittee on Communications and Technology – Ensuring the Security, Stability, Resilience, and Freedom of the Global Internet](#), 2-Apr-2014

which were already in ICANN bylaws, and proposed adding key *Affirmation* commitments to ICANN bylaws – including the 4 periodic community reviews:

ICANN's accountability & transparency

Preserving security, stability and resiliency

Promoting competition, consumer trust, and consumer choice

The extent to which WHOIS services meet legitimate needs of law enforcement

Now, these reviews will be part of ICANN bylaws, enhanced to give the community access to ICANN internal documents and control over review team composition. In addition, the IANA stewardship group proposed an IANA Functions Review be added to the bylaws.

When combined with new powers to challenge ICANN board decisions, these bylaws changes would enable termination of the *Affirmation of Commitments*. The CCWG concluded that the *Affirmation* should be terminated to avoid having a side agreement different from the new bylaws, and to eliminate a bilateral agreement with the US that would become a target for critics of a unique US government role in ICANN oversight.²⁷

5.4 The post-transition ICANN would not increase government censorship of online content

As noted in section 4 above, Senators Cruz, Lankford, and Lee wrote to ICANN's chairman this year about his CEO's engagement with the Chinese government and China's latest regulatory restrictions on domestic Internet domain name registrations. The response from ICANN asserted that the CEO's personal engagement with a Chinese conference was not related to his role as CEO, and said that ICANN's engagement with China "does not suggest any level of support for the nation's government or its policies."²⁸

However, recent moves by the Chinese government to regulate domain name registrations remains troubling to NetChoice members, since it could lead to fragmentation of the global internet and isolation of China's citizens and businesses. The Senators are right to

²⁷ p. 6, Annex 9 - Recommendation #9: Incorporating the Affirmation of Commitments in ICANN's Bylaws, at <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>

²⁸ 6-Apr-2016, Response from ICANN to Senators Cruz, Lee, and Lankford, at <https://www.icann.org/en/system/files/correspondence/crocker-to-cruz-lankford-lee-06apr16-en.pdf>

be concerned about this, and a post this week by NTIA's Larry Strickling and Ambassador Danny Sepulveda echoes those same concerns:²⁹

If left unchanged, China's regulations would undermine some of the most fundamental aspects of the Internet — openness, reliability, and interoperability — within China. By creating its own rules for domain name management, China is threatening to fragment the Internet, which would limit the Internet's ability to operate as a global platform for human communication, commerce, and creativity.

However troubling the Chinese government's recent moves may be, they are not an attempt to take control of ICANN or the global domain name system. The Chinese government's move to control domain registrations by Chinese nationals is part of its larger effort to control what reaches or originates from its citizens. It may also be driven by a desire to reduce online fraud and abuse among several hundred million Chinese Internet users, many of whom are going online for the first time.

Fortunately, the Chinese government's censorship regime works only at the *edge* of the Internet, where online traffic enters networks within China's physical borders. Neither China nor other governments can extend censorship to the *core* of the global Internet, so long as our multi-stakeholder community controls ICANN policy development and holds ICANN accountable for its actions.

Our transition proposal does not help China — or any other government — to extend censorship to the root of the DNS. In fact, we have new powers to challenge board implementation of GAC advice that exceeds our new—and narrower—mission for ICANN. The new bylaws explicitly limit ICANN's ability to impose restrictions on content or conduct:³⁰

ICANN shall not regulate (i.e., impose rules and restrictions on) services that use the Internet's unique identifiers or the content that such services carry or provide, outside the express scope of Section 1.1(a). For the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority.

Authoritarian regimes don't want the IANA transition to succeed. This transition empowers the private sector, civil society, and technologists -- not governments -- to take the reins over the global Internet. As one noted China cyber expert put it, this is a development that would dramatically undermine the authoritarians' arguments that only governments can truly manage

²⁹ 16-May-2016, Lawrence Strickling and Daniel Sepulveda, "China's Internet Domain Name Measures and the Digital Economy", at: <https://blogs.state.gov/stories/2016/05/16/china-s-internet-domain-name-measures-and-digital-economy>

³⁰ 20-Apr-2016, ICANN Draft new Bylaws, at <https://www.icann.org/en/system/files/files/proposed-new-bylaws-20apr16-en.pdf>

something as powerful as the Internet.³¹ We know this to be false, because of the incredible role that stakeholders from around the world have played for decades in keeping the global Internet safe and running smoothly.

