

Statement of

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Testimony before the

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Committee on the Judiciary

Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts

September 14, 2016

*Protecting Internet Freedom: Implications of Ending U.S. Oversight of the Internet*

I am Executive Director of NetChoice, an association of leading online businesses.<sup>1</sup> At state, federal, and international venues, NetChoice promotes the integrity and availability of the Internet. We've attended 33 ICANN meetings and I'm serving a 6th term as policy chair for ICANN's Business Constituency. I've attended all Internet Governance Forum (IGF) meetings and testified in 9 Congressional hearings on ICANN and Internet governance, including 4 hearings on the IANA transition.

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 discriminatory regulation, taxation, and censorship driven by government agendas. We need policies that are predictable and enforceable, facilitating innovation and creativity while protecting consumers. I will focus on three points today:

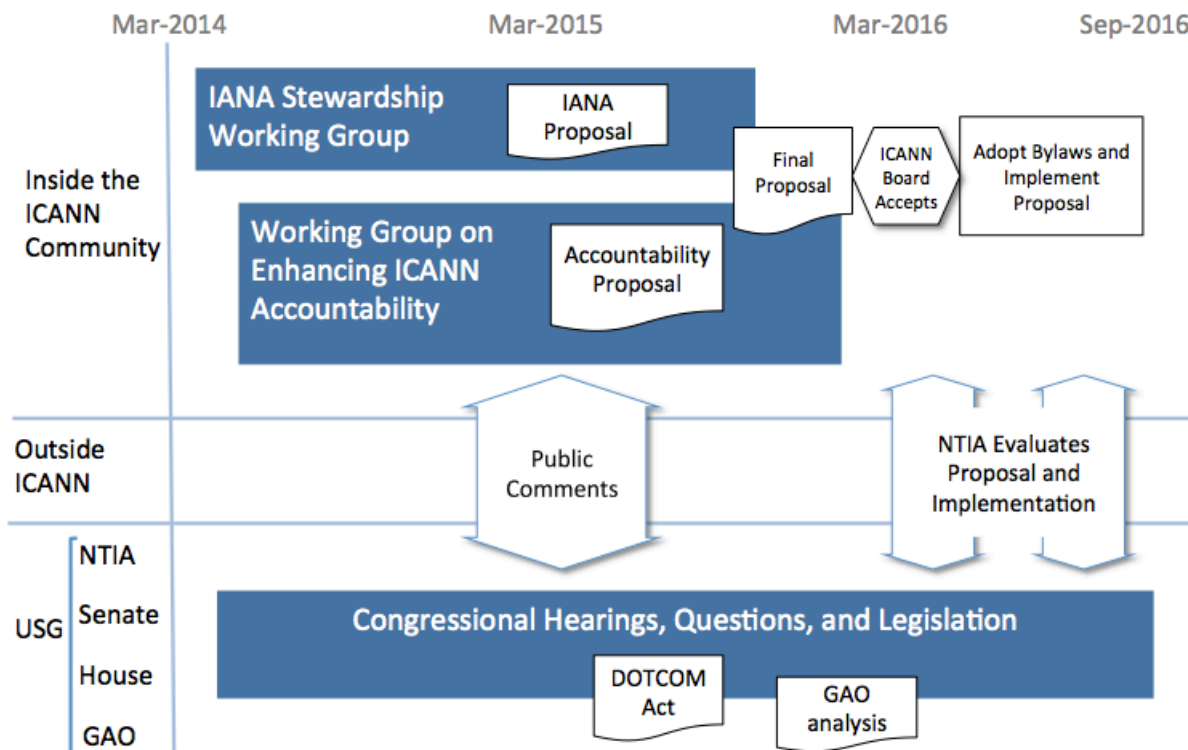
1. Over 18 years and three administrations, the US government had only light-touch oversight over ICANN. However, it is neither sustainable nor necessary for the US to retain its unique role forever. In fact, retaining this unique role increases the risk of Internet fragmentation and government overreach. At NTIA's request, the Internet community created a plan to strengthen ICANN's accountability to the global Internet user community and privatize core Internet functions to keep them 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. In 2015, the House of Representatives and Senate Commerce Committee voted overwhelmingly to back the community with the DOTCOM Act, insisting that NTIA require ICANN to adopt the multistakeholder proposals *as a condition of the transition*. Now, some in Congress seek to delay the transition, inviting new risks and problems.
3. The community's proposal meets NTIA requirements and reduces governments' power in ICANN. It makes ICANN accountable to the technologists, businesses, civil society, users, and governments 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, and we should seize the chance to lock-in this community proposal.

