

Statement of

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Testimony before the

U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Communications & Technology

March 17, 2016

Privatizing the Internet Assigned Numbers 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 7 Congressional hearings on ICANN and Internet governance, including this committee's hearings in Apr-2014 and May-2015.

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

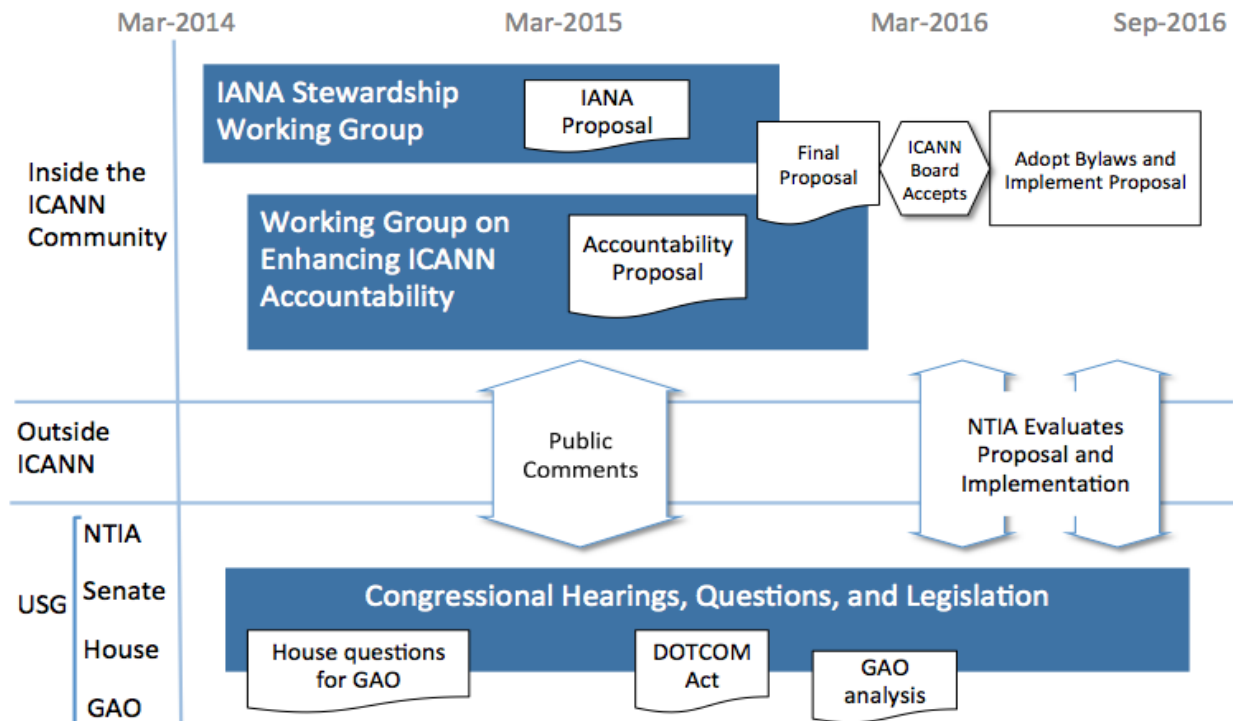
1. Over 18 years and three administrations, the US government has protected the ICANN multistakeholder model from government encroachment while exercising light-touch oversight. However, it is neither sustainable nor necessary for the US to retain its unique role forever. At NTIA's request, the Internet community prepared proposals to let ICANN loosen ties to the US government and strengthen its accountability to the global Internet user community, such that core Internet functions stay 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 Apr-2014 and May-2015. Your committee also asked the Government Accountability Office (GAO) to analyze risks and implications of transition. Your committee then backed the community with its DOTCOM Act, insisting that NTIA require ICANN to adopt the multistakeholder proposals as a *condition of the transition*. This backing proved invaluable when ICANN's lawyers and board resisted some of the community's proposals.
3. The community's proposal meets NTIA requirements and reduces governments' ability to override community consensus with its advice to ICANN's board. There are implementation challenges in the months ahead, but this transition empowers global Internet stakeholders to challenge the ICANN board and hold it accountable -- something that has never before existed within ICANN.

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.