But in the face of these threats to fragment the global Internet, it's more important than ever to ensure that the innovators and entrepreneurs who have always been responsible for growing and protecting the Internet remain at the helm, free from undue government influence. The transition plan we are here to discuss will do precisely that.

5.5 At this point, a significant delay in this transition could create far more risks than rewards for the interests of US government, businesses, and citizens

As noted in section 4, Senators on the committee circulated letters last week indicating reasons to delay the transition beyond the IANA contract expiration on 30-Sep-2016. We acknowledge that a modest delay could give more time to complete remaining implementation tasks and verify promised implementation by the ICANN Board. But an extended delay would create more risks and no significant benefits from the perspective of the US government, businesses, and citizens.

First, Sen. Rubio wrote that the proposal “would create a radically different governance structure for ICANN”. While it is true that the proposed new governance structure is somewhat complicated, it is rooted in California law to give legal powers to the community. This is the same kind of accountability typically used by shareholders, association members, and voters. Moreover, the newly empowered community would invoke these new accountability powers only if ICANN’s board ignored community consensus in its pursuit of a budget, a bylaws change, or a policy action. The mere existence of these new community powers will diminish the board’s appetite to confront a united community of disgruntled Internet stakeholders.

Second, Senators raise concern “about the expanded role of governments”. That concern could reasonably arise from looking in isolation at the GAC’s status as multi-equal stakeholder in the empowered community. But as noted in section 5.3 above, the net effect of transition changes does not increase the influence of governments over ICANN activities. This is also evident in the complaints of France, Brazil, and other GAC members who believe their influence is being reduced in favor of other ICANN stakeholder groups.

³¹ Adam Segal, “The Hacked World Order”, (PublicAffairs, 2016) at 220.

Third, Senators Cruz, Lankford, and Lee worry that the CCWG proposal could commit ICANN to potentially troubling enforcement obligations for human rights. NetChoice shared this concern with the first draft of Bylaws regarding the *Work Stream 2* framework on human rights, so we support this amended Bylaw text:

(viii) Subject to the limitations set forth in Section 27.3, within the scope of its Mission and other Core Values, respecting internationally recognized human rights as required by applicable law. This Core Value does not create, and shall not be interpreted to create, any obligation on ICANN outside its Mission, or beyond obligations found in applicable law. **This Core Value does not obligate ICANN to enforce its human rights obligations, or the human rights obligations of other parties, against such other parties.**

This proposed bylaws text would make it clear that ICANN will not become embroiled in enforcement of claims related to human rights, and should address the Senators' concern.

Fourth, Sen. Rubio and others observe that there are "details of the proposal that have yet to be developed", referring specifically to Work Stream 2 elements such as transparency improvements and a new framework for respecting human rights. Actually, there are several additional tasks in Work Stream 2, which will take the CCWG well into mid-2017 to complete.

However, the whole point of separating Work Stream 1 and 2 tasks was to identify what had to be implemented *before* the IANA contract expired, after which there would be very little leverage to force accountability measures that would be resisted by ICANN's board. Work Stream 1 includes new powers to block the board's budget, overturn a board decision, and to recall board directors. Those powers are deemed sufficient to force a future ICANN board to accept Work Stream 2 changes that are developed through community consensus.

In other words, ICANN's new bylaws give the Empowered Community new powers to implement further reforms *at any time*. So the only way to evaluate all changes the community might pursue in the future is to delay the transition *indefinitely*.

A long-term delay of transition would re-ignite the fire at the United Nations, where many governments have cited the US government role as the sole supervisor of ICANN and the IANA functions as an excuse to gain more control over the Internet for themselves. With this transition we are eliminating the role where one government holds ICANN accountable, by moving to a structure where ICANN is accountable to a broad community of Internet stakeholders. After transition, the UN and ITU can no longer point to the US government role and say they should step into those shoes.

Finally, an extended delay of transition would signal that the US government does not actually trust the multi-stakeholder model that we are encouraging China and other governments to trust. China's government would surely note our hypocrisy for criticizing them for failing to embrace domain registration policies developed by ICANN's multi-stakeholder community.

6. Conclusion

This transition is the best opportunity to pursue difficult but necessary reforms to ensure that ICANN is accountable to the community it was created to serve.