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<sup>1</sup> See <http://www.NetChoice.org>. Members include Facebook, Google, Verisign, and Yahoo. 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?**

Congress has been closely following the transition, as seen in this timeline:

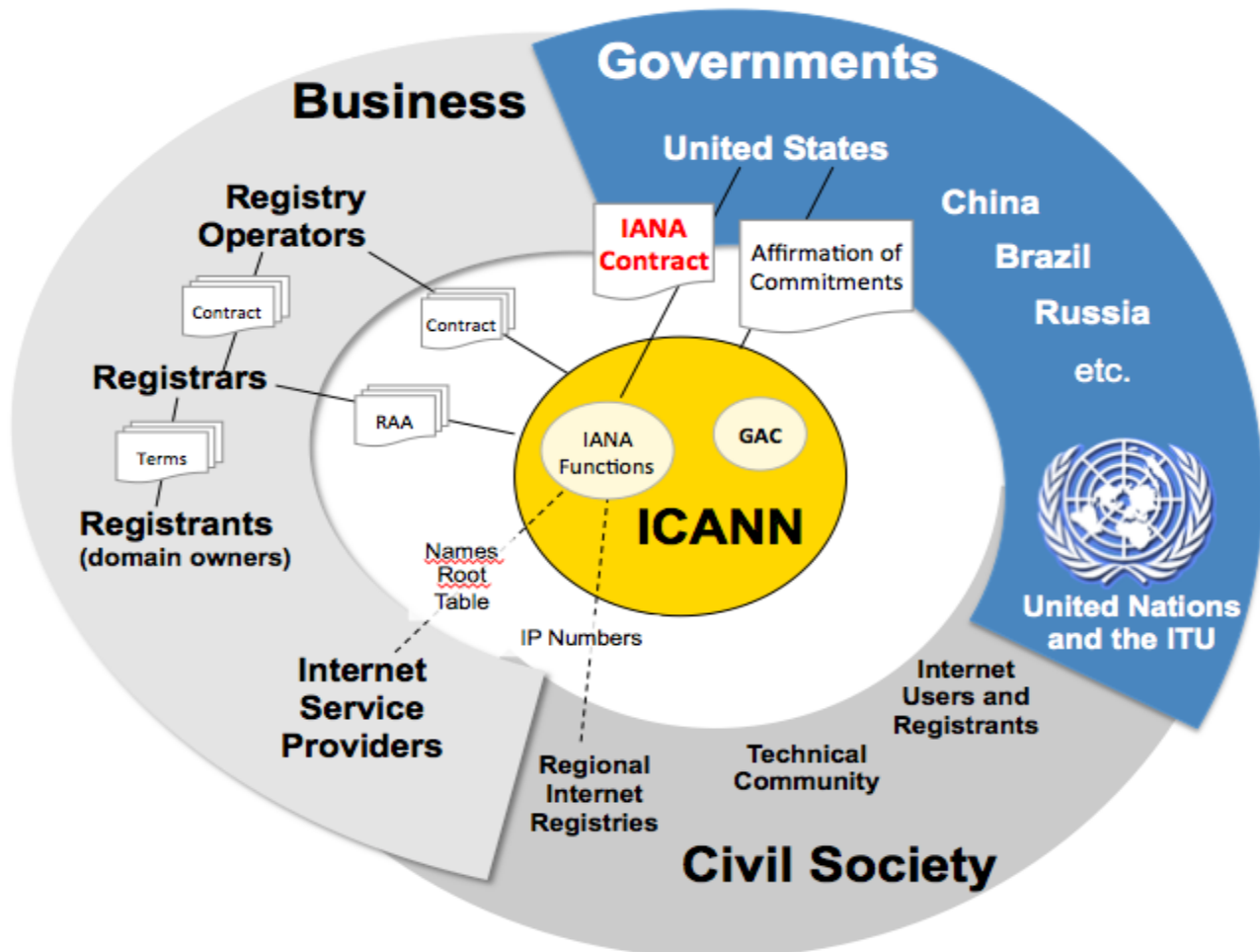


This summer, the ICANN community began designing *Work Stream 2* accountability measures, addressing transparency, diversity, and other issues. ICANN’s new bylaws give the community powers to ensure these measures can be implemented—even if ICANN’s board and management were to object.