² Press Release, "NTIA Announces Intent to Transition Key Internet Domain Name Functions", March 14, 2014, at

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

This committee has led Congressional oversight of NTIA's transition plan, starting at the beginning, at the mid-point, and now at the end. This timeline helps visualize the process:



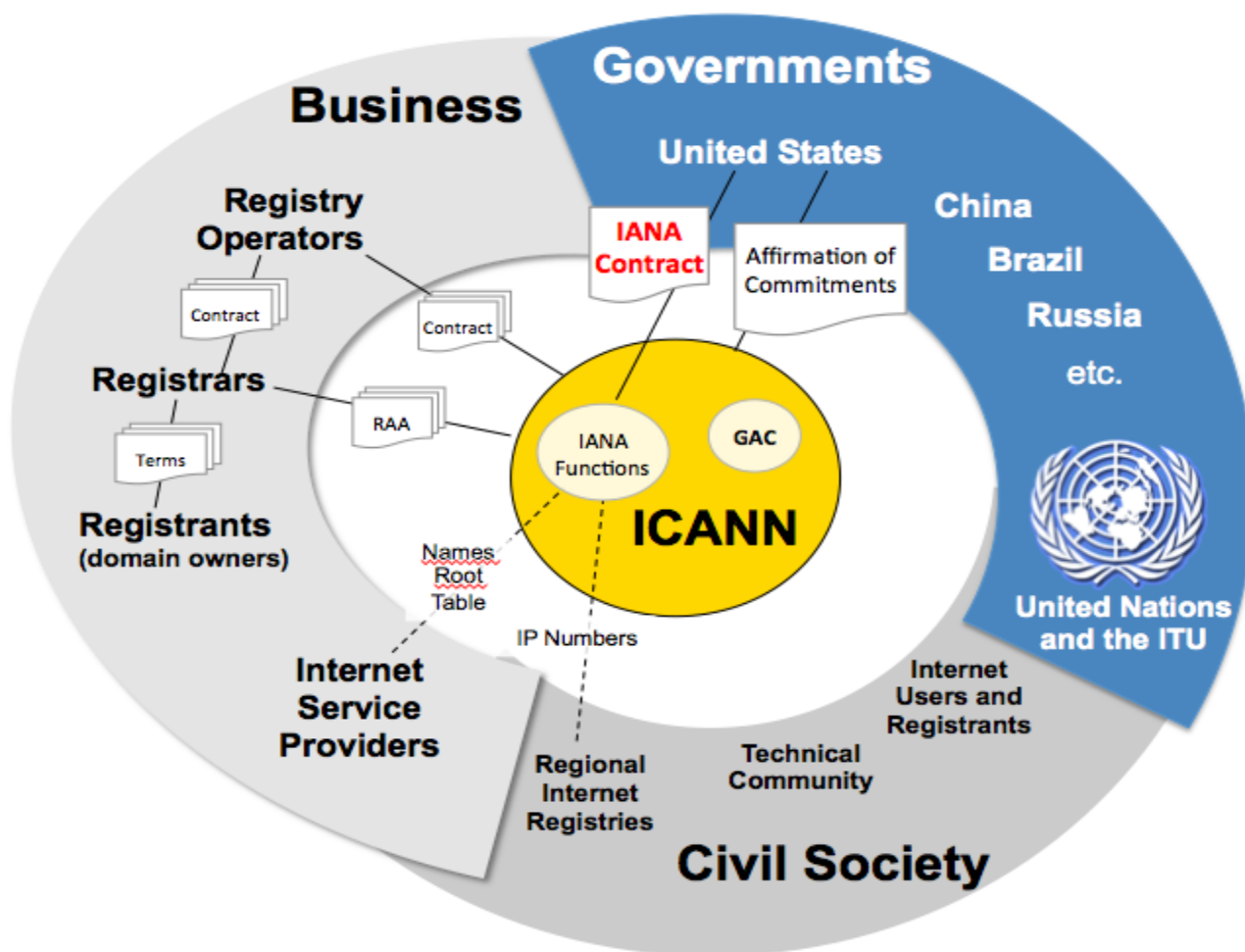
Although ICANN's board accepted our transition proposals and forwarded them to NTIA last week, the timeline leading up to the IANA contract expiration date on 30-Sep is *tight*:

- 1-Apr-2016: draft bylaws for review by community working groups.
- Mid-Apr: ICANN board approves bylaws for public comment period of 30 days.
- Late May: Evaluate public comments and ICANN board approves new bylaws.
- 15-Jun: NTIA evaluates adopted bylaws and reports to Congress in time for review before recess in mid-July.
- 15-Aug: NTIA evaluates *implementation* of community proposals because this is the last chance for NTIA to extend the IANA contract, if needed.