It's imperative to empower the Internet community to challenge ICANN decisions on situations that will arise in the decades ahead. The new Bylaws provide direct court enforcement for community's statutory power to remove an individual director or to recall the entire ICANN board.³² And if the community wins in an independent review process (IRP) and the ICANN board does not comply with the IRP decision, the community can petition a court to enforce the result of the IRP. For all other community powers, the recourse is to recall the entire ICANN board, which is also enforceable *in court*.

The global Internet community has devoted thousands of hours developing this proposal and bylaws, and is facing additional effort on *Work Stream 2* enhancements. We are therefore grateful that this committee approved legislation insisting that NTIA require ICANN to adopt the multistakeholder community proposals *as a condition of the IANA transition*. Your strong support helped us persuade ICANN's board to commit to adopt bylaws changes required by the community proposal – regardless of when this proposal works its way through Washington.

To prepare ICANN for a future independent of US government contracts, the Internet community needs to hold ICANN accountable, with powers like shareholders have over corporations; voters over their elected officials; and members over their trade associations. This transition can realize the *White Paper* vision for an ICANN that is led by, and accountable to its multistakeholder communities, including the private sector; civil society; and technology experts – along with a limited role for governments. Together, we can bring connectivity, content, and commerce to the next billion global Internet users and to future generations of Americans.

³² p. 9, Annex 02 –Recommendation #2: Empowering the Community through Consensus, at <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>

Annex – United States government stewardship of ICANN and IANA

American engineers came up with a “recipe” for core Internet technologies and promptly gave that recipe to the world. Internet hosts were appearing internationally by the 1980s. The 1990’s saw the explosion of commercial uses of the Internet, based on a naming and numbering system also created in the United States. In 1998, the Clinton administration sought to privatize and internationalize the Domain Name System (DNS) with this directive in the *White Paper*:

The President directed the Secretary of Commerce to privatize the Domain Name System in a way that increases competition and facilitates international participation in its management.

The US Government is committed to a transition that will allow the private sector to take leadership for DNS management.³³

In the 18 years since, it’s been a long road from American invention to internationalized private-sector leadership by an entity the US established for the task: the Internet Corporation for Assigned Names and Numbers (ICANN). Three administrations and several Congresses have worked to help ICANN mature and protect the vision of private-sector leadership from growing pressure for control by governments, who saw the growth of the Internet and assumed that its governance required an inter-governmental solution.

The transition to an independent ICANN was expected to take a few years, but the National Telecommunications and Information Administration (NTIA) made several extensions of its oversight arrangements, the latest of which expired in September 2009. At the time, NetChoice was among those calling for another extension so that ICANN could develop permanent accountability mechanisms.

Instead, NTIA and ICANN unveiled a new agreement, the *Affirmation of Commitments*.³⁴ The *Affirmation* established periodic reviews giving all stakeholders – including governments – a defined oversight role in assessing ICANN’s performance. The *Affirmation* gave the global Internet community what was promised: independence for ICANN in a framework where governments were alongside private sector stakeholders.

³³ The “White Paper” on Management of Internet Names and Addresses, US Department of Commerce, Jun-1998, see http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm

³⁴ Affirmation of Commitments, 2009, <http://icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>

But concerns about the US role in naming and numbering remained after the execution of the *Affirmation*, because NTIA retained its contracting role for the Internet Assigned Numbers Authority (IANA). The IANA contract is deemed essential to ICANN and therefore provided NTIA leverage to hold ICANN to its *Affirmation* obligations.

However, ICANN can quit the *Affirmation* with just 120 days notice. And within a year of signing, ICANN's then-chairman told a group of European parliamentarians that he saw the *Affirmation* as a temporary arrangement ICANN would like to eventually terminate.³⁵

All of this to say that ICANN needs a persistent and powerful reminder that it serves at the pleasure of global stakeholders; that ICANN has no permanent lock on managing the Internet's name and address system. We said at the time that ICANN's role in IANA functions should disappear if it were to walk away from the *Affirmation of Commitments*.