**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 unrelated to ICANN– stoked international concerns about the US government having greater influence over ICANN than any other government. While it's false to conflate Snowden revelations with ICANN's activity, this brought renewed attention to the unique US government role as holder of the IANA functions contract. That gave the US a chance to lead the world and show that the businesses and organizations responsible for running the Internet – not governments – are the ones who should be shepherding the future of ICANN.

### **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 role<sup>2</sup>:

- 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 an element of accountability for ICANN, and saw the need to develop accountability enhancements 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 direct leverage associated with the IANA contract once it expires.

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<sup>2</sup> 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 to 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:** 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 make ICANN answerable to more than just itself.<sup>3</sup> 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

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<sup>3</sup> 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 ICANN board of directors approved in May 2016.

The new ICANN bylaws are 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.

In the next section I summarize questions and concerns raised by members of this subcommittee regarding the announced transition of IANA and enhancing ICANN accountability.

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

Subcommittee members have engaged in transition discussions, with letters and inquiries that have shaped the process, as summarized below:

- Five members of this subcommittee were among 35 Senators who wrote NTIA in Apr-2014 to reiterate the 2012 joint congressional resolution supporting the multi-stakeholder model, while also posing questions about this transition: *why, by what authority, when, how, and what about potential risks?*<sup>4</sup>
- In Sep-2015 Senator Cruz led a bicameral request for GAO to determine whether the administration has the power to relinquish IANA functions.<sup>5</sup>
- In Feb-2016 Chairman Cruz and Senators Lankford and Lee wrote to ICANN, objecting to actions they believe supported Chinese Internet censorship.<sup>6</sup> ICANN's response<sup>7</sup> was

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<sup>4</sup> 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>

<sup>5</sup> 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](http://www.cruz.senate.gov/?p=press_release&id=2453)

<sup>6</sup> 4-Feb-2016, Letter to ICANN CEO, at <https://www.icann.org/en/system/files/correspondence/cruz-et-al-to-chehade-04feb16-en.pdf>

<sup>7</sup> 19-Feb-2016, ICANN CEO response letter, at <https://www.icann.org/en/system/files/correspondence/chehade-to-cruz-et-al-19feb16-en.pdf>

followed by another letter from the same Senators on 3-Mar-2016, referring to China's latest regulations for Internet domain registrations.<sup>8</sup>

- On 19-May-2016, Chairman Cruz and Senators Lankford and Lee wrote to Commerce Secretary Pritzker and NTIA Assistant Secretary Strickling, giving reasons they believe NTIA should extend the IANA contract:<sup>9</sup>
  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
- On 8-Jun-2016, Chairman Cruz introduced the "Protecting Internet Freedom Act" (S. 3034), which would prohibit NTIA from allowing the IANA contract to lapse unless specifically authorized to do so by an Act of Congress.<sup>10</sup>
- On 8-Sep-2016, Judiciary Chairman Grassley, Senator Thune, and Congressmen Upton and Goodlatte wrote to the Justice and Commerce departments.<sup>11</sup> They request a delay in transition, citing concerns about accountability, jurisdiction, and antitrust.