In parallel, the ICANN community will be designing additional accountability measures, including improvements in transparency, diversity, and a framework for human rights. The newly adopted community powers should 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, starting with its genesis in the Clinton administration. 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 a greatly diminished role for NTIA and growing independence for ICANN. 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 remaining tether of ICANN accountability to the US – 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 demanding an end to the unique US role in IANA oversight and an increasing governmental role in global Internet policy.

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: ICANN stakeholders named representatives to a cross-community working group (CCWG) that began meeting in Dec-2014. (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 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

ICANN's lawyers and the community's independent legal counsel are jointly drafting the necessary changes to ICANN bylaws, with a target publication date of early April.

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

4. Accountability enhancements suggested by stress testing

In my testimony before this committee for its Apr-2014 hearing, I described several stress tests that should be applied to a post-transition ICANN.⁴ Chairman Walden, NTIA, and many in the Internet community embraced stress testing as a way to allow community planning to proceed, while informing and evaluating proposals against potential threats. The committee report on your Apr-2014 hearing includes:⁵

The discussion with stakeholder witnesses generated significant discussion around ICANN accountability and the topic of 'stress tests'--a series of tests designed to simulate a set of 'plausible, but not necessarily probable, hypothetical scenarios' in an effort to determine the resiliency of ICANN under any proposed solution.

Beginning with 8 stress tests that NetChoice presented to your committee, the accountability and IANA stewardship groups added 29 more. I led the working group that applied these stress tests to the accountability proposal, and we concluded that new accountability measures would empower the community to challenge ICANN's actions. For some stresses caused by external events, new accountability measures could help the community challenge the board's preparation and reaction, but could not completely mitigate the impact on ICANN.

Thanks to this committee's request last June, GAO examined stress tests in their analysis.⁶ GAO completed its analysis last September, reporting:

stakeholders identified a risk that ICANN could be captured by a particular interest. To address this risk, stakeholders proposed changes that would empower the multistakeholder community to veto board decisions related to ICANN's plans and budget and to remove board members, among other things.⁷

GAO recommended that NTIA apply a framework to evaluate whether the proposal meets its requirements and to consider the accountability mechanisms in the proposal.

⁴ 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

⁵ House Energy & Commerce Committee Issues Report on DOTCOM Act, 23-Jun-2015, at <https://www.gpo.gov/fdsys/pkg/CRPT-114hrpt175/pdf/CRPT-114hrpt175.pdf>

⁶ Letter to GAO from House Commerce Committee Chairmen Upton and Walden, and members Blackburn, Shimkus, Kelly, and Rokita, 5-Jun-2014, at <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/letters/20140605GAO.pdf>

⁷ United States Government Accountability Office Report to Congressional Requestors, Aug-2015, at <http://gao.gov/assets/680/672055.pdf>

Overall, the stress test team determined that proposed new accountability measures were a significant improvement compared to existing measures, and would give the community adequate powers to challenge ICANN's actions. Two particular stress tests are worth exploring in this hearing because they identified critical risks of having ICANN quit the *Affirmation of Commitments* and avoiding expansion of governmental influence over ICANN.

4.1 Proposal to bring Affirmation commitments and reviews into ICANN bylaws

In our April 2014 testimony, the very first stress test that we proposed was where ICANN decides to quit the *Affirmation of Commitments*, which it may do with just 120 days notice.⁸ Moreover, this committee asked about making *Affirmation* obligations enforceable, as part of question #3 sent to GAO last June. The accountability group was also significantly concerned about this stress test and said in its proposal:

After the IANA agreement is terminated, the *Affirmation of Commitments* will become the next target for elimination since it would be the last remaining aspect of a unique United States oversight role for ICANN.⁹

Once the IANA contract is gone, the *Affirmation* stands out and would be targeted for elimination by governments who resent the US having a unique, bilateral relationship with ICANN. Against this contingency, the accountability group examined *Affirmation* items to determine if they were already part of ICANN bylaws. This resulted in a proposal to add key *Affirmation* commitments to ICANN bylaws:

Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;

ICANN shall perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial or non-financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability, and resiliency of the DNS.

ICANN shall adhere to transparent and accountable budgeting processes, providing advance notice to facilitate stakeholder engagement in policy decision-making, fact-based policy development, cross community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, and to publish each year an annual report that sets out ICANN's progress against ICANN's Bylaws, responsibilities, and Strategic and Operating Plans.