Since the UN created the Internet Governance Forum (IGF) in 2005, IGF meetings have become increasingly productive, yet some governments still want the UN to oversee DNS tasks handled by ICANN and IANA. In its July-2010 statement to the UN, China's government asked the UN and IGF to "solve the issue of unilateral control of the Critical Internet Resources." By 'unilateral control', China means US custody of the IANA contract. And 'Critical Internet Resources' include IP addresses, root servers, and the policymaking for domain names.

China was not alone in its desire for the migration of ICANN and IANA functions to the UN's International Telecommunication Union (ITU). ITU leadership did not like a model where governments share power with industry and civil society, and warned ICANN that sooner or later governments would take greater control of the organization.

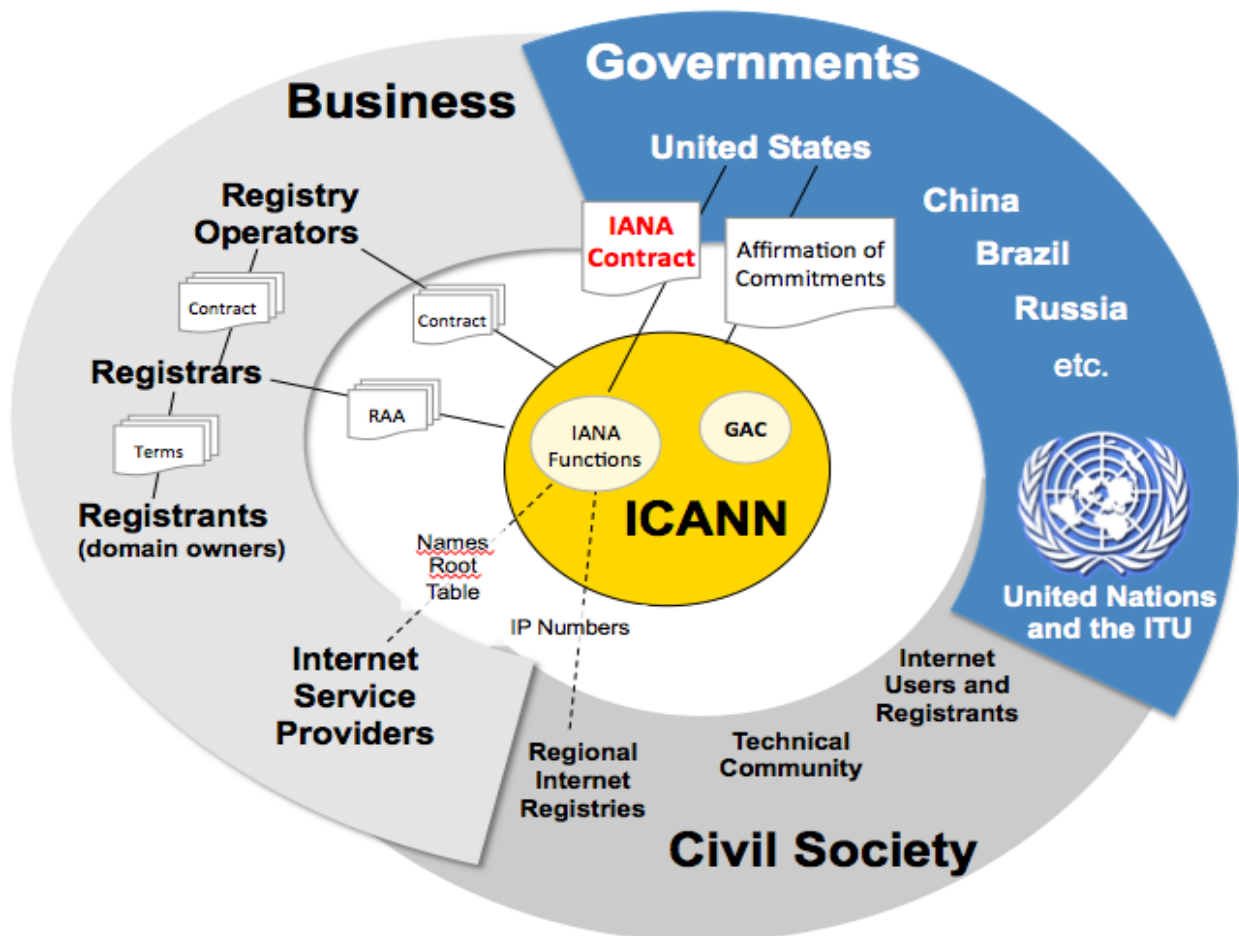
In 2011, a group of governments proposed their own replacement for US oversight and ICANN's model of private sector leadership. India, Brazil, and South Africa declared it was time for "establishing a new global body" located "within the UN system" to "oversee the bodies responsible for technical and operational functioning of the Internet."³⁶ In contrast, both houses of Congress unanimously affirmed a resolution in 2012 stating, "the consistent and

³⁵ Peter Dengate Thrush, in response to a question from Steve DelBianco, at event hosted by European Internet Foundation in Brussels, June 22, 2010.

