

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROTECTING INTERNET FREEDOM: IMPLICATIONS
OF ENDING U.S. OVERSIGHT OF THE INTERNET

- - -

WEDNESDAY, SEPTEMBER 14, 2016

United States Senate,
Subcommittee on Oversight, Agency Action,
Federal Rights and Federal Courts,
Committee on the Judiciary,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 10:09
a.m., in room SD-226, Dirksen Senate Office Building, Hon.
Ted Cruz, Chairman of the Subcommittee, presiding.

Present: Senators Grassley, Lee, Cruz, Flake, Vitter
Klobuchar, Coons, and Blumenthal.

1 OPENING STATEMENT OF HON. TED CRUZ, A U.S.
2 SENATOR FROM THE STATE OF TEXAS

3
4 Senator Cruz. This hearing is called to order. Good
5 morning, welcome to the witnesses, welcome to everyone who
6 has come to attend.

7 The Internet is one of the most revolutionary forces
8 ever unleashed on the world. This transformational
9 technology has changed how we learn, how we communicate, how
10 we do commerce, how we live our lives. People even meet and
11 get married through the Internet.

12 And of course, the Internet did not invent itself. It
13 was not invented by any politicians. It was invented by the
14 incredible ingenuity of the American people with the
15 financial support of American taxpayers.

16 In the spirit of freedom and generosity that is the
17 essence of our great nation, the American people did not try
18 to keep the Internet just for themselves, but made it
19 available for the benefit of all humanity. Since the
20 Internet's inception, the United States government has stood
21 guard over critical Internet functions. In almost any other
22 country, that power could have been used to deny Internet
23 access to websites that were deemed politically undesirable
24 or unpopular or threatening or simply disfavored by the
25 powers that be, but not here. Not in the United States.

1 Because of the First Amendment to our Constitution,
2 which affords more protection for speech than anywhere else
3 in the world, the United States government--as long as it
4 has authority to oversee the infrastructure of the Internet--
5 has a duty to ensure that no website is denied Internet
6 access on account of the ideas it espouses. Under the
7 guardianship of the United States and the First Amendment,
8 the Internet has become truly become an oasis of freedom.

9 But that could soon change. In 16 days, without
10 seeking the consent of the American people, without seeking
11 the consent of Congress, the Obama Administration has stated
12 that it intends to relinquish the government's historic
13 guardianship and give it instead to an international body
14 known as ICANN. Now what is ICANN? It is not a democratic
15 body. It is a corporation with byzantine governing
16 structure designed to blur the lines of accountability that
17 is run by global bureaucrats who are supposedly accountable
18 to the technocrats, to multinational corporations, to
19 governments, including some of the most oppressive regimes
20 in the world like China, Iran, and Russia.

21 Sadly, ICANN officials have already begun showing
22 extraordinary affinity for China, the world's worst abuser
23 of Internet freedom, according to Freedom House in 2015.
24 Numerous ICANN gatherings have featured Chinese officials
25 responsible for Chinese government censorship and

1 propaganda.

2 ICANN's recently departed President and CEO, Fadi
3 Chehadé, who shepherded the transition plan through the
4 Obama Administration, made China a central focus within
5 ICANN and the future of that organization. Mr. Chehadé is
6 on record saying that, "From ICANN's standpoint, engagement
7 with China is not an option. If we do not engage with China
8 at every level of our community, we, frankly, lose a part of
9 our global legitimacy."

10 It is striking that an organization we are being told
11 we should trust with control of the Internet believes that
12 legitimacy depends upon engaging in a regime that is the
13 world's leading censor on the Internet, silencing speech on
14 the Internet, and that imprisons democracy and human rights
15 advocate and Nobel laureate Liu Xiaobo.

16 Not surprisingly, Mr. Chehadé left ICANN after the
17 transition plan was approved to lead a high-level working
18 group for -- wait for it -- China's World Internet
19 Conference, a conference that was rightly criticized for
20 refusing to let *New York Times* and *Washington Post* reporters
21 cover it. As a result, Reporters Without Borders demanded a
22 boycott, calling China an "enemy of the Internet."

23 Yet, we are being asked to trust an organization,
24 without having our government have the authority to protect
25 free speech, to trust an organization whose former leader

1 who shepherded this plan has gone to associate himself with
2 and stand with those who are, in the words of Reporters
3 Without Borders, "the enemy of the Internet."

4 Once the government is out of the picture, First
5 Amendment protections go away. The First Amendment by its
6 term binds the government. It does not bind private
7 individuals. That means when ICANN escapes from government
8 authority, ICANN escapes from having to worry about the
9 First Amendment, having to worry about protecting your
10 rights or my rights.

11 Imagine an Internet run like one of our large private
12 universities today with speech codes and safe zones -- an
13 Internet that determines some terms are too scary,
14 microaggressions are too troubling, we will not allow them
15 to be spoken on the Internet. Imagine an Internet run like
16 far too many European countries that punish so-called "hate
17 speech" -- a notoriously malleable concept that has often
18 been used to suppress views disfavored by those in power.
19 Or imagine an Internet run like many Middle Eastern
20 countries that punish what they deem to be blasphemy. Or
21 imagine an Internet run like China or Russia that punish and
22 incarcerate those who engage in political dissent.

23 Now, some will say none of that parade of horrors
24 will happen, there is nothing to fear here in handing
25 control of the Internet to this international group of

1 stakeholders, this mini UN. Well, that is what this hearing
2 is here to determine. Is there something to fear?

3 And I will point out a question I think a lot of
4 Americans are asking is: why risk it? The Internet right
5 now works. It is not broken. What is the problem that is
6 trying to be solved here? That is what this hearing is
7 about as well.

8 I welcome the witnesses. With that, I recognize the
9 Ranking Member, Senator Coons.

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 OPENING STATEMENT OF HON. CHRISTOPHER COONS, A U.S.
2 SENATOR FROM THE STATE OF DELAWARE

3
4 Senator Coons. Thank you, Chairman Cruz. We are here
5 in the Senate Judiciary hearing room today to talk about the
6 protection of Internet freedom. That is an aim that I
7 believe everyone in this room, respective of their partisan
8 stripes, would and will support.

9 First I am going to take a moment and talk about what
10 should be happening in this committee hearing room. A
11 hearing on the President's nominee to the Supreme Court,
12 Chief Judge Merrick Garland.

13 Until February of this year, I would not have thought
14 our obligation to consider a sitting President's nominee to
15 our nation's highest court would be a partisan issue either.
16 Yet as we sit here, six months have passed since the
17 President nominated Chief Judge Garland, six months without
18 a hearing of this committee, six months since the President
19 nominated someone, and six months since we have had the
20 opportunity for this nominee of impressive intellect,
21 experience, and character to answer questions before the
22 American people.

23 There is also important work I believe this
24 subcommittee has left untouched so far. Last month Senator
25 Whitehouse and I sent a letter to Chairman Cruz asking for

1 an oversight hearing to consider whether our existing
2 criminal statutes and federal court jurisdictions
3 sufficiently protect our American elections from the
4 interference of foreign entities.

5 Since then, there have been even more reports of cyber
6 attacks targeting multiple states' boards of election
7 systems and warnings of this growing threat. Unfortunately,
8 this subcommittee has not yet responded to this concern, and
9 it appears there may not be any such hearing in advance of
10 our November elections.

11 Instead of dealing with a vacancy on the Supreme Court
12 of the United States and foreign cyber threats to our
13 upcoming presidential election, both issues, which if
14 unaddressed, threaten the foundations of our constitutional
15 democracy. We are here relitigating a complex and important
16 issue, but which the Senate has already reviewed in great
17 depth.

18 We are here today to have a hearing about the
19 transition of the IANA functions to a multi-stakeholder
20 community. The Senate Commerce Committee, on which the
21 Chairman also serves, has had two full hearings on this
22 topic in this Congress.

23 Stewardship of the Internet Assigned Numbers Authority,
24 IANA, relates to the technical coordination of names,
25 numbering, and protocol parameters. Under its current

1 contract with the Internet Corporation for Assigned Names
2 and Numbers, ICANN, the NTIA, an entity within our U.S.
3 Department of Commerce, verifies that established policies
4 and procedures are followed whenever ICANN processes
5 changes. Once it is performed, that verification, NTIA
6 authorizes the implementation.

7 The transition about which this hearing, centrally, is
8 concerned, would remove NTIA as an intermediary in this,
9 essentially, clerical process, allowing the process to be
10 completed more quickly. It is not, as some have suggested,
11 the United States giving up ownership of the Internet. The
12 United States does not own the Internet. That bears
13 repeating. Today, the United States does not own the
14 Internet, and transitioning of this Internet management
15 function that our government has had a small role in
16 performing to a non-governmental, non-UN group of technical
17 experts is a process that has been ongoing since 1998 across
18 both Republican and Democratic Administrations.

19 It is important that we execute this transition
20 properly to ensure the security of our economy, our
21 homeland, and our fundamental value, freedom of expression.
22 Done properly and openly, this transition can enhance our
23 credibility on the international stage and allow us to
24 continue to play a leadership role in keeping the Internet
25 free and open for decades to come.

1 Delayed without good reason, or done improperly, we
2 miss a key opportunity to demonstrate our leadership in the
3 Internet. That is why since 2014, a multi-stakeholder
4 community made up of businesses, many leading American
5 businesses, technical experts, academics, civil societies,
6 and associations have engaged in a thorough and rigorous
7 process to chart the course of this transition. B The
8 community has held over 600 conference calls and exchanged
9 over 30,000 emails.

10 I want to thank our witnesses today, and especially
11 thank those who have been a part of this process. This
12 stakeholders have carried out the important task of ensuring
13 the transition plan satisfies key values laid out by the
14 NTIA within our Department of Commerce, and those are
15 briefly four: supporting and enhancing the multi-
16 stakeholder model of Internet governance; maintenance of the
17 security, stability, and resiliency of the Internet DNS;
18 satisfaction of the needs and expectations of the global
19 customers and partners of IANA services; and the maintenance
20 of the openness of the Internet.

21 NTIA has stated it would not accept a proposal that
22 replaces its role in IANA functions with a governmental or
23 intergovernmental solution. So after this labor-intensive
24 multi-stakeholder process over many years, the plan proposed
25 by the community has not only garnered the approval of the

1 NTIA, it has the support of technology companies, industry
2 groups, and civil society organizations who share our
3 profound interests in the freedom, security, and economic
4 opportunity represented by the Internet.

5 Mr. Chairman, I ask unanimous consent that a number of
6 important statements and articles in support of this
7 transition be entered into the record.

8 Senator Cruz. Without objection.

9 Senator Coons. There are many. I will briefly
10 mention that there is an open letter to Congress signed by
11 Microsoft, Amazon, Google, Dell, FaceBook, Intel, Cisco, HP,
12 the Internet Association, the Internet Infrastructure
13 Coalition, the Internet Society, the U.S. Chamber of
14 Commerce, articles from former Secretaries of Homeland
15 Security, Chiefs of Staff, Ambassadors, seven civil society
16 groups, and many others.

17 [The information follows:]

18 / SUBCOMMITTEE INSERT

19 Senator Coons. This is an important part of the
20 record of this hearing. This is an important part of what
21 this multi-stakeholder means, household name, global
22 Internet leading companies founded and headquartered in the
23 United States.

24 The Internet is the public square of the 21st century
25 where ideas are exchanged and viewpoints debated. It is

1 also a marketplace for global business, and as one of the
2 leaders of the Senate Global Internet Freedom Caucus, I know
3 we must engage with individuals, the private sector, and
4 other governments to work to preserve the Internet as an
5 open platform for both commerce and communication.

6 There has been a lot of charged rhetoric about this
7 transition in recent months. I am eager to hear from our
8 witnesses and move beyond the rhetoric, and to understand in
9 detail how this transition can protect U.S. interests,
10 ensure the security and stability of the DNS, and promote
11 the ability of free expression and global commerce to
12 flourish -- one of the most profoundly transformative
13 opportunities and technologies of our time.

14 Thank you.

15 Senator Cruz. Thank you, Senator Coons.

16 The Chairman of the full committee has asked to give an
17 opening statement as well. Senator Grassley?

18

19

20

21

22

23

24

25

1 OPENING STATEMENT OF HON. CHUCK GRASSLEY, A U.S.
2 SENATOR FROM THE STATE OF IOWA, CHAIRMAN OF THE COMMITTEE

3
4 Chairman Grassley. The openness, security, and
5 stability of the Internet are of principal importance to all
6 of us who use the Internet around the world, and yet it is
7 the United States' historic stewardship and its role over
8 key Internet management functions that helps to ensure this
9 openness, security, and stability. Today, this
10 administration intends to end this role not for technical
11 considerations, but for political reasons.

12 This is happening despite the fact that a number of
13 significant questions related to transition remain
14 unanswered, including whether the transition will yield an
15 unconstitutional transfer of United States government
16 property, how the transfer will affect human rights and free
17 speech issues, if U.S.-controlled Top Level Domains such as
18 .gov and .mil could be compromised, or if the Internet
19 Corporation for Assigned Names and Numbers will be subject
20 to increased antitrust scrutiny.

21 Here at the Committee, we have continued to engage with
22 the administration about this transition and to date, the
23 answers we have received have been very inadequate. It is
24 clear that the administration has not conducted a thorough
25 legal analysis of many issues outstanding.

1 In ICANN, we see an organization that was blasted just
2 this past July by an Independent Review Panel for its
3 inability to carry out basic duties of self-governance. The
4 Review Panel found that ICANN's Board Governance Committee
5 has "failed several transparency obligations," engaged in
6 "cavalier treatment" of constituent requests, and failed
7 to undertake an examination of whether ICANN staff or
8 contractors complied with their obligations under the
9 Articles and the Bylaws of incorporation.

10 These failures, then, raise serious concerns about the
11 ability of ICANN to exercise proper corporate oversight and
12 call into question ICANN's organizational maturity. These
13 types of governance problems make ICANN susceptible to
14 corruption and abuse and call for the extension of ICANN's
15 contract and the United States continued oversight and
16 involvement.

17 Such concerns, especially when it comes to
18 accountability and transparency, are reasons why I have
19 always questioned if the transfer is in the best interest of
20 the American people and global Internet users.

21 Despite the administration's intention to give up IANA
22 functions contract, these concerns still persist indicating
23 that this course is misguided and, at best, premature.

24 So I appreciate, Senator Cruz, your taking the
25 leadership during this hearing, and look forward to what the

1 witnesses have to testify about.

2 Senator Cruz. Thank you, Mr. Chairman.

3 The witnesses on our first panel are the Honorable
4 Lawrence E. Strickling, who serves as the Assistant
5 Secretary for Communications and Information and
6 Administrator for the National Telecommunications and
7 Information Administration, the NTIA. A graduate of the
8 University of Maryland and Harvard School, Mr. Strickling
9 previously served as a senior official at the Federal
10 Communications Commission. In the private sector, he has
11 served in senior roles of communication service providers,
12 including Allegiance Telecom Incorporated and CoreExpress
13 Incorporated.

14 Mr. Göran Marby is the President and CEO of the
15 Internet Corporation for Assigned Names and Numbers, ICANN.
16 A graduate of the University of Gothenburg School of
17 Business, Economics, and Law.

18 He previously served as Director General at the
19 Independent Regulatory Body, Swedish Post, and Telecom
20 Authority. Prior to this, he held the position of CEO and
21 Founder of AppGate, a Swedish security software company, and
22 worked as a country manager for Cisco in Sweden.

23 I would ask both of the witnesses to rise and raise
24 your right hand. Your left hand will do, and I hope that
25 you recover soon.

1 Do you affirm that the testimony you are about to give
2 before the committee will be the truth, the whole truth, and
3 nothing but the truth so help you God?

4 Assistant Secretary Strickling. I do.

5 Mr. Marby. I do.

6 Senator Cruz. Very well. Mr. Strickling, we will
7 hear your testimony first.

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 STATEMENT OF THE HONORABLE LAWRENCE E. STRICKLING, ASSISTANT
2 SECRETARY FOR COMMUNICATIONS AND INFORMATION AND
3 ADMINISTRATION, (NTIA), UNITED STATES DEPARTMENT OF
4 COMMERCE, WASHINGTON, DC
5

6 Mr. Strickling. Chairman Cruz, Chairman Grassley,
7 Ranking Member Coons, and Members of the Subcommittee, thank
8 you for the opportunity to come here today to testify for
9 freedom, specifically Internet freedom.

10 I come here to testify for free speech and civil
11 liberties. I come here to testify in favor of completing
12 the transition of the U.S. government stewardship of the
13 domain name system to the global multi-stakeholder community
14 because doing so offers the best hope of protecting Internet
15 freedom.