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

### **5. ICANN's new bylaws address concerns of subcommittee members**

At the same time members of Congress 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

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<sup>8</sup> 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>

<sup>9</sup> 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](http://www.cruz.senate.gov/files/documents/Letters/20160519_ICANNLetter.pdf)

<sup>10</sup> Protecting Internet Freedom Act, at [http://www.cruz.senate.gov/files/documents/Bills/20160524\\_ProtectingInternetFreedomAct.pdf](http://www.cruz.senate.gov/files/documents/Bills/20160524_ProtectingInternetFreedomAct.pdf)

<sup>11</sup> 8-Sep-2016, Letter from Senators Grassley and Thune and Representatives Goodlatte and Upton, at [https://www.commerce.senate.gov/public/\\_cache/files/9b6b37a9-e5a4-4695-931e-73d54b32f768/D453845EFDC860DCC3161346BBCA9C63.20160908-doj-lynch-doc-pritzker-joint-letter-on-iana-transition.pdf](https://www.commerce.senate.gov/public/_cache/files/9b6b37a9-e5a4-4695-931e-73d54b32f768/D453845EFDC860DCC3161346BBCA9C63.20160908-doj-lynch-doc-pritzker-joint-letter-on-iana-transition.pdf)



the transition, I testified before the House Commerce Committee about *stress tests* to inform and evaluate accountability proposals.<sup>12</sup> I led the working group that applied these stress tests to the accountability proposal, and we ultimately determined that *proposed new accountability 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 must maintain a physical and legal presence in the United States**

At the Feb-2015 Commerce committee hearing, Senators noted *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.” At the hearing, the ICANN CEO repeated this commitment, saying, “ICANN shall remain in the United States of America, and we stand by this.”<sup>13</sup>

Those of us in the CCWG were not content to rely upon a verbal promise made by a CEO, so we added further assurance of a continued US presence in ICANN's bylaws and articles of incorporation. 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 can, and would likely 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”<sup>14</sup>. The CCWG proposal amends ICANN's Articles of Incorporation such that any change would require a 75% majority of the empowered community.

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<sup>12</sup> 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

<sup>13</sup> 23-Jun-2015, Roll call vote on HR 805, at <http://clerk.house.gov/evs/2015/roll377.xml>

<sup>14</sup> Section 3 of ICANN Articles of Incorporation, at <https://www.icann.org/resources/pages/governance/articles-en>

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 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.<sup>15</sup>

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:<sup>16</sup>

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.<sup>17</sup>

Several governments had voiced dissatisfaction with the present consensus rule for GAC decisions, so it is entirely plausible that GAC could change its method of approving advice, 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:<sup>18</sup>

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<sup>15</sup> 6-Nov-1998, Bylaws for ICANN, at <https://www.icann.org/resources/unthemed-pages/bylaws-1998-11-06-en>

<sup>16</sup> 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

<sup>17</sup> 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>

<sup>18</sup> Email from Suzanne Radell, Senior Policy Advisor, NTIA, 19-Mar-2015, at <http://mm.icann.org/pipermail/accountability-cross-community/2015-March/001711.html>

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 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).

The increased rejection threshold of 1 additional vote is reserved 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, so the US alone could block GAC advice adverse to American interests. These changes more than justify the requirement of 1 more vote to reject GAC 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 require that ICANN find a solution that is acceptable to the GAC. The board could propose modifications to the GAC advice that would mitigate board concerns, But if GAC refused to adjust its advice, the board's decision to reject would still hold, and the GAC advice would be set aside.

If the ICANN board accepted GAC advice, ICANN could still be stopped from implementing that advice by a challenge brought under the enhanced Independent Review Process (IRP). An aggrieved party or the Empowered Community can bring an IRP challenge based on actions of ICANN to "ensure that ICANN does not exceed the scope of its limited technical Mission and otherwise complies with its Articles of Incorporation and Bylaws."<sup>19</sup>

An IRP challenge could also argue that board action did not defer to the community in determining whether GAC advice was in the global public interest. ICANN's new bylaws defer to

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<sup>19</sup> May-2016, Section 4, ICANN Bylaws, at <https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf>

the community – not the board—to define the global public interest: “ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest.”

While an aggrieved party must pay its own legal costs for the IRP, an Empowered Community IRP would mean that ICANN must pay *all* legal costs. Next, I describe how GAC’s presence in the Empowered Community cannot be used to block a community IRP against implementation of GAC advice.

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 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 nearly all government employees are Internet users. Moreover, governments have a role among all stakeholders in developing public policy and enforcing laws that are relevant to the Internet.