⁸ 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

⁹ p.51 at [draft report](#) of Cross Community Working Group on Enhancing ICANN Accountability, 4-May-2015

Affirmation section 8b was discussed in a Senate Commerce Committee hearing in Feb-2015. 8b 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.” The community determined this commitment was reflected in ICANN bylaws Article XVIII section 1:

“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”¹⁰. We propose amending ICANN's Articles of Incorporation such that any change would require approval by the empowered community. As part of this stress test analysis, we proposed bringing the 4 periodic community reviews from the *Affirmation* into ICANN's bylaws:

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

These reviews will become part of ICANN bylaws, modified 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*. We concluded that the *Affirmation* should be terminated to avoid having a side agreement slightly different from the new bylaws, and to avoid having a bilateral agreement with the US that could become the next target for elimination.¹¹

¹⁰ Section 3 of ICANN Articles of Incorporation, at <https://www.icann.org/resources/pages/governance/articles-en>

¹¹ 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>

4.2 Proposal to limit ICANN obligations to follow advice from governments

In our Apr-2014 and May-2015 testimony, I described a stress test where governments could raise their influence via Government Advisory Committee (GAC) advice to ICANN.¹² This concern was echoed in this committee's question #2 to GAO, and generated keen interest since it addresses ICANN's response to government advice. In our final proposal we said:

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.¹³

Here's how we applied Stress Test 18 to existing and proposed accountability measures:

29 Stress Test #18: Governments in ICANN's Governmental Advisory Committee (GAC) amend their operating procedures to change from consensus decisions to majority voting for advice to ICANN's Board	
30 Consequence(s): Under current Bylaws, ICANN must consider and respond to Governmental Advisory Committee advice, even if that advice were not supported by consensus. A majority of governments could thereby approve Governmental Advisory Committee advice.	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
31 Current ICANN Bylaws (Article XI) require ICANN to try to find a mutually acceptable solution for Governmental Advisory Committee advice.	35 The proposed measure would amend ICANN Bylaws (Article XI, Section 2, item 1j) to require trying to find a mutually acceptable solution only where Governmental Advisory Committee advice was supported by full Governmental Advisory Committee consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection.
32 Today, Governmental Advisory Committee adopts formal advice according to its Operating Principle 47: <i>"consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection."</i>	36 The proposed accountability measure recognizes that the decision not to follow GAC consensus advice would require a 60% majority of the ICANN Board.
33 The Governmental Advisory Committee may at any time change its procedures instead of its present consensus rule.	37 The Governmental Advisory Committee can still give ICANN advice at any time, with or without full consensus.
34 The requirement to try to find a mutually acceptable solution in the current Bylaws would then apply, not just for Governmental Advisory Committee consensus advice.	38 Recognizing the general principle that an AC should have the autonomy to refine its Operating Procedures, the Governmental Advisory Committee could specify how objections are raised and considered.

¹² See Stress Tests 6 & 7, on page 9 at [NetChoice Testimony before the House Energy & Commerce Committee – Ensuring the Security, Stability, Resilience, and Freedom of the Global Internet](#), 2-Apr-2014

¹³ 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>

Our proposal enshrines the GAC's present method of decision-making into ICANN bylaws as the only way to trigger the board's obligation to "try and find a mutually acceptable solution." Many GAC members fiercely resisted this change, saying it interfered with government decision-making and reduced the role of governments. In the end, the proposal we developed increases the threshold for ICANN's board to reject GAC advice, from today's simple majority (9 votes) to 60% (10 votes). However, the GAC would not be allowed to block a community challenge of ICANN Board's implementation of GAC advice.

Another imposition on GAC advice is a requirement that all advisory committees provide a rationale for their advice to ICANN's board. And to address concerns that GAC advice is sometimes inconsistent with ICANN Bylaws, we added this clarification for legal counsel to consider when drafting Bylaws language:

ICANN cannot take action - based on advice or otherwise – that is inconsistent with its Bylaws. While the GAC is not restricted as to the advice it can offer to ICANN, it is clear that ICANN may not take action that is inconsistent with its Bylaws. Any aggrieved party or the Empowered Community will have standing to bring claims through the IRP that the Board acted (or failed to act) in a manner inconsistent with the ICANN Articles of Incorporation or Bylaws, even if the Board acted on GAC advice.