16 Protecting Internet Freedom and openness has been a key
17 criterion for the IANA transition from the day we announced
18 it. The best and most effective way to preserve Internet
19 freedom is to depend on the community of stakeholders who
20 own and operate, transact business, and exchange information
21 over the myriad of networks that comprise the Internet.
22 Free expression is protected by the open, decentralized
23 nature of the Internet, the neutral manner in which the
24 technical aspects of the Internet are managed, and the
25 commitment of stakeholders to maintain openness.

1 Freedom House reported recently that Internet freedom
2 around the world has declined for the fifth consecutive
3 year, but its prescription for defending Internet freedom
4 was clear. It was to encourage the U.S. government to
5 complete the transition to a fully privatized domain name
6 system.

7 What will not be effective to protect Internet freedom
8 is to continue the IANA functions contract. That contract
9 is simply too limited in scope to be a tool for protecting
10 Internet freedom. It simply designates ICANN to perform the
11 technical IANA functions of managing the database of
12 protocol parameters, allocating IP numbers, and processing
13 changes to the root zone file. It does not grant NTIA any
14 authority over ICANN's day-to-day operations or the
15 organization's accountability to the stakeholder community.

16 Extending the contract, as many have asked us to do,
17 could actually lead to the loss of Internet freedom we all
18 want to maintain. The potential for serious consequences
19 from extending the contract beyond the time necessary for
20 ICANN to complete implementation is very real and has
21 implications for Internet freedom and the credibility of the
22 United States in the global community.

23 Privatizing the domain system has been a goal of
24 Republican and Democratic Administrations since 1997. Prior
25 to our 2014 announcement to complete the privatization, some

1 governments used NTIA's continued stewardship to justify
2 their demands that the United Nations, or the International
3 Telecommunication Union, or some other international body of
4 governments should take control over the domain name system.

5 Failing to follow through on the transition, or
6 unilaterally extending the contract will only embolden
7 authoritarian regimes to intensify their advocacy for
8 government-lead or intergovernmental management of the
9 Internet via the United Nations. As former Homeland
10 Security Secretary Michael Chertoff, and retired Vice
11 Chairman James Carwright of the Joint Chiefs of Staff
12 recently wrote, rejecting or even delaying the transition
13 would be a gift to those governments threatened by a free
14 and open Internet.

15 Over the past two years, the global Internet community
16 comprised of businesses, technical experts, public interest
17 groups, and governments have engaged in one of the most
18 compelling demonstrations of a multi-stakeholder process
19 ever undertaken. Given the intensive level of effort that
20 went into constructing the transition plan, and obtaining
21 support from it from all sectors of the community,
22 businesses, civil society, and technical experts, it is no
23 surprise that they support the transition. They want to see
24 the United States follow through on its longstanding
25 bipartisan commitment to privatize the domain name system.

1 I realize the transition raises many important
2 questions. None are more important than the ones we asked
3 in March 2014, when we laid out the criteria for the
4 transition.

5 At that time, we also said we would not accept a plan
6 that replaced NTIA's role with a government-led or
7 intergovernmental organization solution. Upon the
8 community's completion of the plan, NTIA led an intensive
9 interagency review to ensure that the plan met these
10 criteria. During this review, the Department of Justice
11 assessed whether the transition presented any competition
12 issues. And at the end, on June the 9th, we found that the
13 plan satisfied each and everyone of our criteria.
14 Significantly, in the more than three months since we
15 released our analysis, no one -- no one has taken issue with
16 our conclusion that the plan satisfies these criteria.

17 Despite the open and transparent process that developed
18 the plan, misperceptions and outright misrepresentations
19 about the transition continue to circulate. We will have
20 time to talk through those through the testimony this
21 morning, but given my time is nearly expiring, let me close
22 with a commitment and an observation.

23 My commitment is this: after the completion of this
24 transition, NTIA and the U.S. government will continue to be
25 a forceful advocate to protect and advance American

1 interests. We have always been active participants in ICANN
2 and other international venues addressing Internet freedom.
3 Nothing about the transition will reduce the level of effort
4 we put into representing American interests on these
5 important issues.

6 As to the observation, let me quote an analysis
7 released yesterday by the R Street Institute whose mission
8 is to promote free markets and limited government -- "In
9 reality, the Internet isn't ours to give away. If Congress
10 blocks the transition, it will only make it more likely that
11 the Internet will be hijacked by authoritarian governments
12 and special interests."

13 Mr. Chairman and Members of the Subcommittee, I urge
14 you, do not give a gift to Russian and other authoritarian
15 nations by blocking this transition. Show your trust in the
16 private sector and the work of American and global
17 businesses, technical experts, and civil society who have
18 delivered a thoughtful consensus plan. Please support this
19 long-promised privatization.

20 Thank you, and I look forward to your questions.

21 Senator Cruz. Thank you, Mr. Strickling.

22 [The prepared statement of the Honorable Lawrence E.
23 Strickling follows:]

24 / SUBCOMMITTEE INSERT

25 Senator Cruz. Mr. Marby?

1 STATEMENT OF MR. GÖRAN MARBY, CEO AND PRESIDENT
2 INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN),
3 LOS ANGELES, CA
4

5 Mr. Marby. Mr. Chairman, Ranking Member, and Members
6 of the Committee, thank you for inviting me here. I am
7 honored to discuss those important issues and I welcome this
8 opportunity to answer your questions.

9 The IANA stewardship transition marks the next step in
10 evolution in how the Internet's addressing system is
11 coordinated. The transition was first envisioned in 1998
12 when ICANN was formed, and was supported by Democratic and
13 Republican Administrations since.

14 If I would leave you with one point today, it is this:
15 no one controls the Internet. You can think about it as a
16 machine with many moving parts with ICANN being just one
17 part of that machine. And ICANN can be replace in that
18 machine.

19 The -- has nothing to do with content or freedom of
20 expression. ICANN had nothing to do with protecting free
21 speech on the Internet. We do not and cannot impact how
22 sovereign States censor speech within their borders.

23 The Internet with its many moving technical parts is
24 currently running smoothly. It is a voluntary arrangement
25 among private actors operating on the basis of trust.

1 ICANN's primary job is to coordinate the top level of the
2 Internet's naming and numbering systems. Essentially, we
3 publish a telephone book for the Internet. The -- are
4 technical feature that helps the Internet operate like a
5 single global network.

6 ICANN plays a small but significant role working
7 together with other organizations such as the Internet
8 Engineering Task Force, the regional Internet registrars,
9 the Internet service providers, and many more to make the
10 Internet work.

11 It is important to note that ICANN is not a regulator.
12 The only power we have is through more than 2,000 contracts
13 and agreements with registrars and other entities across our
14 multi-stakeholder community.

15 Because ICANN is a California public benefit nonprofit
16 organization headquartered in Los Angeles, these agreements
17 are subject to California law. Our bylaws and articles of
18 incorporation formally subject ICANN to the U.S.
19 jurisdiction. Let me add that ICANN is not now, nor has it
20 ever been exempt from antitrust laws.

21 When ICANN's contract with the U.S. government expires,
22 nothing will change for the world's 3.4 billion Internet
23 users. The ending of this contract will not increase the
24 role of governments over the Internet or ICANN as an
25 organization. In fact, it will be a stricter requirement

1 than is currently in place for -- of government advice.

2 Governments that do not support a free and open
3 Internet do not support the transition. They hope we will
4 fail or be delayed.

5 The proposal submitted to the U.S. government were
6 developed by U.S. industry, global businesses, technical
7 experts, civil society, and academia. Stakeholders engaged
8 in more than two years of discussions, debates, and
9 compromises. They devoted thousands of hours to work to
10 ensure that the views of Congress, the Department of
11 Commerce, the private sector and global stakeholders were
12 all taken into account.

13 The proposals build in additional checks and balances
14 to hold the ICANN organization and the board accountable
15 after transition. This is why the transition is widely
16 supported by the U.S. business community, U.S. human rights
17 organizations, and global Internet stakeholders. The U.S.
18 Chamber of Commerce, Microsoft, Amazon, Dell, the Internet
19 Association, Human Rights Watch, Freedom House, and numerous
20 others have voiced support for the proposal submitted to the
21 U.S. government.

22 The global Internet community, including all of these
23 U.S. companies, organizations, and users has called for this
24 transition. The ICANN organization is ready, and we believe
25 the transition should proceed on plan without delay.

1 Thank you. I am looking forward for your questions.

2 Senator Cruz. Thank you, gentlemen.

3 [The prepared statement of Göran Marby follows:]

4 / SUBCOMMITTEE INSERT

5 Senator Cruz. Mr. Strickling, you said you are here
6 to testify in support of freedom, and you said freedom
7 "depends on the network of stakeholders." Now, you and I
8 are both graduates of the Harvard Law School. Somehow, we
9 have survived that.

10 Mr. Strickling. You, better than me, it appears.

11 [Laughter.]

12 Senator Cruz. The First Amendment by its terms
13 applies only to State action, to government action. It
14 binds the federal government. It binds the states. It
15 binds local governments, American governments.

16 The First Amendment does not bind foreign governments.
17 The First Amendment does not bind private corporations.
18 Which you agree with everything I have just said?

19 Mr. Strickling. Yes, sir.

20 Senator Cruz. So your testimony to this committee is
21 that we should trust these stakeholders, none of whom are
22 bound by the First Amendment, with protecting our rights,
23 and indeed, you cited a number of the global technology
24 companies. In your judgment, do the global technology
25 companies have a strong and impeccable record of protecting

1 free speech online?

2 Mr. Strickling. Sir, I would like to make two
3 comments in response to that. First off, in your opening
4 remarks you posited a vision or a scenario of ICANN and the
5 U.S. government's role in it, vis-a-vis that just does not
6 comport with the facts.

7 Senator Cruz. Sir, I asked you just a simple
8 question. Do the global technology companies have a good
9 record of protecting free speech online?

10 Mr. Strickling. I would believe that they do a fine
11 job of that, but I am in no --

12 Senator Cruz. A fine job --

13 Mr. Strickling. -- way position of saying that they
14 have done a perfect job of that. But the comparison here
15 that is important is how will it be different between the
16 existing situation of ICANN and what it will be in the
17 future.

18 When you talk about the First Amendment protecting
19 content online, you are talking about website providers who
20 are operating at the second level, third level of the domain
21 name system. NTIA, and the Department of Commerce, and the
22 U.S. government has no role whatsoever with respect to who
23 gets domain names at the second level or above, what content
24 they put on those websites, and how it is handled
25 internationally.

1 So when you posit that there is some First Amendment
2 protection that exists today, I am not sure what you are
3 talking about because when you are talking about website
4 owners, we are not involved in that. So there will be no
5 First Amendment protection from the United States that would
6 extend in anyway to protect people operating at that level
7 of the domain name system.

8 Senator Cruz. I will say it is remarkable and
9 distressing to see a senior representative of the Obama
10 Administration saying you have no idea what I am talking
11 about when it comes to First Amendment protections, because
12 I will tell you exactly what I am talking about, sir. Right
13 now under the existing arrangement if ICANN decided to
14 delist a website because it disagreed with the political
15 content, I am assuming your agency would step in to prevent
16 that.

17 Mr. Strickling. That is not -- you are not positing a
18 realistic scenario. ICANN would be involved --

19 Senator Cruz. You are saying --

20 [Simultaneous speech.]

21 Mr. Strickling. -- as a top level domain level. We
22 are talking .com, .net, .web, those sorts of names. We are
23 talking about the names that then other people in the
24 Internet eco system would then use to develop their own
25 websites. So ICANN would never be involved in the takedown

1 of a second level, third level site, except to the extent
2 that it is involved as part of their contract compliance
3 issues with registrars.

4 But the United States has no role at that point.

5 Senator Cruz. Now, hold on a second. You just said
6 they would not do that, except if they did it as part of
7 their contract compliance. But this is all under the
8 context in which they are operating under a contract with
9 the United States government.

10 Mr. Strickling. It is not. It is not. That is not
11 correct.

12 [Simultaneous speech.]

13 Senator Cruz. Sir, please do not interrupt me.

14 Mr. Strickling. I apologize, and I will listen to
15 your question.

16 Senator Cruz. In a circumstance where the United
17 States government relinquishes any oversight over this
18 contract, the oversight instead shifts to multi-national
19 stakeholders. Now, you testified in response to the
20 question I asked you earlier that you think that the global
21 technology companies have -- I think the word you used was a
22 "fine record" protecting free speech.

23 I will tell you I, for one, am not comforted with
24 trusting our freedom to companies with a "fine record."
25 Although, you said "not perfect." And I suspect there is a

1 reason you said "not perfect." Because, for example,
2 Microsoft, Facebook, and You Tube, which is owned by Google,
3 all of whom are supporting this transition signed a code of
4 conduct with the European Union to remove so-called hate
5 speech from European countries in less than 24 hours.

6 That is not what I would call a "fine record of
7 protecting free speech," working with governments to take
8 down speech that they disagree with. Likewise, Facebook
9 recently faced serious allegations of censoring speech on
10 its platform to silence conservative voices. I would note
11 this is not uniform one direction or another.

12 Progressives, leftists -- Verizon refused to distribute
13 and optional opt-in text message from NARAL Pro-Choice
14 America, saying that it does not accept programs from any
15 group that "seeks to promote an agenda or distribute content
16 that" in its discretion "maybe seen as controversial or
17 unsavory to any of our users." Now that, I would suggest,
18 is not a "fine record of protecting the First Amendment."

19 Now, listen, Verizon, Google, Facebook, they are not
20 government entities. They are not bound by the First
21 Amendment, but the United States government is. And for
22 those of us that want the Internet to remain free, want to
23 avoid Internet censoring, being told that we should trust
24 these stakeholders when their conduct over and over again --
25 indeed, recently the *Journal of Law Technology and Policy* at

1 the University of Illinois said, "prominent American
2 corporations, including CISCO Systems, Microsoft, Nortel
3 Networks, Websense, and Sun Microsystems have all played a
4 part in quickly equipping China with censorship equipment."

5 You are asking the American people to trust private
6 companies with control over their free speech and remove the
7 U.S. government role.

8 Mr. Strickling. I have not, Senator. That is
9 absolutely not correct.

10 Senator Cruz. What is incorrect about it?

11 Mr. Strickling. The United States involvement is only
12 with respect to the IANA functions. That is what we
13 contract with ICANN to perform.

14 That deals at the highest level with the root zone
15 file, meaning top level domains. This has nothing to do
16 with what choices individual companies make in terms of what
17 they put on their own websites. It has nothing to do with
18 what is happening with the content of what is passing on the
19 Internet day-by-day.

20 We have no role in that. We have no authority over
21 that. All we are suggesting is that that contract in which
22 all we do is verify that changes to the root zone file have
23 been made accurately. It no longer has a technical reason
24 to exist. It no longer has a political reason to exist
25 because if anything, it is being used by authoritarian

1 governments who do want to control content, who do want to
2 affect what goes over the Internet. It gives them the
3 opportunity to argue for that in international venues and
4 attempt to -- control of the Internet away from the multi-
5 stakeholder body that performs these functions today.

6 Senator Cruz. You testified before this committee
7 that the American government would remain -- I think the
8 term you used was a "forceful advocate."

9 Mr. Strickling. Yes, sir.

10 Senator Cruz. Of free speech.

11 Mr. Strickling. Yes, sir.

12 Senator Cruz. That is very much the same language
13 that is used on the NTIA's Q&A document that says the United
14 States, "will continue to play and active leadership role in
15 advocating for a free an open Internet within ICANN as a
16 member of the Governmental Advisory Committee and in other
17 international venues."

18 Mr. Strickling. That is correct.

19 Senator Cruz. With all do respect, simply being told
20 that we will argue for the First Amendment and try to
21 convince Russia, try to convince China, try to convince Iran
22 the First Amendment is a good idea -- within the
23 Governmental Advisory Committee if this transition goes
24 forward, would the United States government have any greater
25 ability to defend it's position than would Russian, or

1 China, or Iran?

2 Mr. Strickling. The important point to take away from
3 the Government Advisory Committee is that for it to render
4 advice that has any force with the Board, it has to be
5 consensus advice, meaning it has to be advice to which no
6 government objects, which means there will be no advice
7 coming out of the Governmental Advisory Committee that the
8 United States does not agree to that requires the Board to
9 take any particular action with respect to it. Otherwise,
10 the Board can continue to reject advice as they do today.

11 Senator Cruz. Just to clarify your answer to the
12 question. If the transition goes forward on the
13 Governmental Advisory Committee, the United States would be
14 on the very same footing as with Russia, or Iran, or China?

15 Mr. Strickling. That is correct, but what I am
16 telling you is that nothing will go forward from the GAC
17 that the United States does not agree with.