While GAC is an essential ICANN stakeholder, 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:<sup>20</sup>

"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 of the private sector-led ICANN community.

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<sup>20</sup> 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/](http://www.theregister.co.uk/2016/03/24/france_slams_us_govt_internet_transition/)

As the ICANN community gathered in Mar-2016 to approve the CCWG proposal, Russia's GAC representative complained that transition would leave ICANN rooted in the USA:

"Sharply criticising the transition proposal, Ismailov said it appeared that ICANN would remain a US corporation and the functions of the NTIA would just be resolved within the ICANN procedures, and be totally laid on US ground."<sup>21</sup>

As detailed in this testimony, 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 has been added to ICANN bylaws**

The first stress test that we proposed to Congress was where ICANN might decide to quit the *Affirmation of Commitments*, a bilateral agreement with the US that either party may terminate with 120 days notice.<sup>22</sup> Even if ICANN were to retain the *Affirmation* after transition, that agreement would be targeted for assumption or elimination by governments who resent the US having a unique, bilateral relationship with ICANN.

Chairman Cruz' May-2016 letter raised concern that the transition proposal "will embolden an unaccountable ICANN board." To address that concern, our proposal made the *Affirmation* obligations part of 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 that was added to the bylaws.

When combined with new powers to challenge ICANN board decisions, these bylaws changes would enable consensual termination of the *Affirmation of Commitments*. The CCWG concluded that the *Affirmation* should be terminated to avoid having a side agreement different

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<sup>21</sup> 08-Mar-2016, Monika Ermert, article in Intellectual Property Watch, <http://www.ip-watch.org/2016/03/08/icann-meeting-in-marrakesh-more-hiccups-on-way-to-iana-transition/>

<sup>22</sup> 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

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.<sup>23</sup>

#### **5.4 The new bylaws enable ICANN to enforce contractual commitments of registries and registrars – including safeguards for intellectual property**

ICANN community members who developed the accountability proposal were committed to maintaining an Internet that is not subject to government restrictions on free expression. At the same time, many of us wanted to ensure that safeguards against DNS abuse in the new registry contracts would continue to be enforceable, and not subject to challenge under the more explicitly limited mission statement for ICANN. Here is the commitment in the bylaws:<sup>24</sup>

ICANN’s performance of its obligations or duties thereunder, may not be challenged by any party in any proceeding against, or process involving, ICANN (including a request for reconsideration or an independent review process pursuant to Article 4) on the basis that such terms and conditions conflict with, or are in violation of, ICANN’s Mission or otherwise exceed the scope of ICANN’s authority or powers pursuant to these Bylaws (“Bylaws”) or ICANN’s Articles of Incorporation.

This protection from challenge is applied to “all registry agreements and registrar accreditation agreements between ICANN and registry operators or registrars in force on 1 October 2016,” which includes agreements and renewals that contain abuse “Safeguards” requested by GAC<sup>25</sup>.

Such safeguards could still become part of registry and registrar agreements negotiated in the future, as long as they avoid giving ICANN new powers to “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).” And the new bylaws expressly authorize ICANN to enter and enforce contracts: “ICANN shall have the ability to negotiate, enter into and enforce agreements, including public interest commitments, with any party in service of its Mission.”

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<sup>23</sup> 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>

<sup>24</sup> May-2016, Section 1.1 of ICANN Bylaws, at <https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf>

<sup>25</sup> Safeguards for new gTLD Registries are in Specification 11 of the Registry Agreement, at <https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-09jan14-en.htm>. Section 3a is the most relevant to IP concerns:

...prohibiting Registered Name Holders from distributing malware, abusively operating botnets, phishing, piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law, and providing (consistent with applicable law and any related procedures) consequences for such activities including suspension of the domain name.

The accountability proposal did not alter ICANN's existing obligations to enforce its contracts and to enforce consensus policies against registries and registrars. As always, anyone can bring contract enforcement matters to the attention of ICANN's compliance department. However, ICANN moves deliberately to investigate and respond to enforcement complaints, rarely to the satisfaction of those making the complaint. Concerns about enforcement have often come down to the speed and effectiveness of ICANN's follow-up and on differing interpretations of contract terms and policies.