Some government representatives opposed these changes to ICANN bylaws. That is not unexpected because some government representatives have previously voiced dissatisfaction with the consensus rule for GAC decisions. It is entirely plausible that the GAC could unilaterally change its method of approving advice at some point, such that a majority could prevail over a significant minority of governments. On the other hand, several governments supported the change, including a forceful statement from NTIA¹⁴:

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.

I firmly believe the tradeoff of one extra vote to reject GAC advice, while reducing GAC influence through several measures, is clearly a net gain for ICANN's private sector stakeholders and meets NTIA's conditions for the transition.

¹⁴ Email from Suzanne Radell, Senior Policy Advisor, NTIA, 19-Mar-2015, at <http://mm.icann.org/pipermail/accountability-cross-community/2015-March/001711.html>

4.3 Stress Tests regarding enforcement of ICANN contracts

Stress Tests 29 and 30 examined challenges to ICANN's ability to enforce its contracts with registries and registrars. This committee's Jun-2015 report also stated an expectation regarding ICANN's enforcement of contract provisions:

The Committee therefore asks the NTIA to work with ICANN and stakeholders so that the transition proposal ensures the contractual obligations created through the multistakeholder process are fulfilled and effectively enforced.¹⁵

The community's accountability proposal addresses your request with these recommendations:

ICANN shall have the ability to negotiate, enter into and enforce agreements, including Public Interest Commitments ("PICs"), with contracted parties in service of its Mission.

For the avoidance of uncertainty only, the language of existing registry agreements and registrar accreditation agreements (including PICs and as-yet unsigned new gTLD Registry Agreements for applicants in the new gTLD round that commenced in 2013) should be grandfathered to the extent that such terms and conditions might otherwise be considered to violate ICANN's Bylaws or exceed the scope of its Mission. This means that the parties who entered/enter into existing contracts intended (and intend) to be bound by those agreements.¹⁶

4.4. Enforcing the Community's new Accountability Powers

Your Jun-2015 committee report also stated an expectation that "NTIA will not certify their adoption until such time as the Internet community can avail themselves of the terms, either through ICANN's processes or through the courts."

The final proposal includes direct court enforcement for community's statutory power to remove an individual director or to recall the entire ICANN board.¹⁷ If the community wins in an independent review process (IRP) and 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*.

This historic transition creates the opportunity for the community to obtain accountability enhancements that the ICANN board would not likely approve if those enhancements were

¹⁵ House Energy & Commerce Committee Issues Report on DOTCOM Act, 23-Jun-2015, at <https://www.gpo.gov/fdsys/pkg/CRPT-114hrpt175/pdf/CRPT-114hrpt175.pdf>

¹⁶ pp. 3-4, Annex 05 –Recommendation #5: Changing Aspects of ICANN's Mission, Commitments and Core Values, at <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>

¹⁷ 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>

proposed after the leverage of the IANA contract is gone. By the same token, the GAC would resist these bylaws changes if they were proposed at some point after the IANA transition.

This transition is the best opportunity to pursue difficult and sometimes controversial changes to ensure that ICANN is accountable to the entire community it was created to serve. This transition is the best opportunity for the US government to use its leverage to get ICANN to implement the community's proposed accountability enhancements. It's imperative to empower the Internet community to challenge ICANN decisions on situations that will arise in the decades ahead. That leads us to the final segment of our testimony, on the continuing role for Congress.

5. Congress's role in ensuring an accountable ICANN

Members of this committee raised questions and concerns about the transition, accountability mechanisms, and potential stress tests. Your work on the DOTCOM Act stimulated the questions sent to GAO last June by Chairmen Upton and Walden, and members Blackburn, Shimkus, Kelly, and Rokita. Those questions included critical matters also in DOTCOM, such as national security concerns and implications for other US agencies.

The global Internet community has devoted thousands of hours developing this proposal for the transition, and is facing additional work to implement the bylaws and plan for 'work stream 2' accountability enhancements. We are therefore grateful that this committee passed legislation insisting that NTIA require ICANN to adopt the multistakeholder community proposals *as a condition of the IANA transition*. Your strong support helped us last week in Marrakech, where ICANN's board committed 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 governments. Together, we can bring connectivity, content, and commerce to the next billion global Internet users and to future generations of Americans.

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.¹⁸

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*.¹⁹ 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.

¹⁸ 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

¹⁹ 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.²⁰

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.