18 Senator Cruz. Very good. We will continue this
19 questioning.

20 Senator Coons?

21 Senator Coons. Thank you, Mr. Chairman.

22 So let me make sure, Assistant Secretary Strickling,
23 Mr. Marby, that we have got our basic facts right here, if
24 we could. First, it has been presented today that this is a
25 political agenda by the Obama Administration to, "relinquish

1 the historic guardianship of the Internet to an
2 international body." If I understand your testimony correct,
3 Mr. Assistant Secretary, the choices before us are
4 continuing on a transition path that would privatize, not
5 relinquish to the UN, or the ITU, or a multi-government
6 international body, to privatize the DNS function,
7 essentially --

8 Mr. Strickling. Yes.

9 Senator Coons. -- to allow ICANN to continue to
10 perform its function which is technical and does not involve
11 censorship of the Internet?

12 Mr. Strickling. That is correct.

13 Senator Coons. Is that correct? Mr. Marby, if I
14 could, just to be clear, does ICANN have the ability to
15 censor Internet content?

16 Mr. Marby. No, we do not.

17 Senator Coons. Mr. Assistant Secretary, is this a
18 political agenda of this administration, or has it enjoyed
19 bipartisan support across several administrations and across
20 a wide range of Members of Congress?

21 Mr. Strickling. This has been a longstanding
22 commitment of administrations, both Democratic and
23 Republican going back to 1998.

24 Senator Coons. And one of the questions asked by the
25 Chairman at the outset -- do we have something to fear -- is

1 a question I will put to you in a different way. What
2 concerns should we have if this transition does not go
3 forward? How would other stakeholders act? How would it
4 "embolden" -- as you have said -- authoritarian regimes?
5 What is the alternative? If we delay this transition for
6 months or years, what happens next?

7 Mr. Strickling. The longstanding debate on Internet
8 governance over more than the last 10 years has been do the
9 stakeholders who built the Internet, the businesses, the
10 technical experts, civil society who play an important role,
11 should they be the ones making the decisions about how the
12 Internet grows and thrives? They have been the ones that
13 have been doing it, and you have to like the record that
14 they created based on the incredible growth, innovation, job
15 creation that has occurred as a result of the Internet.

16 On the other hand, do governments run it? Several
17 years ago, in 2012, that debate took an ugly turn when at an
18 international conference in Dubia, for the first time a
19 majority of governments wanted to give a UN agency, The
20 International Telecommunication Union, more authority in
21 this space.

22 As I said in many speeches and in testimony before,
23 people use the fact of this IANA functions contract, people
24 being other governments, as an excuse to argue that if the
25 U.S. is in there, we ought to be there as well. We saw the

1 outcome of that in Dubia with a vote where the U.S. was in a
2 minority.

3 Since then, we and, in particular, the State Department
4 have through international diplomacy worked hard to reverse
5 that impression, and have worked hard to build support for
6 the multi-stakeholder model among governments in the
7 developing world, governments that had not really made up
8 their mind yet. I know people have said nothing about this
9 transition is going to change the views of Russian and
10 china, and they are right. We would not dispute that one
11 bit, but Russia and China cannot do this by themselves. It
12 works by their ability to convince other countries to vote
13 with them on these things.

14 If this transition does not go forward, our credibility
15 as a power in terms of supporting the multi-stakeholder
16 model will be shot. There will be people that say the
17 United States has reneged on its promises, and it will be
18 exploited by these foreign governments at world conferences
19 that will be starting up as early as October.

20 Senator Coons. So let me make sure I understand you,
21 Mr. Assistant Secretary. On the one side we have
22 governments that censor the Internet and its content within
23 their own countries, Russia, China, Iran, others,
24 advocating, militating for a transition of this function to
25 a UN body like the ITU or something else, a body run by

1 governments.

2 Mr. Strickling. Yes.

3 Senator Coons. And you are part of a multi-
4 stakeholder process that is instead, the alternative,
5 seeking to privatize it --

6 Mr. Strickling. That is correct.

7 Senator Coons. -- to take this government agency, the
8 NTIA, out of a purely clerical function that does not censor
9 or control content --

10 Mr. Strickling. That is correct.

11 Senator Coons. -- in order to take away an argument
12 that authoritarian regimes have.

13 Mr. Strickling. Yes.

14 Senator Coons. And if we do not proceed, those
15 authoritarian regimes will have a strengthened hand as they
16 seek to persuade countries that are not yet clear on which
17 way they are going to come down.

18 Mr. Strickling. That is correct.

19 Senator Coons. And how many countries are in that
20 middle ground where you think our delaying this transition
21 might persuade them that the UN, the ITU, some multi-
22 government agency is better than this privatization?

23 Mr. Strickling. Well, there would be dozen of
24 governments in that category. What we know is that through
25 the efforts of the State Department and NTIA, over the last

1 2 to 3 years, we have basically brought about 30 of those
2 governments onboard in support of the multi-stakeholder
3 model.

4 And the risk is that they, and even like-minded
5 governments who have long-been supporters of us will see a
6 backtracking on the U.S. government's support of the multi-
7 stakeholder model as perhaps an argument to go to a
8 different direction.

9 Senator Coons. Got it. Let me ask a few quick
10 questions before I relinquish for this round.

11 Mr. Marby, will the ICANN continue to be subject to
12 U.S. law after this transition? Much has been made of the
13 possibility that ICANN might decamp for another
14 jurisdiction.

15 Mr. Marby. We will be subject to California law, yes.

16 Senator Coons. Any reason to be concerned that ICANN
17 might suddenly change its state of incorporation, its
18 bylaws, its compliance with U.S. law, its headquarters in
19 Los Angeles?

20 Mr. Marby. Not at all. The whole basis of ICANN
21 today is built around California law. Our bylaws, our
22 charter, everything is based on California law.

23 I would like to add my biggest concern is not about the
24 governments, which that is a big risk. I also want the
25 committee to understand that this is a voluntary system that

1 nobody controls, with different moving parts.

2 If the transition does not happen, there could be
3 another ICANN outside of the U.S., with no protection of
4 .gov, .mil, or anything else. It is a voluntary system that
5 works together for the benefit of it all, but it could be
6 replaced.

7 Senator Coons. Let us make sure we get that point.
8 So just because the structure, the architecture of the
9 network of networks that is the Internet was initially
10 developed and designed in the United States by U.S. agencies
11 and companies does not mean that that has to continue to be
12 the case. And if the international voluntary global multi-
13 stakeholder community that currently maintains this
14 architecture and functioning internationally -- if they lose
15 confidence in the process towards a privatization
16 transition, they may instead simply set up competing
17 systems.

18 Mr. Marby. Yes.

19 Mr. Strickling. And the current network of networks
20 might began to fracture further, and that would harm the
21 Internet's functioning in its current architecture.

22 Mr. Marby. Yes.

23 Senator Coons. Okay. Last, what safeguards are there
24 in this transition, Mr. Assistant Secretary, against what
25 has been raised as one of the things we should be concerned

1 about? What safeguards are there against potential -- of
2 ICANN by foreign governments in the future.

3 Mr. Strickling. Well, there are many. Number one,
4 governments cannot sit as voting members of the Board of
5 Directors.

6 Number two, in the Government Advisory Committees we
7 have talked about there has now been a strengthening of the
8 provision under which the GAC can provide consensus advice
9 to the board. It is now defined in the bylaws as advice to
10 which no country objects. So that means that that advice to
11 which the board has to provide special attention or special
12 consideration now only will apply to advice that the United
13 States government agrees with.

14 Third, to the extent that they have created this
15 empowered community as a way to exercise powers against the
16 board in terms of reviewing and approving the budget, even
17 removing board members, governments, if they choose to
18 participate in that, and they have not yet, and indeed it is
19 the position of the United States that governments should
20 remain advisory and should not participate in the empowered
21 community, they would be one of all the other members of the
22 community, and indeed, they would not be able to participate
23 if the advice that was being challenged by the community was
24 advice that the Government Advisory Committee had produced.

25 So there is no possibility of governments being able to

1 take control of ICANN through the provisions that have now
2 been put in the bylaws. This was one of our core criteria
3 when we announced the transition in 2014. And the community
4 responded quite thoroughly in making sure that the plan that
5 they have crafted will prevent that from ever happening.

6 Senator Coons. I would like to thank you both for
7 your testimony so far. This is a very complicated technical
8 area, but it is important to keep the simple facts straight.

9 What we are debating between is two potential paths
10 forward. One where authoritarian regimes have a greater
11 likelihood of compelling a transition to control of the
12 functions we are talking about today by the ITU or another
13 UN agency or multi-government agency, or a future where the
14 international structure of the Internet fractures and
15 competing DNS functions are set up, or the transition that
16 has been underway across several administrations, Republican
17 and Democrat, that has been worked out largely through a
18 consensus process, much of it private sector-led that is
19 essentially a privatization of a purely clerical function
20 that is essential to the operation of the Internet, but is
21 in no way involved in censorship on the Internet. Is that
22 your testimony today?

23 Mr. Strickling. Yes, sir.

24 Mr. Marby. Yes. Sir.

25 Senator Coons. Thank you both very much.

1 Senator Cruz. Thank you, Senator Coons.

2 Chairman Grassley?

3 Chairman Grassley. Mr. Strickling, I happen to agree
4 on the importance of continued U.S. control of the top
5 domain names such as .mil or .gov. In 2015, you testified
6 that you would, "take a look and make sure that if there is
7 a way we can strengthen U.S. government's rights to those
8 names, we will do it." While NTIA and ICANN affirmed that,
9 "any change made to .mil or .gov can only be made with the
10 expressed approval of the U.S. government," we have come to
11 learn that the affirmation has come not through a binding
12 legal agreement, but by a mere exchange of letters and it
13 remains possible that ICANN could re-delegate these.

14 Why is the Administration content to receive so little
15 assurance, a mere letter, instead of a binding legal
16 agreement from ICANN? Followup question -- has the NTIA
17 consulted with the Justice Department, a member of the DNS
18 interagency working group, regarding this language, and if
19 so, what was their response?

20 Mr. Strickling. So the answer to your first question
21 is the United States does not wish to cede any sovereignty
22 that we may have over .mil and .gov. That is why we have
23 done this as an exchange of letters.

24 The United States, prior to the creation of ICANN, had
25 the complete authority and control over .mil and .gov. That

1 condition exists today, and it will continue on in the
2 future.

3 To enter into a contract with ICANN would, in some
4 respects, risk indicating that ICANN has rights in the
5 control or authority over those names that it does not have
6 today. So in evaluating the desirability of doing a
7 contract, it became clear understanding the history of these
8 domain names that that actually was a risky maneuver and
9 might lead to the United States ceding some form of
10 authority over these names that we enjoy today.

11 Chairman Grassley. What about consulting with the
12 Justice Department?

13 Mr. Strickling. Well, we consulted with the
14 Department of Defense because it operates .mil. I do not
15 recall whether there was a specific discussion with the
16 Department of Justice about it, but this was the course of
17 action that the operator of .mil wished to take in terms of
18 doing this as an exchange of letters as opposed to doing a
19 contract.

20 Chairman Grassley. Mr. Marby, is ICANN opposed to
21 executing a binding legal agreement with the Administration
22 that would ensure that the U.S. continue to control certain
23 top level domains like the ones I mentioned permanently into
24 the future?

25 Mr. Marby. I think it is up to the U.S. government to

1 decide how it would like to have protection. I would
2 emphasize we do not see that we have any rights over that
3 today. I also would like to restate the fact that if the
4 transition does not go through and ICANN is replaced with
5 something else--which we can be technically--there will be
6 no safe haven for those names.

7 Chairman Grassley. Let me ask you, Mr. Marby,
8 something that Senator Coons has touched on. In your
9 testimony, you explained that ICANN's place of incorporation
10 is not a settled matter and that it and the location of
11 ICANN's headquarters could potentially change. Your
12 predecessor went so far as to announce in 2014 that ICANN's
13 board had, "given him the green light to begin working on
14 the creation of a parallel legal international structure in
15 Switzerland for ICANN." So no matter how much the
16 Administration and ICANN wish to downplay this issue, it is
17 one that many people are rightly concerned about and it is
18 an issue that has not been truly settled.

19 So is ICANN opposed to including requirements in
20 ICANN's bylaws to definitively ensure that ICANN's place of
21 incorporation never changes from California, or is it
22 impossible and a reason why this transition should not go
23 forward?

24 Mr. Marby. I think we fairly say that the protection
25 is stronger than -- bylaws. The whole concept of ICANN is

1 built around California law -- that is the charter of how we
2 do things. So you have to go all the way down to how we are
3 organized to be able to do that. So it is a stronger
4 protection than just bylaws.

5 Chairman Grassley. Thank you, Mr. Chairman, I am
6 done.

7 Senator Cruz. Thank you, Chairman Grassley.

8 Senator Lee?

9 Senator Lee. Thank you, Mr. Chairman.

10 Thanks to both of you for being here. Mr. Strickling,
11 I would like to start with you if that is okay.

12 Mr. Strickling. Certainly.

13 Senator Lee. As I am sure you are aware, some
14 observers, some legal scholars, and other analysts of this
15 industry have contended that any protection from antitrust
16 liability that ICANN may have enjoyed in the past, in fact,
17 ended in 2009 concurrent with a change in level of oversight
18 specified by the NTIA contract.

19 However, there is a 2015 decision rendered by a panel
20 of the U.S. Court of Appeals for the Ninth Circuit affirming
21 the dismissal of antitrust claims brought by namespace. In
22 that opinion, the Ninth Circuit suggested that some
23 insulation from antitrust liability may still remain. More
24 to the point, I think the Ninth Circuit's reasoning supports
25 the conclusion that this continuing measure of protection,

1 whatever it is that remains of the protection from antitrust
2 liability, may fall away with the expiration of the NTIA
3 contract, that if and when this happens, that somehow
4 whatever insulation remains would disappear.

5 In particular, the Ninth Circuit reasoned that it could
6 not infer that ICANN entered into an anti-competitive
7 agreement as ICANN's apparent insider-driven process for
8 shaping the bidder process for new top level domains was,
9 "fully consistent with its agreement with the Department of
10 Commerce." Now, by way of explanation, the court noted, "It
11 was understood from ICANN's inception that its board would
12 include industry insiders and that the board would approve
13 the application process."

14 So I would like to ask you the question, given the
15 uncertainty of the situation as far as antitrust law goes
16 and the uncertainty that I think is acknowledged by the
17 Ninth Circuit in this opinion, did NTIA reach out to the
18 Department of Justice Antitrust Division for an opinion on
19 possible liability risks that ICANN might incur, that ICANN
20 and its board of directors might face following the removal
21 of insulation from a normalized antitrust analysis brought
22 about by the termination of the NTIA contract? Is that
23 something that happened?

24 Mr. Strickling. During the evaluation of the
25 transition plan, there was an interagency committee of

1 federal agencies, including the Department of Justice. As
2 part of that process, the Department of Justice looked at
3 whether there were any competition concerns that might
4 result from this transition, and they concluded that there
5 were none.

6 Now, it has been our view that ICANN has not enjoyed
7 antitrust liability, not -- going back to its creation in
8 the late 1990s. So we have never seen the transition as
9 taking away something that they hold today because we do not
10 recognize that they have any antitrust immunity today. That
11 is also the Department of Justice's view, so that the
12 transition obviously then would not change that circumstance
13 because if they do not have it now, they will not have it
14 going forward.

15 So that was all evaluated as part of our overall review
16 of the transition proposal.

17 Senator Lee. Right, but you do not dispute that some
18 courts have seen it differently? You do not dispute that --

19 Mr. Strickling. Well, I am not here to -- I do not
20 hold myself as an antitrust expert. I know the Department
21 of Justice has offered a briefing for the Chairman and, I
22 assume, Members of this subcommittee to go into that in
23 greater depth.

24 I am aware of a case -- I think it is a 2009 case --
25 that has been cited as providing some level of immunity. It

1 is not really an antitrust immunity. It is more derived
2 from sovereign immunity, but that case did not involve
3 ICANN. It involved a predecessor to Verisign. The court
4 case you are describing in the Ninth Circuit, the 2015 case,
5 I thought the holding was there was no cause of action
6 stated. I do not believe they made any finding of immunity
7 as part of their holding.

8 Senator Lee. Yes. Well, it was a different sort of
9 ruling. They did not find that they were immune in the same
10 sense that they would have been if they were a government
11 actor, but there was this connection to the government
12 entity that seemed to be significant in finding no liability
13 then.

14 Mr. Strickling. Right, but am I correct that they
15 found no cause of action.

16 Senator Lee. Correct.

17 Mr. Strickling. That they did not dismiss the case
18 based on any of those issues?

19 Senator Lee. They found no cause of action.

20 My time is expiring. I do want to know -- actually,
21 let me ask this of you, Mr. Marby. ICANN is, of course, a
22 nonprofit organization, and it is organized under California
23 law. It has been since its inception in 1998.