While registry contract interpretation and enforcement are not directly affected by transition of IANA functions, there are two ways that the transition enhances the Internet community's ability to increase ICANN's compliance actions for contracts with registries and registrars.

First, affected parties can invoke the enhanced Independent Review Process (IRP) if ICANN failed to enforce its contractual obligations and its inaction was in violation of ICANN's Commitments and Core Values. The IRP is a binding process and decisions of the independent reviewer can be enforced in California courts, or in any court that recognizes international arbitration proceedings.

Second, affected parties may work within the ICANN stakeholder organization for generic TLDs (GNSO) to amend and clarify any Consensus Policy where ICANN's compliance department is taking a too narrow or too broad interpretation of the policy. All registry and registrar contracts require implementation and enforcement of any Consensus Policy developed by the stakeholder organization for generic TLDs – the GNSO. These Consensus Policies are the mechanism by which the ICANN community addresses DNS abuse that was not already or adequately addressed in current contracts.

The sufficiency of these measures will almost certainly be tested in the years ahead. If the ICANN community finds these measures insufficient, the next step is to propose changes that increase contract enforcement powers over registries and registrars. Such changes could be proposed as recommendations from formal reviews of accountability and transparency, or of the review of the new gTLD program. Under the new bylaws, registries and registrars alone would not be able to block a community IRP challenge if ICANN refused to implement such bottom-up recommendations for stronger contract enforcement.

## **5.5 The post-transition ICANN would not enable increased government censorship of online content**

As noted in section 4 above, Chairman Cruz and Senators 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."<sup>26</sup>

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. Senators are right to be concerned about this, and a post in May by NTIA's Larry Strickling and Ambassador Danny Sepulveda expressed those same concerns:<sup>27</sup>

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 effort to control what reaches or originates from its citizens<sup>28</sup>.

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.

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<sup>26</sup> 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>

<sup>27</sup> 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>

<sup>28</sup> These regulations are not applicable to Chinese registrants who use non-domestic Chinese registrars. These registrants could register domains, but would have to host their content outside of China and thereby risk having their sites blocked via the "great firewall".



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:<sup>29</sup>

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 something as powerful as the Internet.<sup>30</sup> 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 does precisely that.

### **5.6 ICANN’s commitment to “respect” human rights will not create obligations to enforce human rights obligations**

Chairman Cruz and Senators Lankford and Lee have expressed concerns 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 supported this new 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.**

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<sup>29</sup> May-2016, ICANN Bylaws, at <https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf>

<sup>30</sup> Adam Segal, “The Hacked World Order”, (PublicAffairs, 2016) at 220.

The bylaws make it clear that ICANN will not become embroiled in enforcement of claims related to human rights, which should address the Senators' concern.

**6. A delay in this transition could create far more risks than rewards for the interests of US government, businesses, and citizens**

The global Internet community has devoted thousands of hours developing this proposal and bylaws. We were grateful that the House of Representatives and the Senate Commerce committee overwhelmingly approved legislation insisting that NTIA require ICANN to adopt the multistakeholder community proposals *as a condition of the IANA transition*.

However, as noted in section 4, Chairman Cruz and others have suggested reversing course, and want to delay the transition. Below, I explain why an extended or indefinite delay would create more risks and no significant benefits from the perspective of the US government, businesses, and citizens.

During the Senate Commerce hearing in May-2016, I acknowledged that a modest delay of a few months might be useful in order to verify the creation of new organizational elements and the adoption of new ICANN Bylaws and Articles of Incorporation. But at this point, the required bylaws, articles, and entities have been put into place to implement the community's transition proposal.

However, ICANN's board resolution adopting the new bylaws takes effect only when the IANA contract is terminated, and that creates a new problem for American interests. If the IANA transition were deferred, ICANN's board committed to implement whatever part of the new Bylaws were still applicable, but that means stripping IANA accountability out of the Bylaws. That's a losing proposition for America's Internet industry, which wants the new power to replace ICANN if it fails at names, numbers, or protocol services.