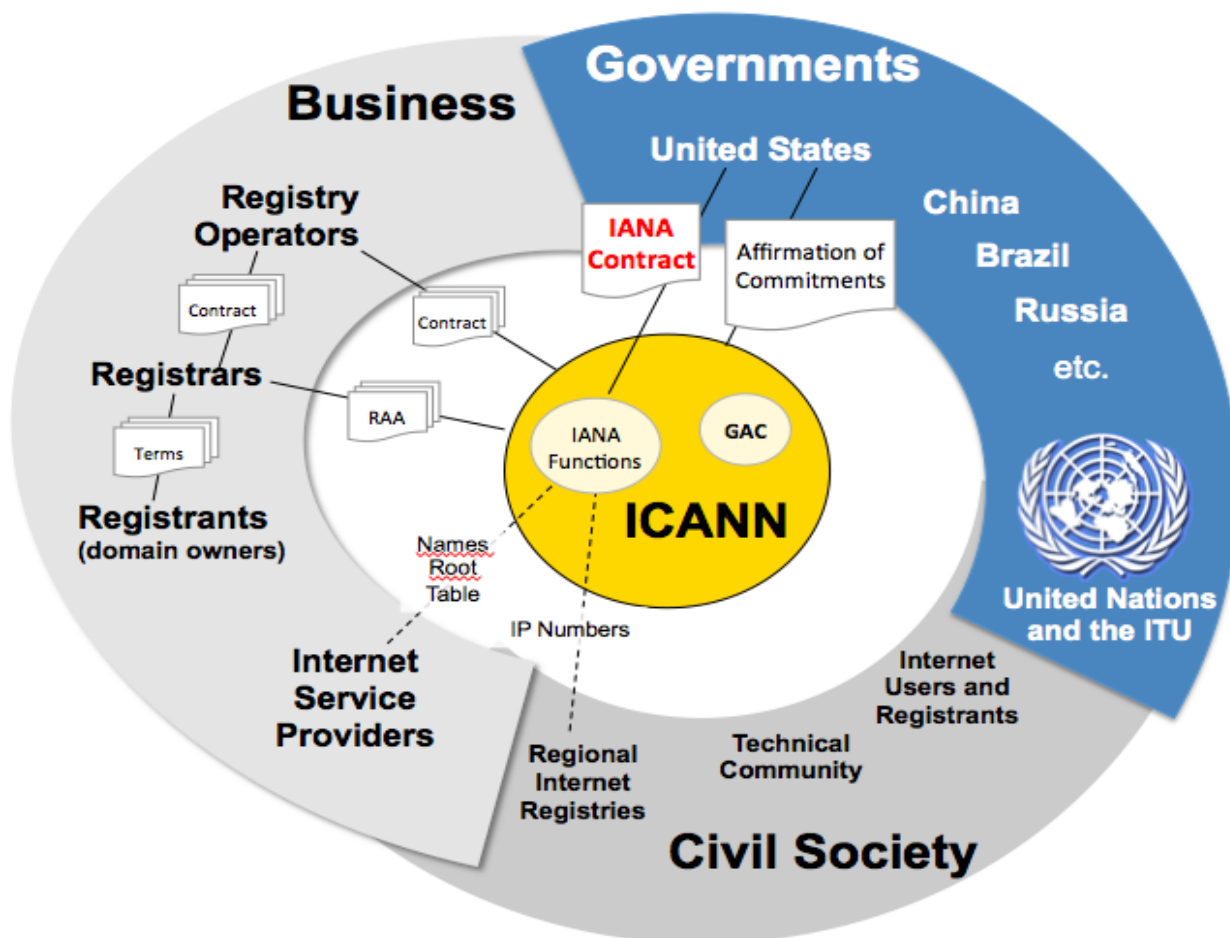
In 2011, a group of governments proposed their own replacement for US oversight and ICANN's model of private sector leadership. India, Brazil, and South Africa declared it was time for "establishing a new global body" located "within the UN system" to "oversee the bodies responsible for technical and operational functioning of the Internet."²¹ In contrast, both houses of Congress unanimously affirmed a resolution in 2012 stating, "the consistent and

²⁰ Peter Dengate Thrush, in response to a question from Steve DelBianco, at event hosted by European Internet Foundation in Brussels, June 22, 2010.

²¹ 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.”²²

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

²² 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.²³ 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:²⁴

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.

²³ Joint questions, <https://www.icann.org/en/system/files/correspondence/cooper-et-al-to-chehade-crocker-03sep14-en.pdf>

²⁴ 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."²⁵

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.

²⁵ 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>