24 Is ICANN committed to remaining domiciled in
25 California, subject to both U.S. and California law post-

1 transition?

2 Mr. Marby. Yes.

3 Senator Lee. Okay. So ICANN is not in a position of
4 saying we want to keep our options open? It is committed to
5 staying in California remaining a California corporation?

6 Mr. Marby. As I said, the basis of ICANN is built
7 around California law. The bylaws are founded on them, the
8 charter of the organization is founded on California law.
9 Plus the 2,000 plus contracts we have with different
10 registrars and others around the world are all based around
11 California law as well.

12 Senator Lee. Okay. Thank you.

13 I see my time is expired.

14 Senator Cruz. Thank you, Senator Lee.

15 Mr. Marby, let us --

16 Chairman Grassley. Could I have 15 seconds, please?

17 Senator Cruz. Sure.

18 Chairman Grassley. I thought that Mr. Marby answered
19 my question, and then Senator Lee followed up. I would like
20 to know from you for clarification whether or not it is in
21 the bylaws -- is there no way that you can sit here and
22 definitively assure me that ICANN's place of incorporation
23 will never change?

24 Mr. Marby. First of all let me explain a little bit
25 about my role. I am the CEO and President of the ICANN

1 Corporation which is a supporting organization to the
2 community and the board. Any decision that is made, it has
3 to be made by the community, and not by me. That is the way
4 that this is set up. I am here to execute the wishes of the
5 community.

6 Chairman Grassley. Okay. So you cannot assure us,
7 then, that it is always going to be under California law in
8 California?

9 Mr. Marby. To be able to change where we are --
10 because of the fact we are built upon California law, we
11 have -- the charter and the bylaws are built upon the
12 California law. I would say it would be a very hard thing
13 to do. I think it would be easier to start a new ICANN
14 elsewhere with no California law as a basis.

15 Senator Cruz. Thank you, Mr. Chairman.

16 Let us, Mr. Marby, stay focused on this question. You
17 have made a lot of references to the bylaws as a nonprofit,
18 and indeed Mr. Strickling also told us we should trust the
19 bylaws because they ensured that nothing could go out of the
20 government advisory committee without consensus.

21 Under California law, does anything prevent ICANN from
22 changing its bylaws at any time it wishes?

23 Mr. Marby. There are checks and balances built into
24 the system to be able to change those bylaws.

25 Senator Cruz. So yes, ICANN can change the bylaws.

1 If we sit here today and say there is something in the
2 bylaws -- after the transition, ICANN could change the
3 bylaws and remove whatever the assurance is we are being
4 told to trust?

5 Mr. Marby. If you refer the ICANN organization, the
6 answer is no.

7 Senator Cruz. ICANN cannot change its own bylaws?

8 Mr. Marby. As I said in my opening statement and many
9 times said before, to be able to make sure that nobody takes
10 control over the ICANN which consists of three parts, the
11 community, the board, and the organization I represent which
12 is a support organization -- I am the CEO and President of
13 the ICANN organization, do not have the mandate, do not have
14 the possibility to go in and change proposed bylaw changes.
15 The only one that can do that is the community which is
16 consisting of, for instance, U.S. businesses.

17 Senator Cruz. So just to clarify, your testimony is
18 the community, the U.S. businesses who have had a
19 questionable record of protecting free speech in the past,
20 have the authority to change the bylaws in the future. Is
21 that correct?

22 Mr. Marby. As I stated earlier, if someone really
23 wants to change this setting, it is easier to start an
24 alternative ICANN with another -- outside of the U.S.

25 Senator Cruz. I am not asking which is easier. I am

1 asking if the bylaws can be changed.

2 Mr. Marby. There are so many checks and balances
3 within the system, I would say it is hardly possible to do.

4 Senator Cruz. Sir, this is not a complicated
5 question. Can the bylaws be changed? You are saying, gosh,
6 it would be easier to do something else that -- under the
7 bylaws can be changed, or they cannot.

8 Mr. Marby. I think I answered the question to the
9 best of my ability. I cannot do it. The community, after
10 all checks and balances, but the whole bylaws are built on
11 California law.

12 Senator Cruz. And under California law the bylaws can
13 be changed by what you refer to as the stakeholders'
14 community; correct?

15 Mr. Marby. After -- there are checks and balances
16 built into that system that represent U.S. users and other
17 ones into that system as well. It is not only U.S.
18 companies that are in there as well. That is why the
19 transition has so much support from other parts as well.

20 Senator Cruz. Now to follow up, also, on your
21 exchange with Chairman Grassley, can you tell this committee
22 today that there is zero possibility that ICANN will choose
23 abroad to a foreign jurisdiction?

24 Mr. Marby. I do not have the mandate to take that
25 decision as I explained earlier. And we have no intention

1 of moving ICANN.

2 Senator Cruz. But you cannot say there is zero
3 possibility it will occur?

4 Mr. Marby. I am only representing the organization.
5 I would say it is highly improbable to do that.

6 Senator Cruz. Well then let me ask you, your
7 predecessor, Mr. Fadi Chehadé, on February 21st, 2014,
8 before the French Senate said, "First, to begin working on
9 the creation of a parallel legal international structure,
10 maybe in Switzerland, for ICANN." Why was he telling the
11 French Senate something different from what you are telling
12 the American Senate?

13 Mr. Marby. First of all, I cannot read it because it
14 is too low, and I cannot explain that because I do not know
15 in what circumstances he said that.

16 Senator Cruz. So you have no explanation for your
17 predecessor making reference to creating an international
18 organization in Switzerland for ICANN?

19 Mr. Marby. Neither him or me has that mandate. And
20 if you look back to the bylaws and how we set it up, also
21 the U.S. government is satisfied with the protection we
22 built in.

23 Senator Cruz. Alright, well talking about your
24 predecessor, let us talk about another aspect of his record
25 which is that he stated, if we do not engage with China at

1 every level of our community, we frankly lose a part of our
2 global legitimacy. And, indeed, after leaving ICANN, Dr.
3 Chehadé became cochair of an advisory committee to the World
4 Internet Conference organized by China. He did so after
5 Reporters Without Borders called for a boycott on that
6 conference, saying that China was an enemy of the Internet.

7 Now do you agree with Mr. Chehadé's views of China?

8 Mr. Marby. I am not -- maybe this is my English. I
9 do not really understand the question.

10 Senator Cruz. Do you agree with Mr. Chehadé's views
11 about China about the legitimacy of China, about the need to
12 work with them even when they are censoring the Internet?

13 Mr. Marby. My understanding is there are about 300
14 million Internet users in China. We are a nonpolitical
15 technical community that works to be able that the Internet
16 functions technically. I cannot vouch for what my
17 predecessor said in different surroundings.

18 Senator Cruz. Well let me ask you this. Do you agree
19 with what Reporters Without Borders said in December of
20 2015, that China is "the world's leading enemy of the
21 Internet." Do you agree with that?

22 Mr. Marby. You are asking a personal question which I
23 will now answer in a personal way, if I can. The reason I
24 am working for ICANN, the reason I took this job, the reason
25 I left private sector is because I think the Internet is a

1 vehicle -- as you believe, Senator -- to be able to open up
2 hearts and minds of people around the world.

3 I do not even go close to what you do when it comes to
4 policies, what happens on top of the Internet. ICANN cannot
5 prevent anyone, any country, any network owner to prohibit
6 their uses, to be able to prohibit access to information on
7 the Internet.

8 What we do is to create the opportunity for a network
9 or networks for other ones to use or not to use. It is a
10 voluntary system.

11 Senator Cruz. Sir, so let me just ask this question
12 again because you did not answer it. Do you agree with
13 Reporters Without Borders that China is the world's leading
14 enemy of the Internet?

15 Mr. Marby. I think there are many countries around
16 the world who, unfortunately, prohibit access to
17 information. I think it is bad every time.

18 Senator Cruz. Do you think China is an enemy of the
19 Internet?

20 Mr. Marby. I do not have the competence to rank
21 those.

22 Senator Cruz. I did not say rank. I said do you
23 agree that China is an enemy of the Internet?

24 Mr. Marby. I think there is a highly potential risk
25 if the transition does not go through that China, together

1 with Russia and other countries, will use that possibility
2 to move the supervision of ICANN over to the UN.

3 Senator Cruz. Is ICANN bound by the First Amendment?

4 Mr. Marby. I think you know the answer to that
5 question.

6 Senator Cruz. I am asking your views.

7 Mr. Marby. To my understanding, no.

8 Senator Cruz. I want to finally make a point that the
9 criticism, the opposition to transferring control of the
10 Internet to an international community of stakeholders
11 without any authority of the U.S. government is bipartisan
12 criticism. It is across the spectrum because freedom,
13 ensuring the Internet free of censorship is and should be a
14 bipartisan objective.

15 I would note that former Obama Administration Federal
16 Trade Commission Chairman, Jon Liebowitz has stated that,
17 "It was difficult for the Commission to get straight answers
18 out of ICANN," and "If Commerce cuts the umbilical cord with
19 ICANN before these issues are ironed out, there will be a
20 lot of risk to consumers." That is the Chairman of the
21 Federal Trade Commission appointed by President Obama.

22 Likewise, Delaware Secretary of State, Jeffrey Bullock
23 -- from the home state of the Ranking Member on this
24 committee -- expresses his views of ICANN in an August, 2016
25 letter in which he wrote that, "legitimate policy concerns

1 have been systematically brushed to the curb by ICANN
2 staffers well-skilled at manufacturing bureaucratic
3 processes to disguise predetermined decisions."

4 Likewise, I want to point to yet another famous right
5 wing organization, the *Washington Post*. The *Washington Post*
6 Editorial Board said, "It is bad enough that this
7 authoritarian governments repress online expression within
8 their borders, they should not be let anywhere near the
9 governance of the Internet's global infrastructure."

10 No one has yet had a convincing explanation for how the
11 multi-stakeholder model will be immune to pernicious
12 influences from governance. This criticism is widespread.
13 It is bipartisan, and it is unified behind the need to
14 preserve freedom online.

15 Senator Coons?

16 Senator Coons. Thank you, Mr. Chairman.

17 Senator Cruz. And very briefly, without objection, I
18 would like to enter each of those three statements into the
19 record.

20 [The statements follow:]

21 / SUBCOMMITTEE INSERT

22 Senator Coons. First if I might just briefly speak to
23 my friend, neighbor, and former colleague in government, our
24 now Secretary of State, Jeff Bullock. The comments that he
25 has made -- if I understand them correctly -- related very

1 narrowly to .llc and .inc and whether or not they were being
2 governed or managed in a way that could be misused by
3 entities that are not, in fact, legal corporations to
4 represent that they are corporations and has nothing to do
5 with the transition process that is before us today.

6 Let me ask two questions and then make a comment if I
7 could. First to the Assistant Secretary, is there anything
8 about this transition of the IANA functions that will newly
9 empower foreign governments to sensor the Internet?

10 Mr. Strickling. No.

11 Senator Coons. Is there anything about failing to
12 make this IANA transition that might empower foreign
13 governments to have a greater role in the structure and
14 architecture of the Internet if we do not move forward?

15 Mr. Strickling. Within their own countries,
16 governments can do what they wish today. That is what has
17 led to the comments such as the Chairman pointed out about
18 China and the practices that it engages in to restrict
19 content from its own citizens. There is nothing about the
20 way the Internet runs today that gives us, ICANN, or anyone
21 else any ability to step in and change what those countries
22 choose to do.

23 Our hope has to be that over time, as the stakeholder
24 groups grow in influence and in importance in their own
25 countries that they bring about that change internally.

1 That is the whole core of this stakeholder model.

2 What we are seeing in developing countries and what we
3 have seen over the last several years is that as countries
4 see this, as businesses in these countries come to ICANN
5 meetings and see how this works, as there nascent civil
6 society groups start to develop and emerge and they see how
7 they can participate in this process, as they work with
8 their local Internet society chapters, as they emerge and
9 grow, you are seeing these movements being built up in these
10 developing countries to build this tradition in support of
11 freedom, in support of multi-stakeholder control, and
12 against government control. That is what we risk losing if
13 this transition does not go forward in terms of cutting off
14 those measures at the knees because countries give up hope
15 once they see the United States is no longer serious about
16 supporting this model.

17 Senator Coons. Mr. Assistant Secretary, we are going
18 to hear the second panel -- a number of witnesses who
19 support the concept of the transition, who support the
20 privatization of this clerical function, but who say it is
21 not ready yet.

22 So you believe this transition plan has been adequately
23 tested, and are you confident in the continued security and
24 stability of the Internet post-transition, or should we
25 listen to those who urge caution and delay?

1 Mr. Strickling. The transition is ready now. The
2 only technical change that occurs as a result of this
3 transition is that the United States will no longer be in
4 the middle of root zone updates that take place today.
5 Today ICANN transmits a change to us. We transmit it, then,
6 to Verisign with instructions to go ahead and implement the
7 change. That one technical role would be eliminated.

8 There has been testing over the last many months of the
9 new system that will allow that to occur without the
10 government in the middle. And that system checked out--over
11 90 days of testing--error-free. So we are ready to go
12 forward.

13 What is getting confused in all of this are the
14 accountability improvements. As I said in my opening
15 statement, today the United States government does not have
16 control over the accountability of ICANN. That has to come
17 from the community.

18 Now we have nudged, we have advocated, we have been a
19 participant in improving ICANN's accountability over the
20 years. As part of the affirmation of commitments in 2008,
21 ICANN committed to conducting three-year reviews, top to
22 bottom, of their accountability. I personally participated
23 on the first two of those reviews and important improvements
24 were made as a result of that.

25 Improving ICANN's accountability is a constant effort.

1 It is not something that we do once, and then we are done
2 with it. So these measures that are being talked about in
3 terms of the accountability measures have nothing to do with
4 the IANA functions contract, and will come in place on their
5 own authority.

6 Senator Coons. So is it possible, Mr. Assistant
7 Secretary, that the editorial from the Washington Post that
8 was just show, and which is, I think, about a year and a
9 half old, does not reflect the testing, the improvements,
10 the progress that has been made preparing for this
11 transition?

12 Mr. Strickling. Well more importantly, that editorial
13 was written before a transition plan had been completed.

14 Senator Coons. Right. So it is not relevant --

15 Mr. Strickling. No. It is --

16 [Simultaneous speech.]

17 Mr. Strickling. history at this point.

18 Senator Coons. My time is about to run out. I just
19 want to ask one last question that I think is important
20 because there was a big display put up, a quote from Mr.
21 Chehadé who is your predecessor and ICANN leader.

22 I want to be careful about this and get it right
23 because I think the point that was being made with his quote
24 demonstrates the way in which the whole thrust of this
25 hearing gets exactly wrong the moment before us and the

1 decision before us.

2 Mr. Chehadé was notionally testifying to the French
3 Senate, saying that we should begin to develop parallel
4 legal international structures, perhaps, in Switzerland. I
5 do not know him. I have not read into that testimony. I do
6 not know anything other than what was just put up here. But
7 it seems to me that what he is advocating for is exactly the
8 negative outcome that you are saying is likely if we delay
9 this transition, meaning others who are fans, perhaps of
10 China, or Russia, or other authoritarian states, others who
11 are suspicious of any U.S. role will begin to actively
12 advocate for creating an alternative to ICANN that is not
13 incorporated in the United States, that is not headquartered
14 in California, that is not largely guided and led by this
15 private sector multi-stakeholder community, but is instead
16 outside of the United States, headquartered in Switzerland.

17 That comment did not reflect an intention for ICANN to
18 relocate outside of the United States. That comment
19 reflected the possibility that a completely alternative
20 competing function, a competing group to ICANN may well be
21 set up and may well be the first step towards a competing
22 system for architecting, connecting and governing the
23 Internet.

24 Today we have a global system. Just to posit a,
25 perhaps, clearer example, where airplanes take off and land

1 all over the world in various airports and there is,
2 essentially, one global system by which airplanes and
3 airports communicate with each other and convey their
4 schedules, and decide who is going to take off and land
5 where, and by which control towers make decisions about
6 communicating with airplanes and who is going to land when.

7 They are not talking about the content of advertising
8 of those airlines. They are not governing the conversations
9 happening on those airplanes, but there is really one global
10 system for the management of air traffic.

11 Imagine that there were a competing system for the
12 management of air traffic internationally that did not talk
13 to a U.S. initiated, U.S. system of managing air traffic.
14 We are not talking about the content of the traffic, just
15 how it flows.

16 If I understood your initial testimony correctly,
17 moving forward with this transition -- which you have tested
18 and in which you have confidence -- is a way to show to the
19 world that we can continue with the current architecture of
20 the flow, the network of networks that characterizes the
21 Internet.