Moreover, the process of rescuing the remaining accountability reforms in ICANN's new bylaws invites the risk of re-litigating accountability mechanisms that were approved only as a complete package. Those compromises may be irretrievable, as governments and other factions of the ICANN community seek to improve their previous compromise positions. As a result, we might never regain the strong accountability powers approved earlier this year.

Even if we were able to rescue some of the accountability mechanisms, would a delay really be “test drive” for new community powers? Some in Congress say that a delay would allow time to make sure that accountability measures work properly. But there is no way to predict when the ICANN community would exercise its new powers to challenge a board decision or recall directors. These are extraordinary measures that we do not expect would be exercised often. Moreover, one reason for having these accountability measures available is that they will deter the ICANN board from defying consensus recommendations of the ICANN community. So the board is likely to accede rather than force the Empowered Community to invoke its new powers.

Therefore, a delay of several months (or even several years) brings no reasonable expectation of having the benefit of a “test drive” for new accountability measures.

Nor would such a delay enable any effective evaluation of yet-to-be-completed accountability enhancements, such as the projects in Work Stream 2. 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 less 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 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*.

My primary concern about any delay is that it would re-ignite the fire at the United Nations, who sees the legacy US government role as something *the UN* should be doing instead. With this transition we are eliminating the role where one government alone (the US) holds ICANN accountable, and we are instead making ICANN accountable to the community of Internet stakeholders. Once we complete this transition, the UN and ITU could no longer point to the US government role and insist that the UN should step into those shoes.

In 2011, a group of governments proposed their own UN 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.” In contrast, both houses

of Congress unanimously affirmed a resolution in 2012 stating, “the consistent and 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.”<sup>31</sup>

If Congress blocks or delays the transition and signals that governments, not industry, should manage the core of the Internet, it could reverberate at a UN/ITU conference being held in just a few weeks. US industry is already actively working to defeat proposals by some governments that would have the ITU regulate everything from cloud services and the *Internet of Things* to digital payments. These regulations would be a significant impediment to innovation by many American companies. A successful IANA transition will allow us to clearly demonstrate that governments and intergovernmental organizations are ill-suited to deal with complex issues like these, where bottom-up processes work best. A failed or delayed transition will send the opposite message.

A delay of transition would also signal that the US government does not actually trust the multi-stakeholder model that we are encouraging China and other governments to trust. The government of China would surely note our hypocrisy in criticizing them for failing to embrace policies developed by ICANN’s multi-stakeholder community, whereas our government defies the same community’s consensus plan for transition.

The governments of China and Russia would exploit any transition delay to persuade moderate governments that the UN needs to replace the legacy US government role, a result that none of us here would find acceptable. If Congress blocks the transition, after previously backing the community-led process with the DOTCOM Act, it signals to the world that the legacy US role in IANA is so important that it must be preserved. And that will make the IANA contract role a shiny object that the UN aspires to claim for itself.

At this point, a deferral of this transition could create far more downside than upside for the interests of US government, businesses, and citizens. 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. This transition helps American businesses to serve and expand the global internet.

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<sup>31</sup> 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

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.<sup>32</sup> 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*.

To prepare a privatized ICANN to be 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 original 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.

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<sup>32</sup> May-2016, ICANN Bylaws, at <https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-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.<sup>33</sup>

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*.<sup>34</sup> 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.

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<sup>33</sup> 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](http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm)

<sup>34</sup> 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.<sup>35</sup>

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."<sup>36</sup> In contrast, both houses of Congress unanimously affirmed a resolution in 2012 stating, "the consistent and