³⁶ Recommendations of IBSA Multistakeholder meeting on Global Internet Governance, September 2011, at http://www.culturalivre.org.br/artigos/IBSA_recommendations_Internet_Governance.pdf

unequivocal policy of the United States to promote a global Internet free from government control and preserve and advance the successful multistakeholder model that governs the Internet today.”³⁷

The diagram below shows the multiple contractual ties and connections between ICANN and its global stakeholders.



Clearly, the last 18 years of “transition” have seen significant improvements in globalizing ICANN and IANA, although there have certainly been some challenges. Along the way, some governments and intergovernmental organizations have criticized the US role and

³⁷ H.Con.Res.127 and S.Con.Res.50 - Expressing the sense of Congress regarding actions to preserve and advance the multistakeholder governance model under which the Internet has thrived, Aug 20, 2012

openly coveted taking over that role. But throughout, the US Congress and multiple administrations have stayed with the vision of multistakeholder, private-sector leadership for Internet addressing and policymaking. And our government has used its contractual tools to improve ICANN's performance and to hold the organization to the accountability measures in the *Affirmation of Commitments*.

Still, the US continued to work towards full privatization of ICANN and IANA, at a deliberate pace and with measurable progress. Then came 2013 and Edward Snowden's revelations of US government surveillance. While not unique to the US and entirely unrelated to ICANN and the IANA functions, Snowden stoked international concerns that led to the administration's decision to relinquish the remaining tether of ICANN accountability to the US – the IANA functions contract.

Ensuring that ICANN accepts and implements the community proposals

In September 2014 all ICANN advisory committees and stakeholder groups wrote a joint letter raising questions about ICANN's proposed accountability process.³⁸ ICANN responded by asking whether and why the community seemed to lack trust in ICANN's board and management. The Business Constituency's reply is remarkable for its clarity on why the community needs new measures to hold ICANN accountable:³⁹

First, this discussion is not about whether the community 'trusts' the current ICANN board. It's about trusting future boards — after we no longer have the leverage/influence of the US Government to rely upon. This IANA transition is the community's chance to establish mechanisms to rein-in a future board that would put ICANN's corporate interests ahead of the community. We are not suggesting that a future board would do so. Rather, we are acknowledging that the board is obliged to protect the corporation's interests first, as required by ICANN bylaws:

Section 7: Directors shall serve as individuals who have the duty to act in what they reasonably believe are the best interests of ICANN and not as representatives of the entity that selected them.

³⁸ Joint questions, <https://www.icann.org/en/system/files/correspondence/cooper-et-al-to-chehade-crocker-03sep14-en.pdf>

³⁹ p. 3, Business Constituency comment on Enhancing ICANN Accountability Process, 27-Sep-2014, at <http://www.bizconst.org/wp-content/uploads/2014/09/BC-comment-on-Enhancing-ICANN-Accountability-Process.pdf>

Should there be any confusion about whether the bylaws refer to 'ICANN' as the corporation or the community, see ICANN's *Management Operating Principles* (2008):

"The third and perhaps most critical point of tension is between the accountability to the participating community to perform functions in keeping with the expectations of the community and the corporate and legal responsibilities of the Board to meet its fiduciary obligations. The ultimate legal accountability of the organization lies with the Board, not with the individuals and entities that make up the ICANN community."⁴⁰

The Business Constituency had it right: ICANN's present bylaws do not hold the board accountable to the community. Before the US government lets go of the oversight leverage inherent in the IANA contract, it must ensure that ICANN accepts and implements the proposals needed to keep the ICANN corporation accountable to the global multistakeholder community that ICANN was created to serve.

⁴⁰ ICANN Accountability & Transparency Frameworks and Principles, Jan-2008, p.5, at <https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-10jan08-en.pdf>