22 What Mr. Chehadé was talking about is the very real
23 threat that if we do not proceed with the transition, a
24 competing system for the architecture and control of the
25 Internet through a competing corollary, a parallel structure

1 to ICANN may move forward. Is that correct?

2 Mr. Marby. Yes, that is correct. And there are tests
3 of those systems already today, where you are looking to
4 alternatives, a root -- and alternative DNS systems which is
5 happening outside of the U.S.

6 Senator Coons. So the idea that somehow that,
7 "supports" that ICANN is thinking about relocating to
8 another country or that ICANN is thinking about affiliating
9 with China, the enemy of the Internet, is exactly wrong.
10 That quote makes the case that there are already efforts to
11 set up an alternative competitor to the open private sector-
12 led structure of Internet governance that this IANA
13 transition to ICANN represents.

14 Mr. Marby. I think that one of the most accountable
15 aspects of what the ICANN organization is doing is that we
16 have to be good to serve the Internet community, the ICANN
17 board, and the ICANN community. If we do not perform, we
18 can be replaced. If the contract does not expire, we can be
19 replaced.

20 I know this is a technical thing that might seem as a
21 threat or anything else, but that is how the U.S. wants it
22 set up, the Internet. That is why when the U.S. set up this
23 organization and all of its parts to make sure that no
24 country, no organization, no -- can control it.

25 That is why Internets consist of so many different

1 moving parts that work together under trust, under the
2 assumption that the U.S. will leave this last contract to
3 expire. It is intentionally set up by the U.S., and the
4 world is grateful for having this model because I think it
5 is beneficial not only for the rest of the world, but also
6 for the U.S. and U.S. businesses, that today you can reach
7 3.4 billion users around the world as a business potential.

8 But it is set up as tiny parts working together. All
9 of them are important, and they can be replaced.

10 Senator Coons. Thank you, Mr. Marby.

11 Thank you, Mr. Assistant Secretary.

12 Senator Cruz. Senator Flake?

13 Senator Flake. Thank you, Mr. Chairman. Thank you
14 for holding the hearing, and thank you for testimony, and I
15 apologize I have to run very quickly. I just wanted to just
16 ask one question with regard to the second panel that will
17 be coming up.

18 We will be hearing from the ordeal of an Arizona
19 Corporation, Ping, trying to register a top level domain.
20 They tried to register the Ping domain name and wind up
21 paying over a million dollars to do that at auction. I
22 think it is troubling that Ping was essentially forced to
23 pay for its own intellectual property.

24 How will the ICANN transition address concerns of
25 American trademark holders like Ping, and will the process

1 of resolving these kind of claims change following the
2 transition?

3 Mr. Strickling. Let me start in terms of the impact
4 by the transition, itself. What you are describing is the
5 process established by the community as to how it would
6 expand the list of top level domains that are available.
7 And as a result of this, hundreds of new domains have gone
8 into the root file. It has nothing to do with the
9 performance of the IANA functions.

10 So the contract that we have with ICANN under which
11 they perform -- the root zone files does not reach this
12 policymaking activity of ICANN. So when the contract goes
13 away, it will still be up to the community of businesses and
14 everyone to set the policies.

15 Now, the example you are talking about comes right out
16 of the guidebook that the community developed over years in
17 terms of what to do when multiple parties seek the same
18 domain name, because it is not like the trademark world
19 where people can -- like Apple can use Apple as a trademark
20 in one context and a different company could use Apple in a
21 totally different industry. Unfortunately, on the Internet
22 only one person can have dot apple.

23 So the question the community faced was how do we deal
24 with the competing claims on these names. What the
25 community decided -- and by the community I mean all of the

1 businesses that are now seeking domain names along with the
2 technical experts and civil society members that participate
3 in this policymaking process -- decided that where you have
4 two people making equal claims for a name, they need to work
5 it out. And at the end of the day, the process that they
6 put in place to resolve -- at the end -- is an auction which
7 can be conducted privately or can be conducted under the
8 auspices of ICANN. The parties decide that. And that has
9 been used.

10 Has it been a great outcome? It is a good question to
11 ask the second panel, if they feel that the experience of
12 dealing with these contentions -- that's where people ask
13 for the same domain name -- has worked the way that they
14 expected it to when they set that policy several years ago.
15 As they look forward to establishing a second round of
16 expansion of domain names, the community may well use a
17 different way to handle that.

18 But the point to keep in mind is that is part of ICANN
19 policymaking. That is part of what the multi-stakeholder
20 community does. It is not in anyway within the scope of the
21 IANA functions contract that we have with ICANN.

22 Senator Flake. Thank you. I will submit additional
23 questions for the record.

24 Thanks Mr. Chairman.

25 Senator Cruz. Thank you, Senator Flake.

1 [The questions follow:]

2 / SUBCOMMITTEE INSERT

3 Senator Cruz. This will be the final round of
4 questions for the first panel.

5 Mr. Strickling, I want to focus right now on questions
6 of compliance with federal law. If Congress passes an
7 appropriate rider this month mandating that NTIA renew the
8 contract with ICANN, will you commit that NTIA will comply
9 with that mandate?

10 Mr. Strickling. We will follow your direction, sir.

11 Senator Cruz. So you are aware, and that means you
12 will renew the contract if that is mandated?

13 Mr. Strickling. If that is what we are told to do,
14 and that passes Congress, we will do that. We have taken
15 the preparatory steps to allow us to do that as late of the
16 night of September 30th, if it comes to that.

17 Senator Cruz. Now you are aware that Section 539 (a)
18 of the Consolidated Appropriation Act already makes clear
19 that, "None of the funds made available by this act may be
20 used to relinquish the responsibility of the National
21 Telecommunications and Information Administration, during
22 fiscal year 2016, with respect to Internet domain name
23 functions, including responsibility with respect to the
24 authoritative root zone file and the Internet Assigned
25 Numbers Authority Functions." That is existing federal

1 law --

2 Mr. Strickling. That is correct.

3 Senator Cruz. -- passed by Congress and signed by the
4 President.

5 Mr. Strickling. That is correct. And I have followed
6 that as well as all members of my staff.

7 Senator Cruz. So it is your testimony you have
8 followed this?

9 Mr. Strickling. Absolutely.

10 Senator Cruz. That you have -- and you are aware that
11 when an appropriation rider says none of the funds may be
12 spent carrying out a function that that means not only
13 dollars, that means time of government employees?

14 Mr. Strickling. Right. I have done nothing to
15 relinquish the responsibility of NTIA with respect to the
16 Internet domain name system during this fiscal year.

17 Senator Cruz. So it is my understanding that the NTIA
18 awarded a contract in the amount of \$18,690 to the Berkman
19 Center at Harvard University to study the transition plan.
20 Is that correct?

21 Mr. Strickling. We asked for corporate govern and
22 expertise. That is correct.

23 Senator Cruz. It is my understanding that the NTIA
24 paid Professor Brakman-Reiser \$9,207 to conduct a review of
25 the transition plan.

1 Mr. Strickling. That sounds correct, yes. We
2 absolutely retained her.

3 Senator Cruz. It is my understanding that the NTIA
4 incurred expenses of \$1,658 for two meetings in New York
5 with experts relating solely to the transition. Is that
6 correct?

7 Mr. Strickling. We had two meetings in New York. I
8 do not remember the precise dollar amount, but that sounds
9 right.

10 Senator Cruz. And you have used government-salaried
11 staff time to conduct a review of the transition and to
12 prepare and draft the IANA Stewardship Transition Proposal
13 Assessment Report. Is that correct?

14 Mr. Strickling. Just as Congress direct us to, yes,
15 sir.

16 Senator Cruz. You are also aware of the terms of the
17 Federal Antideficiency Act, also federal law which provides
18 that it is a criminal offense, punishable by up to two years
19 in prison and a \$5,000 fine if an officer of the government
20 knowingly and willfully makes or authorizes an expenditure
21 or an obligation exceeding an amount available in an
22 appropriation or fund for the expenditure of the obligation?
23 Are you aware of that?

24 Mr. Strickling. I am aware of the Antideficiency Act,
25 yes, sir.

1 Senator Cruz. How would you explain to this committee
2 does your conduct -- expenditures we went through -- all
3 working to relinquish control of the Internet? How is that
4 consistent with federal law and the Antideficiency Act?

5 Mr. Strickling. Well, you have just added a word that
6 is not in the rider. You added "working" to relinquish
7 responsibility. I have not relinquished any responsibility.
8 The provision does not reach preparatory activities, and
9 indeed Congress expected us to engage in preparatory
10 activities because at the time the first rider was passed in
11 2014, we were directed to conduct a thorough review of any
12 transition plan that we received. So Congress understood
13 that during the pendency of that rider that we would be
14 engaged in activities preparing for the transition, but
15 those, themselves, do not relinquish any responsibility.

16 Senator Cruz. Do you have an office of legal counsel
17 --

18 Mr. Strickling. I do.

19 Senator Cruz. -- opinion stating that, as you put it,
20 "preparatory functions are not included in this rider" --

21 Mr. Strickling. We were so advised.

22 Senator Cruz. Do you have a written opinion from OLC
23 to that effect?

24 Mr. Strickling. From -- I am sorry. I have it from
25 my Office of General Counsel at the Department of Commerce.

1 Senator Cruz. I would ask you to submit that legal
2 advice to this committee.

3 Mr. Strickling. I understand. I will take that back.

4 Senator Cruz. But you do not have an opinion from the
5 Office of Legal Counsel of the United States Department of
6 Justice to the effect?

7 Mr. Strickling. I am not aware of one, no.

8 Senator Cruz. I would point out that under your
9 interpretation, which I consider to be tortured
10 interpretation of this statutory language and unfaithful to
11 the text -- and let us go to the other one, to the actual
12 rider.

13 Your interpretation is preparatory conduct is not
14 encompassed in this, so that the Commerce Department can do
15 absolutely everything required to relinquish the Internet,
16 the responsibility right up until the moment of pushing the
17 button --

18 Mr. Strickling. Well, Senator --

19 Senator Cruz. Wait -- hold --

20 Mr. Strickling. I am sorry.

21 Senator Cruz. Your position is every single act of
22 preparation can be done, and as long as it actually has not
23 been culminated with the relinquishment, that is perfectly
24 okay. I am going to say two things.

25 Number one, I am going to ask you if that

1 interpretation is right, why on earth would Congress pass
2 this? This is a meaningless rider. If your interpretation
3 is right, what the heck is Congress prohibiting?

4 Mr. Strickling. They have prohibited us from
5 relinquishing responsibility. But let me ask you this,
6 Senator. What is the responsibility referred to there? The
7 only responsibility that we have is not based on any
8 statutory obligation. Our responsibility --

9 Senator Cruz. I understand you disagree --

10 Mr. Strickling. Let me finish, Senator, if I may.

11 Senator Cruz. I understand --

12 Mr. Strickling. Senator, if I may finish --

13 Senator Cruz. No. No, you may not. You may answer
14 my questions. I understand --

15 Mr. Strickling. I am telling you that the
16 responsibility we have --

17 Senator Cruz. Sir? Sir?

18 Mr. Strickling. -- has been to privatize the domain
19 name system.

20 Senator Cruz. I understand that you have a political
21 mandate to do that.

22 Mr. Strickling. No. It --

23 Senator Cruz. But let me be very clear. The fact
24 that you disagree with the policy judgment of the Congress
25 of the United States as reflected by federal law -- you are

1 entitled to disagree with it.

2 Here is what you are not entitled to do, sir -- and I
3 want to speak for a moment to the employees who work for
4 you, to the government employees at the NTIA, and at the
5 Department of Commerce. These legal prohibitions have been
6 passed into law by Congress and signed by the President. If
7 your political superiors instruct you to proceed with this
8 transition, to spend your time, to spend one penny of
9 government money, you have an obligation as an employee of
10 the federal government to decline to follow that instruction
11 to violate federal law. And let me note for you, if you do
12 not, if your superiors direct you to do it and you carry out
13 those orders, under the Antidificiency Act, you are risking
14 personal criminal liability of up to two years in prison.

15 I would not this administration that has politically
16 mandated handing over oversight of the Internet, this
17 administration is not going to prosecute anyone. But in
18 January of 2017, a new administration will be in Washington.
19 We do not know who that will be, but I am advising the
20 employees of the Department of Commerce your political
21 superiors do not have the authority to instruct you to
22 violate federal law, to violate what Congress has passed.

23 Mr. Strickling has told us he disagrees with Congress.
24 He is entitled to disagree with Congress. He is not
25 entitled to instruct federal employees to violate federal

1 law, and each of you should be on notice -- who has worked
2 hard to have long, distinguished careers -- that political
3 appointees of this administration cannot instruct you to
4 violate federal law.

5 Mr. Strickling. Senator, we have followed the law.
6 We have not relinquished our responsibility. I am outraged
7 that you are accusing us of doing that, especially when the
8 very conduct you that you raised -- if I may read to you --
9 "The committee directs NTIA to conduct a thorough review and
10 analysis of any proposed transition of the IANA contract."

11 We were directed to do that as a part of the spending
12 bill that was pass for fiscal year 2015. It carried forward
13 in fiscal year 2016. So it is clear that Congress never
14 intended "relinquish the responsibility" to mean all of the
15 preparatory activities we are engaged in because we were
16 directed specifically to conduct a review of the plan.

17 Senator Cruz. Mr. Strickling, a committee report
18 cannot change clear statutory text, and you, under your
19 interpretation -- which I consider not a reasonable
20 interpretation of federal law because it renders federal law
21 absurd and meaningless -- under your interpretation, this
22 rider had no effect whatsoever. And for those federal
23 employees working for you, they need to make a determination
24 are they willing to risk their own careers based on what I
25 believe to be a political interpretation. I hope the answer

1 to that is no.

2 Congress has the authority to make this determination,
3 and you are welcome to disagree with it, but you are not
4 welcome to disobey federal law passed by Congress.

5 Mr. Strickling. I have not disobeyed any federal law
6 with respect to this.

7 Senator Cruz. Senator Coons?

8 Senator Coons. Thank you, Mr. Chairman.

9 The Chairman began this hearing today by, in part,
10 intoning have we something to fear. I just want to make
11 sure I am giving you an opportunity, Mr. Assistant
12 Secretary, given that exchange, to put on the record your
13 understanding of whether your employees have something to
14 fear, or whether, in fact, you are complying with
15 Congressional direction.

16 So let me just make sure I understand because the
17 proposition was just put forward that your interpretation
18 would render Congressional action or statute absurd and
19 meaningless. What I have understood your view to be is that
20 Congress, at the same time, directed you -- let us give a
21 metaphor. It is the equivalent of saying, we are going to
22 urge the Department of Homeland Security, or the FBI to plan
23 and prepare for a future acquisition of a headquarters,
24 while at the same time saying, you shall not build a new
25 headquarters in this year. That is not absurd; is it --

1 that tension between those two?

2 Mr. Strickling. Not at all. I think that is what
3 happened here. We were preserving a status quo.

4 Senator Coons. So your understanding was that there
5 is not absurdity or profound tension between being told
6 continue to engage in responsible, professional review of
7 this transition plan, but do not execute on that transition
8 plan in one fiscal year?

9 Mr. Strickling. Absolutely.

10 Senator Coons. That is your understanding. And you
11 have gotten guidance from the counsel to the Department that
12 supports that view?

13 Mr. Strickling. Yes.

14 Senator Coons. So do you have any fears for yourself
15 or your employees that you are in violation of statute of
16 the directions of Congress?

17 Mr. Strickling. I do not. Plus, as I said before,
18 our responsibility which stems solely from an Executive
19 Memorandum of 1997, has been to privatize the domain name
20 system. There is no federal statute, no federal regulation
21 directing NTIA or any other agency of the federal government
22 to run the domain name system.

23 Senator Coons. Thank you, Mr. Assistant Secretary. I
24 am going to defer to my colleague, if I might, Senator
25 Klobuchar.

1 Senator Cruz. Senator Klobuchar?

2 Senator Klobuchar. Thank you very much. Thank you,
3 Mr. Chairman. And thank you for your service, Mr.
4 Strickling. I am sure it has been a long hearing, but I
5 want to thank you for the work you do in a very complicated
6 area.

7 I have worked on this issue some as a member of the
8 Commerce Committee. So I have been familiar with it for a
9 while, and I know at first, when people hear about this, it
10 seems like, well, why can't our own government just control
11 all of this. But I think we understand that this is an
12 international Internet, and one of the crucial aspects of
13 the Internet is that it is based on the open, free flow of
14 information, and it is not run or controlled by any one
15 government.

16 NTIA's role was meant to be temporary as a multi-
17 stakeholder process at ICANN was established. It has now
18 been over a decade, and NTIA is simply working to transition
19 its role.

20 However, we do know that there are other governments
21 across the world who want to control the Internet, or want
22 to stop the spread of information on the Internet to their
23 citizens, and limit the democratic values that it provides
24 by allowing people to freely share in information across the
25 world.