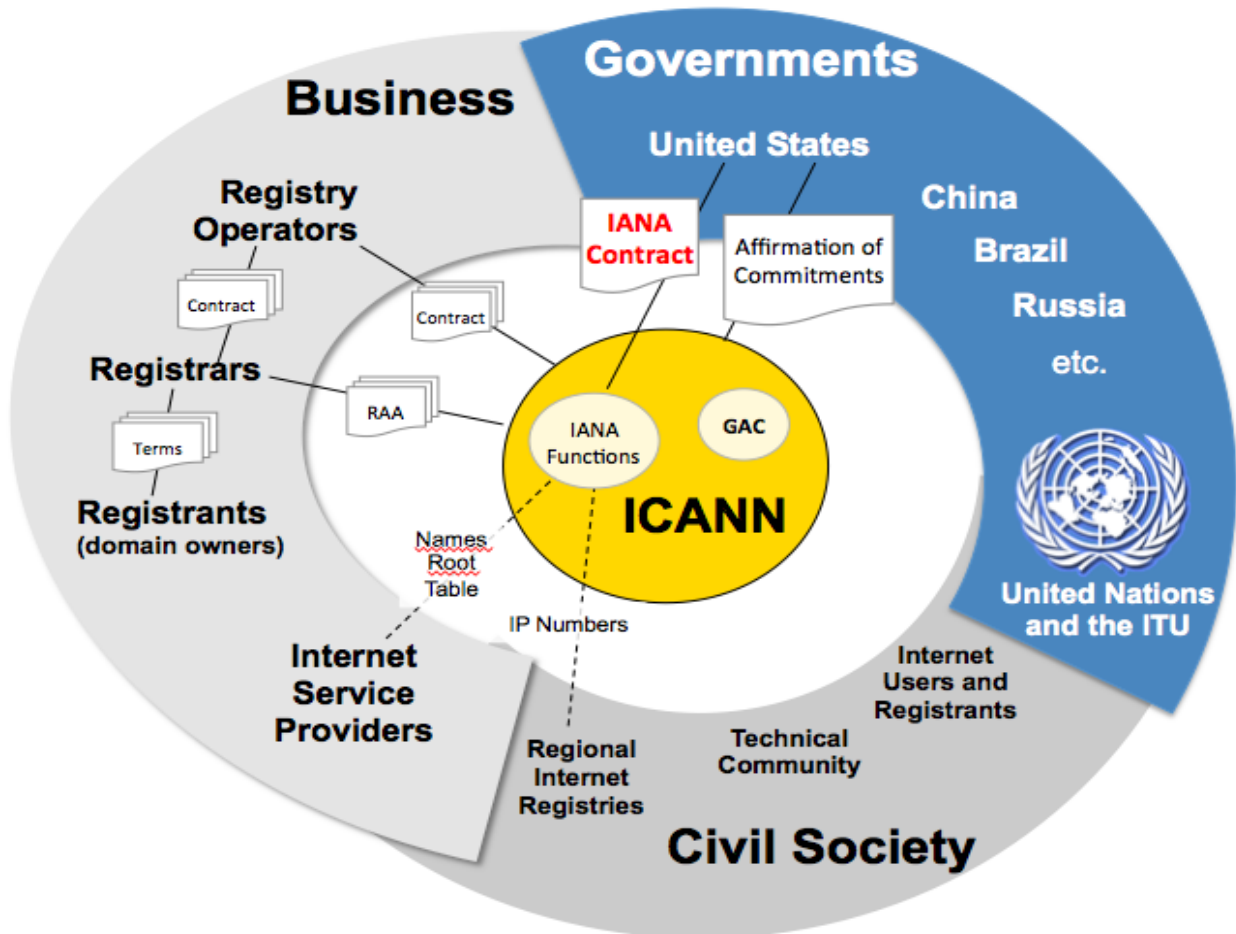
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<sup>35</sup> Peter Dengate Thrush, in response to a question from Steve DeBianco, at event hosted by European Internet Foundation in Brussels, June 22, 2010.

<sup>36</sup> Recommendations of IBSA Multistakeholder meeting on Global Internet Governance, September 2011, at [http://www.culturalivre.org.br/artigos/IBSA\\_recomendations\\_Internet\\_Governance.pdf](http://www.culturalivre.org.br/artigos/IBSA_recomendations_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.”<sup>37</sup>

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

<sup>37</sup> 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.<sup>38</sup> 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:<sup>39</sup>

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.

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

<sup>39</sup> 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."<sup>40</sup>

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 leverage inherent in the IANA contract, it should see that ICANN implements community consensus proposals to make the ICANN corporation accountable to the global multistakeholder community that ICANN was created to serve.

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<sup>40</sup> 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>