1 Can you expand on stepping back a little from the
2 minutia here? Could you expand on why this transition is
3 important to sending a clear message that the Internet
4 should be run by the multi-stakeholder process -- quite a
5 mouthful -- by people from various governments, and not by
6 one individual government?

7 Mr. Strickling. And that has been the long policy of
8 Congress, specifically as well. Back in 2012, both houses
9 of Congress passed resolutions supporting the multi-
10 stakeholder model within that covenant.

11 Senator Klobuchar. What year was that?

12 Mr. Strickling. 2012.

13 Senator Klobuchar. Okay.

14 Mr. Strickling. And this Senate passed a resolution
15 reaffirming its support for the multi-stakeholder model in
16 2015.

17 Senator Klobuchar. So in 2012, then were the
18 Republicans in control of the House when that happened? I
19 think so.

20 Mr. Strickling. I think they were.

21 Senator Klobuchar. Yes, they were. Yes. Okay.
22 Continue on.

23 Mr. Strickling. But, the point is support for the
24 multi-stakeholder model has been bipartisan here in
25 Congress. I mean, these were resolutions that were

1 basically passed without objection.

2 So it has been important that we have served as a
3 beacon to the rest of the world of the importance that civil
4 society, businesses, technical experts, play in charting the
5 course of the Internet, particularly, the technical aspects
6 of the Internet reflected in the discussions we are having
7 today about the IANA functions contract.

8 As I testified earlier, there has been a long struggle
9 between those authoritarian governments that are threatened
10 by their citizens being more actively engaged in managing
11 Internet resources, who have sought to bring Internet
12 governance under the authority of the United Nations or the
13 International Telecommunication Union. That is what is at
14 risk here -- this transition.

15 Senator Klobuchar. So what you are saying is what we
16 have tried to do is set up a process so that it is -- the
17 Internet is governed by these multi-stakeholders, instead of
18 going over to the UN -- is where it would end up?

19 Mr. Strickling. Absolutely. That has been the battle
20 we have been fighting for more than ten years. We are
21 now ==

22 Senator Klobuchar. And who wants it to go over to the
23 UN?

24 Mr. Strickling. I am sorry?

25 Senator Klobuchar. Who wants it to go over to the UN?

1 Mr. Strickling. Typically, it will be authoritarian
2 countries led by Russia, China, and other countries that are
3 threatened by a free and open Internet. They feel that if
4 it can be brought into a framework where only governments
5 can make decisions, they will be able to preserve their
6 ability to censor within their own borders, as well as,
7 perhaps, affect how it is --

8 Senator Klobuchar. And will the United States
9 continue to be an important stakeholder under the ICANN
10 establishment when that gets completed?

11 Mr. Strickling. Absolutely. We will continue to
12 participate actively.

13 Senator Klobuchar. And how will that be?

14 Mr. Strickling. That will be done through the
15 government advisory committee, but we in the State
16 Department will also be advocates for Internet freedom and
17 Internet governance issues in all international venues, not
18 just ICANN.

19 Senator Klobuchar. Okay. At the Commerce Committee
20 hearing on this topic back in May I asked Ambassador Gross
21 about the accountability working group, and he testified
22 that accountability is critically important. According to
23 your testimony, NTIA has thoroughly reviewed and agreed with
24 ICANN's report that ICANN has or will complete all necessary
25 tasks called for by the transition proposal.

1 What aspects of the accountability proposal give you
2 confidence that ICANN will remain accountable after the
3 transition?

4 Mr. Strickling. Well, what the proposal has done is
5 -- first, it has preserved, largely, the existing structure
6 of ICANN, which is important for maintaining the stability
7 of the Internet domain name system. But what it has done
8 is, it has now created a set of powers for the community to
9 be able to exercise if the ICANN board takes an action that
10 the community disagrees with.

11 These powers include being able to reject a budget.
12 They go to the point of being able to actually remove board
13 members and spill the entire board if the board should
14 totally go against the wishes of the community.

15 So while we hope and expect that those will never, ever
16 be exercised, the fact that they are there serves as an
17 important accountability control over how ICANN conducts
18 itself going forward.

19 Senator Klobuchar. And one last question, as the
20 Ranking Member of the Antitrust Subcommittee, focused on
21 those issues -- I know they were discussed earlier. My
22 staff told me, and I understand that ICANN is, has, and will
23 be treated as a private party.

24 Like any private party, when it is compelled to act by
25 the U.S. government, it is not liable under the antitrust

1 law for those compelled actions. Beyond that argument of
2 compulsion, ICANN can claim no immunity under antitrust law.
3 Is that your understanding as well?

4 Mr. Strickling. They have never had antitrust
5 immunity, and they will not have it going forward.

6 Senator Klobuchar. How does the transition affect
7 ICANN's ability to claim immunity under the antitrust laws?

8 Mr. Strickling. It will not affect it one bit.

9 Senator Klobuchar. Thank you very much.

10 Senator Cruz. I thank both of the witnesses for your
11 testimony. The first panel will now be excused, and we will
12 welcome the second panel to come and testify.

13 [Pause.]

14 Senator Cruz. Very well. Now I would like to
15 introduce our second panel on this important topic. We will
16 have seven witnesses testifying on this second panel.

17 Mr. Berin Szoka is President and Founder of
18 TechFreedom. A graduate of the University of Duke, and the
19 University of Virginia School of Law, he previously served
20 as Senior Fellow and the Director of the Center for Internet
21 Freedom at the Progress and Freedom Foundation. Prior to
22 that, he was a lawyer in private practice.

23 Mr. Jonathan Zuck is the President of ACT the App
24 Association, and specializes in issues, including Internet
25 governance, privacy, security, and business development. He

1 has been a member of the ICANN community for over 10 years
2 and has chaired the affirmation of commitments review of
3 competition choice and trust in the new top level domain
4 program.

5 Ms. Dawn Grove is corporate counsel for Karsten
6 Manufacturing Corporation, the parent company of Ping, a top
7 three golf equipment brand. A graduate of Pepperdine
8 University School of Law, Ms. Grove is, among other things,
9 Chair of the Arizona Manufacturing Council, and was
10 appointed this year by Governor Ducey to chair the Workforce
11 Arizona Council.

12 Ms. J. Beckwith (Becky) Burr is Deputy General Counsel
13 and Chief Privacy Officer of Neustar. A graduate of Yale
14 University and Georgetown University Law Center, Ms. Burr
15 previously worked at the Washington, DC office of Wilmer
16 Cutler Pickering Hale and Dorr. Prior to joining the
17 private sector, she served as the Associate Administrator
18 and Director of International Affairs at the National
19 Telecommunications and Information Administration.

20 Mr. John Horton is President and CEO of LegitScript,
21 the world's largest database of online healthcare products
22 and websites, including Internet pharmacies. Prior to
23 joining LegitScript, he worked in the office of National
24 Drug Control Policy where he focused on the abuse of
25 synthetic and prescription drugs.

1 Mr. Steve DelBianco is Executive Director of NetChoice.
2 A graduate of the University of Pennsylvania with an MBA
3 from the Wharton School, he has spent 16 years as an
4 advocate for NetChoice positions pertaining to the Internet
5 governance, online consumer protection, and Internet
6 taxation. Mr. DelBianco also serves as the elected policy
7 chair for the business constituency and representative for
8 commercial stakeholders in planning the IANA transition.

9 Mr. Paul Rosenzweig is a former Deputy Assistant
10 Secretary for Policy in the Department of Homeland Security,
11 and is the founder of Red Branch Consulting in addition to
12 serving as a senior advisor to the Chertoff Group. Mr.
13 Rosenzweig is a cum laude graduate of the University of
14 Chicago Law School, has an MS from the University of
15 California in San Diego, and received his BA from Haverford
16 College.

17 I would ask each of the witnesses to stand and raise
18 your right hand. Do you swear that the testimony you will
19 give today is the truth, the whole truth, and nothing but
20 the truth so help you God?

21 Mr. Szoka. I do.

22 Mr. Zuck. I do.

23 Ms. Grove. I do.

24 Ms. Burr. I do.

25 Mr. Horton. I do.

1 Mr. DelBianco. I do.

2 Mr. Rosenzweig. I do.

3 Senator Cruz. I thank each of you for being here, and

4 Mr. Szoka, you will start.

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 STATEMENT OF BERIN SZOKA, PRESIDENT, TECHFREEDOM,
2 WASHINGTON, DC

3
4 Mr. Szoka. [Off mic.] Chairman Cruz, Ranking Member
5 Coons, and Members of the subcommittee, thank you for
6 inviting me to testify today.

7 I am President of TechFreedom, a think tank dedicated
8 to free markets, free speech, and information -- Internet
9 freedom involves civic freedoms, like the First Amendment or
10 the Fourth Amendment, but equally important are the
11 institutions and processes that govern technology and the
12 processes by which they make decisions. And that is what
13 brings me here today.

14 My concerns are about how ICANN will work after the
15 transition, about the deliberative process that brought us
16 to this point, and most of all about the administration's
17 claims that it can decide this matter without Congress.

18 Let me be clear at the start. I do support the
19 transition. I do not believe the United States Government
20 should be involved in editing the root zone file. So, yes,
21 let us make that transition.

22 But the case has not been made for the rest of the
23 transition, for severing the ultimate contractual link
24 between ICANN and the United States government. Too many
25 important questions remain unanswered about that, how will

1 ICANN work after the transition? Will existing, and
2 antitrust, and consumer protection laws be able to
3 discipline ICANN? Will key provisions of ICANN's bylaws
4 stand up under California nonprofit law? And most of all,
5 is there a government property interest here?

6 The GAO report issued Monday raises more questions -- I
7 would say -- than it answers. It simply does not address
8 the best argument that there is a property interest here,
9 which is that the United States government has always had
10 the right to exclude for others from administering this
11 particular copy of the root, the authoritative one, the one
12 that everyone points to.

13 If NTIA had put the IANA function out for rebid in 2012
14 as it threatened to do, could ICANN have simply walked away
15 with the IANA function? Surely not.

16 Yet, NTIA has dismissed this questions as
17 obstructionism. But they are not.

18 NTIA has, essentially, delegated deliberation over this
19 issue to two bodies of the ICANN community. NTIA failed to
20 seek failed to seek public comment on ICANN's proposed
21 reforms once it received that package. NTIA simply
22 rubberstamped ICANN's proposal. The only additional input
23 NTIA sought was that of a handpicked set of experts hired on
24 a no-bid contract.

25 That process was designed to sweep awkward questions

1 under the rug. It is not how administrative agencies are
2 supposed to work, and yet, increasingly, it is.

3 Multi-stakeholder processes do offer many advantages
4 over rulemaking. But when government uses them to
5 circumvent the safeguards of administrative law, it upsets
6 the constitutional balance of power. Which brings me to the
7 ultimate constitutional question that I am concerned about,
8 which is, simply, who decides?

9 Congress clearly instructed NTIA not to relinquish its
10 responsibility over the IANA function. NTIA told Congress
11 it would follow this law, and they told you on the last
12 panel they would follow a new law if Congress passed one.
13 But NTIA has already violated the rider. They made a
14 decision not to exercise their option to renew the contract.
15 It is just logically impossible that NTIA could have made
16 this decision without expending taxpayer dollars, because
17 taxpayers pay the salaries of everyone at NTIA.

18 The committee report that Larry cites, and all of the
19 talk about spending money on other preparatory activities is
20 a red herring. It distracts from the real issue which is
21 the time spent making a decision that has clearly already
22 been made.

23 I would say the NTIA's attempt to read this rider into
24 oblivion is a blatant violation of the separation of powers.

25 I would leave you with this quote, "The power of the

1 purse has long been recognized as the most important single
2 curve in the constitution on presidential power. The
3 Appropriations clause was intended to give Congress
4 exclusive control of funds spent by the government, and to
5 give the democratically elected representatives of the
6 people an absolute check on executive action requiring an
7 expenditure of funds."

8 No, that was not James Madison. Although, he did say
9 something much like that. And it was not written in 1787.
10 It was written in 1987 by Members of Congress of both
11 parties in the official committee report about the Iran-
12 Contra affair. In other words, defending the power of the
13 purse did not use to be a partisan issue, and it should not
14 be.

15 Senators, I urge you to defend your constitutional
16 prerogatives, but I also urge you to focus on negotiating a
17 compromise that would put ICANN on a sound footing in the
18 future. Yes, that means an extension of some kind of
19 contract for a trial period, but it does not mean
20 obstructing the transition indefinitely. There is a
21 compromise that gets us out of it. It involves getting the
22 United States government out of the editing the root zone
23 file without relinquishing its ultimate contractual right.
24 That is the thing that has disciplined ICANN in the past,
25 and it needs to during, at least, the trial period.

1 Again, thank you for inviting me to testify here today.

2 Senator Cruz. Thank you sir.

3 [The prepared statement of Berin Szoka follows:]

4 / SUBCOMMITTEE INSERT

5 Senator Cruz. Mr. Zuck?

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 STATEMENT OF JONATHAN ZUCK, PRESIDENT, ACT THE APP
2 ASSOCIATION, WASHINGTON, DC

3
4 Mr. Zuck. Chairman Cruz, Ranking Member Coons,
5 Members of the Committee, thanks for inviting me to speak
6 today. And mom, thanks for watching.

7 I am a former software developer, and I am no apologist
8 for ICANN. In fact, at my very first ICANN meeting in 2005,
9 I compared them to a referee that refused to commit to their
10 cause. In fact, my work began with the various concerns
11 raised here today, that the ICANN functions might be taken
12 over by some sort of intergovernmental body.

13 It is for that reason my members committed me to
14 engaging over the past 11 years in improving ICANN's
15 operational excellence and trying to bring about continuous
16 reform inside the organization. I have harped so much about
17 metrics and performance metrics that I am known as metrics
18 man inside of ICANN.

19 What has been missing, however, is a comprehensive
20 framework for accountability. And there was nothing that
21 was going to make that happen with respect to the U.S.'s
22 contract with ICANN. It was not happening.

23 So when the announcement was made about the transition,
24 I confess I was one of the people making a big deal about it
25 because it represented an opportunity to really focus the

1 community on building a framework for accountability inside
2 of ICANN that I believe was always necessary, not linked to
3 the transition, but to the proper functioning of ICANN.

4 My written testimony deals with a lot of the objections
5 that have been raised, and I am sure that we will deal with
6 a lot of them in questions and this unfortunate, sort of,
7 whack-a-mole game that we will be playing. But I feel as,
8 sort of, the techy on the panel, the guy that was
9 programming sockets in the late 80s, it might behoove me to
10 take a step back from these individual objections and talk
11 about the environment in which we operate.

12 The real question is whether or not ICANN is ready for
13 the transition. I believe the real answer is that it has
14 already occurred.

15 First, as Chairman Cruz mentioned, we wisely gave away
16 the Internet during the Reagan Administration. If we really
17 take a hard look at what the Internet is, it is really just
18 a set of protocols and best practices that allow a network
19 of a networks to cooperate together as a single unit. But
20 it is entirely voluntary. And that is, in fact, the genius
21 of the Internet.

22 There is not some police force that tells everybody how
23 they have to connect to the Internet, or even if they have
24 to connect to the Internet. It is simply in everyone's best
25 interest to do so. That is terribly important because they

1 only do so because it is in their best interest to do so.
2 And we need to preserve that environment. We have to set
3 down the notion of control because we do not have it, and
4 think in terms of influence that we do have, but we are
5 threatened to lose.

6 Let me share a quick story. In the late 80s and 90s,
7 the preferred method to navigate the Internet was something
8 called Gopher. It came out of the University of Minnesota.
9 It was a fairly rigid hierarchal system.

10 In 1993, the University of Minnesota decided to start
11 charging for it. Now, this might have been the entire
12 reason, but it was certainly something that sped the whole
13 world's transition away from the United States-built
14 technology to a Swiss-built technology called the World Wide
15 Web that we now use today.

16 So the Internet community is perfectly capable of
17 making a change. It is an example where attempting to exert
18 control where none exists results only in a loss of
19 influence.

20 Let us talk about the IANA's contract functions just
21 briefly. As has been said before, it is really just a
22 spreadsheet or a database on the web, and the U.S.'s role in
23 approving additions and subtractions from that really has
24 become obsolete. Should the United States really be in a
25 position of telling Europe whether or not they can have .EU,

1 for example?

2 So it is really a very simple function, and it is
3 disconnected from the parade of horrors that you will hear
4 today on this panel, and the transition has to be kept
5 separate from those things. In fact, the accountability
6 mechanisms that have been put in place will, in fact, give
7 disagrieved parties more opportunities to hold ICANN to
8 account than they have ever enjoyed under this so-called
9 stewardship by the NTIA.

10 The community is capable of strong action. They face
11 down ICANN and made sure that these accountability
12 mechanisms were put in place, and they face down the United
13 States government too to make sure that accountability was a
14 part of this discussion. It was not originated by the NTIA
15 -- by the community.

16 Here is the harsh reality. If the United States
17 decided to just pull the IANA contract and hand it over to
18 Stanford, for example, the global community could certainly
19 just ignore it. And that is the harsh reality that we have
20 to think about. We could go on with business as usual.
21 Worst still, the United Nations could pass some sort of
22 resolution that says that there should be an alternate root.
23 Maybe all, or some, et cetera would adopt this new root
24 leaving the fragmentation that Senator Coons talked about so
25 eloquently in the earlier part of the testimony.

1 It is these things that we need to be really focused
2 on. This transition is only symbolic. The only question we
3 are asking today is whether or not the United States is
4 going to continue to have its leadership position in the
5 world, and its advocacy for the multi-stakeholder model.

6 This hearing should be better termed "Internet Freedom,
7 What are the consequences of the United States losing the
8 moral high ground?" I would argue those consequences are
9 dire.

10 Thank you, and I look forward to all of your questions.

11 Senator Cruz. Thank you, Mr. Zuck.

12 [The prepared statement of Jonathan Zuck follows:]

13 / SUBCOMMITTEE INSERT

14 Senator Cruz. Ms. Grove?

15

16

17

18

19

20

21

22

23

24

25

1 STATEMENT OF DAWN GROVE, CORPORATE COUNSEL, KARSTEN
2 MANUFACTURING, PHOENIX, AZ

3
4 Ms. Grove. Thank you. Good morning, Chairman Cruz,
5 Ranking Member Coons, Members of the Subcommittee, staff --
6 thank you for this opportunity to give you and example of a
7 U.S. manufacturer's and our subsidiary's experience with
8 ICANN as an ICANN contracted party regarding the IANA
9 transition. Many thanks to you for caring about these
10 important and time sensitive issues.

11 My name is Dawn Grove. I am corporate counsel for
12 Karsten Manufacturing Corporation. I also chair the Arizona
13 Manufacturer's Council, and I serve on the board of
14 directors of the Arizona Chamber of Commerce and Industry,
15 both of which oppose the current IANA transition.

16 Karsten Manufacturing Corporation is the parent of PING
17 and PING REGISTRY. PING is one of the top three golf
18 equipment brands in the U.S. and provides over 800 jobs in
19 Arizona. We are a closely held, private family business
20 started by my grandfather in his garage, and we have been
21 passionately designing and manufacturing custom-fit premium
22 golf equipment and other products in Arizona for over 57
23 years.

24 We have vigilantly protected our brand and that name in
25 many categories, including for domain name registry

1 services. Our name is our lifeblood, and we aim to ensure
2 that the PING name reflects the innovation, design, service,
3 and quality that we put into every one of our products.

4 We believe rushing the transition through now in its
5 current state will endanger manufacturers' rights to their
6 trademarked brand names, severely disadvantage state's
7 rights, jeopardize national security, and prevent the
8 safeguarding of the Internet freedoms we have come to depend
9 on.

10 Karsten, through its affiliated company, PING REGISTRY,
11 paid ICANN'S unilaterally set \$185,000 application fee for
12 .ping. And in our application, we informed ICANN of our
13 well-known rights to our famous PING marks. A wealthy ICANN
14 insider, based in India, that had never made or sold a Ping
15 product, had not trademarked the name throughout the world,
16 filed a competing application with ICANN for .ping.

17 We expected ICANN, with its actual knowledge of the
18 Indian company's history of adverse domain name decisions
19 against its affiliate, and knowledge of our trademark rights
20 and our global brand, to follow ICANN's own charter, bylaws,
21 and applicant guidebook and disqualify the competing
22 applicant. I believe Mr. Strickling also said that there
23 are somehow equal applications. I find that stunning.

24 We eventually discovered that due to ICANN's dependence
25 on the sale of second level domain names -- which the Indian

1 company would have sold more of, since our registry is a
2 closed dot brand -- ICANN had no incentive to follow its
3 rules and bylaws, and ICANN's lawyers made it clear that
4 ICANN would consider our application breached if we took
5 them to court. Under duress, we ended up paying ICANN's
6 \$1.5 million at auction to keep our name.

7 I cannot began to tell you how scary it was for my
8 family to go into that auction knowing that we might lose
9 our name after 57 years -- 56.

10 Our experience is not unique, and I am sure you are
11 familiar with the many independent review complaints filed
12 against ICANN, and with the abuses of ICANN's trademark
13 clearinghouse with the .sucks registry. The handoff is
14 definitely more than a technical matter or a spreadsheet.

15 ICANN is currently accountable to NTIA for both policy
16 and technical functions, and we heard Secretary Strickling
17 say that today, about the policy that they make. Following
18 the transition to global stakeholders, ICANN will be a
19 stand-alone monopoly accountable only to its stakeholders,
20 including 162 foreign government members and 35 observers,
21 the Governmental Advisory Committee or GAC. Under proposed
22 accountability reforms, GAC consensus advice must be taken
23 unless overridden by a supermajority of the ICANN Board.

24 This is a major change from the status quo, and it
25 gives governments more power in ICANN going forward than it

1 ever had before. Moreover, in the GAC, state governments
2 are excluded from voting, states such as Texas, California,
3 New York whose GDP and populations dwarf that of many GAC
4 members, like Grenada, will have no voting right at the
5 table.

6 If the ICANN plan is so complete and so inclusive,
7 where is the seat at the table for the 50 sovereign states?
8 It also appears that both the NTIA and ICANN are operating
9 under the assumption that a former federal contractor
10 inherits the right to continue performing services absent a
11 contract. If we applied that conclusion to various
12 government services, such as defense contracting, that would
13 lead to chaos. The Internet is no less important to our
14 national security.

15 The so-called empowered community, a convoluted
16 structure of stakeholders that will only be activated in
17 times of crisis--assuming they can all agree it is a crisis--
18 -is not suitable to provide day-to-day oversight of ICANN's
19 board. The ICANN community requested and the ICANN board
20 rejected a streamlined, single member model of governance
21 that would have provided a method for day-to-day oversight
22 by the community.

23 It does not take much imagination to see how the stage
24 will be set for an enhanced GAC to step into that role,
25 since the community will not have that ability for that day-

1 to-day oversight.

2 In ICANN's rush to meet NTIA's deadline, some of the
3 most important work was left undone, Workstream 2 issues,
4 such as the permanent jurisdiction of ICANN in the
5 protection of human rights, like free speech. They do not
6 get addressed until after the transition.

7 Make no mistake, there are participants involved in the
8 Workstream 2 work who desire to see ICANN leave California
9 and be reconstituted in another jurisdiction outside of the
10 easy reach of U.S. courts, and who would, likewise, wish to
11 cherry-pick which human rights are observed by ICANN and
12 which are not.

13 My hope is that ICANN will intervene to safeguard the
14 free and open Internet for the use of the world, and also
15 require the repairing of ICANN structure to ensure that it
16 adequately safeguards trademark rights, state's rights,
17 human rights of just free speech, and the free exercise of
18 religion, our national security, and the security of our
19 friends and allies around the world.

20 Thank you.

21 Senator Cruz. Thank you, Ms. Grove.

22 [The prepared statement of Dawn Grove follows:]

23 / SUBCOMMITTEE INSERT

24 Senator Cruz. Ms. Burr?

25

1 STATEMENT OF J. BECKWITH (BECKY) BURR, DEPUTY GENERAL
2 COUNSEL AND CHIEF PRIVACY OFFICER,
3 NEUSTAR, WASHINGTON, DC
4

5 MS. BURR. [Out of mic.] Good morning, Chairman Cruz,
6 Ranking Member Coons, and Members of the subcommittee.

7 Senator Cruz. Please turn your microphone on.

8 MS. BURR. Apologies. Good morning, and thank you all
9 for inviting me to testify. As my testimony notes, I have
10 been elected to the ICANN board of directors, and I will
11 take that seat in November. But I am here today in my
12 personal capacity, and not as a member-elect of the ICANN
13 board.

14 As head of NTIA's Office of International Affairs, I
15 led the interagency team that issued the 1998 policy
16 statement known as the White Paper. The purpose of that
17 policy was to preserve private sector management of the DNS,
18 not to create it out of whole cloth. I want to say that
19 again. At the time that I began looking at this, the
20 private sector in the form of the technical community was
21 managing and coordinating the DNS without material
22 government funding or oversight.

23 The National Science Foundation intended to let a zero
24 dollar MOU with Network Solutions expire, and DARPA was no
25 longer funding DNS related activities at the University of

1 Southern California. Both agencies were satisfied with the
2 management plan developed and supported by the technical
3 community.

4 But there was a problem. In 1997, the technical
5 community was no longer fully representative of the
6 diversity of stakeholders. Businesses and commercial users
7 in the United States and elsewhere were also demanding a
8 seat at the table.

9 When it appeared that the tech community's plan would
10 not garner sufficient support from nontechnical segments of
11 the Internet community, the Commerce Department stepped in
12 on a temporary basis. I submit that what Mr. Szoka said
13 about we have always had the right to exclude is actually
14 not correct.

15 As my written testimony makes clear, we acquired a
16 limited and temporary right when Network Solutions agreed
17 that it would not change the authoritative root without the
18 U.S. government approval, and that it would look to a
19 designated alternative after the transition.

20 Our goal was to allow private sector management of the
21 DNS that existed at the time to evolve to accommodate the
22 increasing diversity of Internet stakeholders. Now, I have
23 never been shy about criticizing ICANN. I think many people
24 will testify to that. But I can say that what started out
25 in 1998 as an experiment to preserve private sector

1 leadership in DNS management and to prevent takeover of that
2 function by an intergovernmental body, now has the
3 processes, procedures, safeguards, and tools to ensure that
4 the DNS continues to be coordinated by the private sector
5 broadly construed, and in the public interest.

6 The maturity of the ICANN model has been tested and
7 proven resilient. It is time to finish what we started in
8 1998.

9 First, the transition will not create incentives for
10 ICANN to change its status or move off shore. The White
11 Paper affirmatively anticipated that competition law would
12 serve as a health constraint on ICANN, and ICANN has
13 operated for 18 years subject to the antitrust laws of the
14 United States and every other jurisdiction in which it does
15 business. It has been sued under antitrust laws, and no
16 court has ever found that it enjoys immunity from those
17 suits. In addition, the revised bylaws erect powerful
18 barriers to ICANN's reincorporation in a different
19 jurisdiction or as an international organization.

20 Second, the transition need not and should not be
21 delayed pending completion of Workstream 2. Post transition
22 work, a form of continuous improvement was built into the
23 design of the accountability group. The test to determine
24 what work needed to be undertaken in advance of the
25 transition turned on analysis of whether the community would

1 have sufficient tools to ensure that Workstream outcomes
2 could be implemented and not, as some have suggested, on
3 whether or not the issue directly involved replacing the
4 U.S. role in the IANA process.

5 Human rights, which in ICANN land means freedom of
6 expression, is a case in point. An effort by an
7 authoritarian government, or a misguided governmental
8 advisory committee that caused ICANN to engage in content
9 regulation would flatly violate ICANN's bylaws and be
10 subject to immediate and binding review through the enhanced
11 independent review process.

12 Finally, let me just say a proof of concept period is
13 unnecessary and would be counterproductive. The process
14 getting to this point has shown that the community can come
15 together and work on difficult problems and create sound,
16 road-tested solutions in an extraordinarily diverse eco
17 system.

18 The deliverables have been vigorously studied and
19 pronounced sound. Delay now would raise questions about the
20 United States commitment to a process that it initiated
21 decades ago, and serve only the interests of the handful of
22 governments who would like to see this process fail.

23 Thank you very much.

24 Senator Cruz. Thank you, Ms. Burr.

25 [The prepared statement of J. Beckwith (Becky) Burr

1 follows:]

2 / SUBCOMMITTEE INSERT

3 Senator Cruz. Mr. Horton?

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 STATEMENT OF JOHN HORTON, PRESIDENT AND CEO,
2 LEGITSCRIPT, PORTLAND, OREGON

3

4 Mr. Horton. Mr. Chairman, Ranking Member Coons, my
5 name is John Horton. I am the CEO of LegitScript. My
6 company's mission relates to consumer protection against
7 cyber crime, particularly in the health care space.

8 Today ICANN argues that it is sufficiently accountable
9 and transparent to take over stewardship of the Internet.
10 My testimony argues that it is not.

11 Some proponents of the IANA transition would have this
12 committee believe that ICANN is merely a technical
13 organization. That is false.

14 One of ICANN's most important jobs is to accredit
15 domain name registrars and make sure that they comply with
16 their accreditation agreement. The accreditation agreement
17 says registrars are supposed to investigate and respond
18 appropriately when they get a complaint that a domain name
19 is being used for illegal or abusive purposes like spam,
20 child pornography, or the sale of fake drugs. If the
21 registrar does not, ICANN is supposed to hold the registrar
22 accountable.

23 I am going to give a couple of examples why ICANN
24 compliance is a failed system, but let me first explain why
25 this is important. First, and most obviously, this is a

1 consumer protection issue. The victims of illegal or
2 fraudulent schemes are typically Internet users, often
3 vulnerable populations.

4 The second reason, however, is that in any sector, the
5 payment processing world, search engine advertising, or
6 registrars, you need some sort of system for voluntarily
7 addressing and preventing abusive activity. If that abuse
8 system does not work, is corrupt, or is not transparent, you
9 leave the organization or sector vulnerable to governments
10 looking for an excuse to step in and exercise more control
11 over that failed system under the guise of fixing the
12 problem.

13 Third, it is imperative that voluntary abuse policies
14 only address harmful activity like child pornography, fake
15 drugs, or spam, et cetera, and not free speech.

16 That is why before ICANN becomes totally independent,
17 it is imperative that it demonstrate a compliance system
18 that is accountable and transparent. Unfortunately, ICANN
19 fails that test.

20 One systemic problem is ICANN compliance's regular
21 dismissal of complaints against registrars who ignore the
22 contractual requirement to investigate and respond
23 appropriately to abuse complaints. In some cases, the
24 registrar clearly indicates that no matter how compelling
25 the evidence of consumer harm, they will not do anything.

1 Not only does ICANN close these complaints, but when asked
2 what the registrar did to meet the contractual requirement -
3 - despite all evidence indicating that it did nothing --
4 ICANN says that is privileged information between it and the
5 registrar.

6 This is like Kafka in reverse. Registrars are first
7 afforded a secret and formal complaints process, after which
8 ICANN's reasons for dismissing the complaint are never
9 disclosed. Because one of ICANN's most important roles is
10 not transparent, nobody, including the multi-stakeholder
11 community can possibly hold ICANN accountable in the future.

12 A similar problem is ICANN's accreditation of
13 registrars that function as an arm of a criminal enterprise.
14 The problem with this is giving criminals the ability to
15 simply register their own domain names is like giving them a
16 press to print their own money.

17 Rx Limited was a criminal network that sold addictive
18 medications to U.S. residents without a prescription for
19 years, causing a number of deaths. This criminal enterprise
20 obtained its ICANN accreditation, the only purpose of which
21 was to generate rouge Internet pharmacy domain names. The
22 revenue from the registrars illicit pharmaceutical sales was
23 flipped into the trafficking of methamphetamine from North
24 Korea, smuggling weapons in and to Africa, and diverting
25 U.S. technology--reportedly missile guidance systems--to

1 Iran.

2 Although now de-accredited for unrelated reasons, what
3 is critical to understand is the individual in question
4 almost certainly could not have funded those activities if
5 his company could not have maintained, for years,
6 accreditation as a registrar from ICANN despite it being
7 obvious to many that the registrar was a shell for
8 criminality. There remain other registrars today whose
9 business model depends, in material part, on providing a
10 safe haven for online crime.

11 This is a problem for Internet safety and for the
12 future openness and independence of the Internet. Any time
13 you have a failed system where voluntary compliance does not
14 work and criminality and fraud are winked at, you hand
15 governments the perfect excuse to try and exercise more
16 control.

17 Voluntary effective and transparent anti-abuse
18 processes are imperative for any industry to remain
19 independent, enabling them to tell governments we do not
20 need you to step in and fix our problems. We have got this.

21 That is what we should all want for ICANN or any other
22 organization entrusted with its functions. But ICANN
23 accreditation compliant systems are a mess. You do not buy
24 your 16-year-old a car if they still back into your garage
25 door every time they try to leave the house.

1 Before approving a transition, the U.S. government has
2 an obligation to Internet users and the global community to
3 ensure that ICANN's operations, including it's compliance
4 and accreditations functions are accountable and
5 transparent. To date, ICANN has failed this test.

6 Thank you.

7 Senator Cruz. Thank you.

8 [The prepared statement of John Horton follows:]

9 / SUBCOMMITTEE INSERT

10 Senator Cruz. Mr. DelBianco?

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 STATEMENT OF STEVE DELBIANCO, EXECUTIVE DIRECTOR,
2 NETCHOICE, WASHINGTON, DC

3
4 Mr. DelBianco. So Chairman Cruz, Ranking Member Cruz,
5 and Members of the Committee, I am Steve DelBianco,
6 Executive Director of NetChoice which is a trade association
7 of America's leading ecommerce and online businesses.

8 I have been involved in ICANN for over a decade, and
9 was a leader in the group that developed the accountability
10 plan over these past two years. So this is not an Obama
11 Administration plan or proposal that some have assumed. It
12 was developed by the private sector, mostly U.S. businesses
13 and civil society, using the leverage of this transition to
14 force ICANN to accept tough new accountability measures it
15 would never otherwise have agreed to.

16 Now we have all heard the sound bites about this
17 transition being an Internet giveaway to an international
18 body like the UN, spelling the end of free expression
19 online. Mr. Chairman, if that were even remotely true, I
20 would be opposing this transition with all of my heart, but
21 it is just not true.

22 First, American engineers gave away the recipe for the
23 Internet protocols 30 years ago, and that let engineers in
24 every country interconnect the network that we have. We do
25 not own the Internet anymore than the Texas government owns

1 the recipe for barbecued brisket.

2 Second, the U.S. government and industry created ICANN
3 in 1998 in order to privatize. As you have noted, Mr.
4 Chairman, the Internet is working well. Well, the DNS works
5 well because ICANN has coordinated it for 18 years and will
6 continue to do so after the transition. There is no new
7 international body.

8 Third, we designed explicit protections against
9 government censorship. Many governments censor web content
10 at the edge of the Internet when online traffic crosses
11 their borders. Neither we, nor ICANN can do anything to
12 stop that kind of censorship.

13 But our plan ensures that governments cannot extend
14 censorship to the core of the DNS where it would affect the
15 global net. I applied 37 stress tests against the new
16 accountability model, of which the most famous was stress
17 test 18, where asked what if a majority of governments
18 wanted to advise ICANN regarding a censorship topic?

19 Well, first, our new bylaws allow just one government
20 to veto that kind of advice. And if no government vetoed
21 the advice, the ICANN board could still reject that advice
22 with 60 percent of its directors. If the board caved to
23 governments, we have empowered the multi-stakeholder
24 community--for the first time--to be able to challenge ICANN
25 on accepting that advice. And the governments get no say in

1 the community decision about making that challenge.

2 The review ruling that comes back from the IRP is
3 binding and enforceable in court. Then, for good measure,
4 we empower the community to fire the entire ICANN board of
5 directors if that is not good enough.

6 Delaying this transition, Mr. Chairman, creates far
7 more risks than benefits. In this hearing today, we have
8 heard some creative reasons to block or delay the
9 transition, and I welcome the chance to address each of them
10 during the questioning.

11 But what if we renege on our 18-year transition plan
12 and a promise made in 2014 and dismiss the private sector's
13 accountability plan? Two consequences -- first, an
14 indefinite delay simply rekindles the fires at the UN who
15 has long-wanted to control IANA. It feeds into the myth
16 that the IANA contract lets the U.S. government, somehow,
17 control the Internet. And that is the sound bite that
18 Russian and China will use to persuade moderate governments
19 that the UN should step into the shoes that the U.S. so
20 desperately wants to keep.

21 Second, we actually stand to lose the new
22 accountability mechanisms that we designed. The ICANN board
23 said that the new bylaws take effect at transition. Then
24 they committed to say that they would try to keep what we
25 could if transition were deferred. But, that means we need

1 to strip out of the new bylaws all of the IANA
2 accountability features that had assumed the transition
3 would occur. That is a total loss for the private sector,
4 particularly American companies who want the power to fire
5 ICANN if it fails at serving names, numbers, or protocol
6 customers, and rescuing the remaining accountability powers.
7 It means re-litigating matters that were approved only as a
8 compromised package.

9 Many governments oppose parts of that package, and
10 ICANN'S board resisted other parts of it as well. Now those
11 compromises may be irretrievable because governments and
12 other factions will try to improve upon their previous
13 compromise when the bylaws are reopened.

14 I know those of you in Congress have seen similar
15 compromises come undone. So there is a very real risk that
16 we will not rescue the strong accountability powers we need.
17 So please weigh those downside risks against the benefits of
18 transition.

19 These new bylaws give the private sector true
20 accountability power over ICANN, the same way corporations
21 are accountable to their shareholders, associations like
22 mine are accountable to my members, and Senators are
23 accountable to your voters. And that accountability is far
24 stronger than what the IANA contract ever gave to the U.S.
25 through NTIA.

1 So in closing, we have to now decide which road to take
2 on this transition. Do we deliver, or do we delay? And as
3 Yogi Berra once said, "When you come to a fork in the road,
4 take it." That is, take the new model of ICANN
5 accountability and preserve the open Internet.

6 I look forward to your questions.

7 Senator Cruz. Thank you.

8 [The prepared statement of Steve DelBianco follows:]

9 / SUBCOMMITTEE INSERT

10 Senator Cruz. Mr. Rosenzweig?

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 STATEMENT OF PAUL ROSENZWEIG, FORMER DEPUTY ASSISTANT
2 SECRETARY FOR POLICY, U.S. DEPARTMENT OF HOMELAND SECURITY,
3 WASHINGTON, DC
4

5 Mr. Rosenzweig. Senator Cruz, Senator Coons, thank
6 you very much for inviting me to appear today before the
7 committee to discuss the IANA stewardship transition. Thank
8 you particularly for your fortitude in such a lengthy panel
9 and such a long hearing. It demonstrates your commitment to
10 hearing something about the issue.

11 For two years, I have worked within ICANN on the
12 proposed IANA transition alongside many of my co-panelists.
13 Unlike them, I think that the effort -- for which I have the
14 greatest admiration -- has produced a proposal that is not
15 yet complete, and is in many ways too flawed.

16 In the written testimony I submitted, I spoke to five
17 specific issues that I thought were important to discuss.
18 But at the risk of going off script a bit, I wanted to
19 directly address a question that you had asked earlier
20 today, Senator Coons, which is whether or not there is a
21 need for a testing period, which is something that I have
22 advocated.

23 In response to that, Assistant Secretary Strickling
24 told you that there was no need because the technical
25 aspects of this transition had been tested for 90 days and

1 had worked perfectly. That is absolutely true, but it is
2 incomplete. The reason is that those technical transitions
3 have been tied, as all the co-panelists here have said, to a
4 reform of the accountability provisions that address how
5 ICANN manages its policy.

6 It is true that to some degree the DNS is just a
7 technical system, but there is a host of policy that lies
8 behind that is operated. It includes things like how we
9 address intellectual property claims, how we address human
10 rights, how we allocate the domain names between competing
11 applicants. It includes such things as whether or not the
12 .islam, .gay, .amazon -- why top level domains will be
13 delegated and to whom.

14 Those are all controversies that have bubbled up in the
15 last couple of years, and without saying whether or not they
16 are resolved correctly, you can easily see that they are
17 issues that trench not upon a technical question, but upon
18 real issues of policy and governance that affect the globe
19 all the way around.

20 It is those accountability measures that have not been
21 test driven yet. Before the transition was announced, the
22 accountability of ICANN, such as it was, depended upon
23 essentially the U.S. government's exercise of soft power,
24 the persuasions behind the scene, if you will, plus the
25 specter of a change in the contractual relationship.

1 So it was not an explicit control, and Secretary
2 Strickling is right about that, but nonetheless, it was
3 implicit in many ways. That is what is going away, that
4 soft power control. And what is coming in instead is a set
5 of accountability measures that will lead to an empowered
6 community that has the ability to essentially, as Mr.
7 DelBianco said, fire the board, et cetera. That has not
8 been tested.

9 In suggesting that the need for testing arises, I am
10 not flying alone out there. That is exactly what the ICANN
11 board suggested earlier when the community suggested the
12 sole membership model. They said that if that was the model
13 to be presented, and the path forward, it may be prudent to
14 delay the transition until the sole membership model is in
15 place and ICANN has demonstrated its experience operating
16 the model and ensuring that the model works in a stable
17 manner. It said that that was necessary because the new
18 model would upset the balance of power and influence amongst
19 any of the groups within ICANN which can change based upon
20 their willingness and ability to participate in the sole
21 member model.

22 Everything that the board said about that sole member
23 model is true as well of the empowered community model.
24 Indeed, I would submit -- and this is my opinion, not a
25 certitude, but I would submit that the empowered community

1 model is more complex, more rococo, and less well-grounded
2 in the simplicity of California nonprofit law, than the
3 empowered community model.

4 So when I suggest that there is a need for a test
5 drive, it is not of the technical system, but of whether or
6 not the empowered community model works. This would not be
7 an indefinite postponement. Indeed, it is unlikely to last
8 much longer than the time it takes to finish the Workstream
9 2 proposal since many of those proposals will result in new
10 bylaws, provisions that would have to go through the new
11 empowered community system. We will have a chance to see if
12 it works.

13 Like Mr. Szoka at the other end, I favor this
14 transition. I think it is essential. Indeed, I think it is
15 essential for many of the reasons that you addressed with
16 Secretary Strickling earlier. I just do not think that we
17 know whether or not this one will work yet. As it is
18 drafted now, the accountability side of this is a leap in
19 the dark. It is a triumph of hope over experience, if you
20 will, and it is not yet finalized in a way that gives me the
21 confidence to be sure it will work.

22 Mr. DelBianco has gone through a number of stress
23 tests. Those are immensely useful intellectual exercises in
24 which we hypothesize how the system might break down, but
25 all of the hypotheses in the world is not worth a single

1 minute of actual experience.

2 For those reasons, my suggestion is a trial period
3 allowing ICANN to operate under the new model completely for
4 whatever period of time is necessary to demonstrate the
5 utility, and then if completion, an irrevocable completion
6 of the transition thereafter, if the system proves itself
7 capable of working. That is what I have suggested to you
8 and to ICANN. It has not won the day thus far.

9 Thank you very much for allowing me to testify today.

10 Senator Cruz. Thank you very much.

11 [The prepared statement of Paul Rosenzweig follows:]

12 / SUBCOMMITTEE INSERT

13 Senator Cruz. Let me start by just making an
14 observation for those government employees who are concerned
15 about whether the conduct they are being asked to carry out
16 is consistent with federal law.

17 Mr. Strickling reported to language in a committee
18 report that he said gave them the authorization to do so.
19 As I noted in that questioning, a committee report cannot
20 supercede language passed into law.

21 What Mr. Strickling did not tell you is that committee
22 report was a committee report for legislation that itself
23 did not pass into law, and whatever authority a committee
24 report might have for legislation that has actually passed
25 Congress and been signed into law, a committee report for

1 legislation that did not pass Congress has precisely zero
2 legal effect, and provides no safe harbor whatsoever to
3 defying the legislative language that Congress has passed.

4 Now, Mr. Szoka, I understand that just yesterday you
5 and Mr. Rosenzweig received a hostile letter from Verisign's
6 general counsel regarding the White Paper that you both
7 authored along with the Heritage Foundation expressing
8 concerns with the transition. Without objection, I would
9 like to include that letter in this record.

10 [The letter follows:]

11 / SUBCOMMITTEE INSERT

12 Senator Cruz. The Verisign letter strongly suggests
13 that if you do not remove references to Verisign in your
14 White Paper, which the company disagrees with, the company
15 may take additional action. I will note that it is highly
16 concerning that Verisign would send a letter of this nature
17 to witnesses of this oversight committee the day before they
18 are scheduled to give testimony. Such a letter could only
19 be designed to have a chilling effect on witness
20 participation and to disrupt the oversight functions of this
21 subcommittee which is seeking immediate answers to time
22 sensitive questions on an issue that has the full attention
23 of the entire United States Congress.

24 I would also note that it is more than a little ironic
25 that Verisign, which has a direct working relationship with

1 ICANN and the United States Department of Commerce, would
2 seek to stifle individual speech in this way, which just so
3 happens to be the main focus of today's hearing. This
4 letter, unfortunately, perhaps provides a glimpse into how
5 Verisign and ICANN can be expected to conduct themselves
6 post-transition without government authority over them.

7 Given the allegations against you, would you like to
8 offer any rebuttal or response to Verisign's letter?

9 Mr. Szoka. We did issue a very brief public comment.
10 I will say first, I have been in the think tank world for
11 going on nine years, and I have never received any kind of
12 letter like that. It was not simply correct -- and we did
13 note that there were slightly, perhaps, confusing word
14 choices in our paper, and we are happy to correct those. It
15 was, as you say, a threat.

16 The issue that we were getting at was simply to
17 illustrate that -- actually, we tend to agree that ICANN
18 probably is not immune from antitrust suit, and that the
19 transition probably will not change that. Our point was,
20 really, to say that there are still unanswered questions
21 about antitrust law.

22 The purpose of the paragraph that Verisign objected to
23 was simply to illustrate what such suits might look like,
24 and suggest that ICANN is inherently tied up in very
25 controversial auctions at which there is lots of money at

1 stake, and ICCAN has a direct financial interest. We were
2 simply explaining that it would be unreasonable to expect
3 that the plaintiffs would not bring this kind of suit and
4 that antitrust litigation, whether frivolous or meritorious,
5 will be used to attack ICANN and to discredit it by those
6 that would, indeed, prefer to push to the ITU model.

7 Senator Cruz. Would you say that threatening
8 witnesses before a Senate oversight hearing is consistent
9 with an entity that we are being told we should trust to
10 respect and protect free speech?

11 Mr. Szoka. No, sir. Although, I would just remind
12 everyone this was Verisign, and not ICANN. And again, I am
13 not accusing anybody of anything. We were simply trying to
14 explain that there are many unanswered questions.

15 The administration says that it has zero correspondence
16 about antitrust issues. Yet, you heard Secretary Strickling
17 today say that there was, indeed, some consideration. That
18 did not turn up in the FOIA request that Americans for
19 Limited Government issued.

20 Again, the point of our paper is, simply, there are
21 many unanswered questions that would have been resolved in a
22 better process where the NTIA had taken public comment and
23 had issued a full report the way an administrative agencies
24 are supposed to do instead of simply rubberstamping what
25 ICANN proposed.

1 Senator Cruz. And today if ICANN tried to implement a
2 policy that threatened Internet freedom, could the United
3 States simply refuse to renew its contract?

4 Mr. Szoka. Yes, sir. And that is ultimately -- when
5 I say that I support a partial transition, that is what I am
6 getting at. I am distinguishing between the right of the
7 United States government, currently, to interfere in the
8 editing of the root zone file, which I agree ought to be
9 ended. That is a personal transition. That is different
10 from what you ask about, which is the ability to put the
11 contract out for rebid. That is something NTIA has
12 threatened to do in the past. It nearly did so in 2012, and
13 it has used that, as Paul says, as soft leverage to
14 discipline ICANN. That, ultimately, is the guarantor of
15 this whole system, and I just think we should be very
16 careful before removing that bit of leverage. That decision
17 is an irreversible one that NTIA has already set in motion,
18 contrary to what Mr. Strickling told you about not violating
19 the appropriations rider.

20 Senator Cruz. And that is a check that goes away if
21 the transition proceeds as the administration intends?

22 Mr. Szoka. Yes, Senator.

23 Senator Cruz. Following up on that point, Mr. Horton,
24 in your written testimony you said, ICANN exercises these
25 powers as a global monopoly. By virtues of its powers to

1 determine who can sell domain names online and whether they
2 comply with standards set out in the accreditation contract,
3 ICANN has a significant effect on the future of the
4 Internet, and it is seeking additional powers that would
5 further limit the openness of the Internet. A working group
6 hand-selected by ICANN's then-CEO has proposed a shift to
7 put all of the world's information about who has registered
8 domain name behind a single gated wall and give ICANN or its
9 contractor the sole power to determine who is authorized to
10 see that data, and for what reason, and to audit and impose
11 penalties against Internet users who access the data for
12 reasons that ICANN considers improper.

13 Mr. Horton. That is correct, Mr. Chairman.

14 Senator Cruz. Now, we are told that in place of the
15 government oversight we should trust the international
16 stakeholders. I would note, Mr. DelBianco, in your written
17 testimony -- Secretary Strickling said we should feel
18 comfort that the government advisory council requires
19 unanimity.

20 And yet your written testimony said, "Several
21 governments had voiced dissatisfaction with the present
22 consensus rule for GAC decisions. So it is entirely
23 possible the government committee could change its method of
24 improving advice such that a majority could prevail over a
25 significant minority of governments." Is that correct?

1 Mr. DelBianco. Yes, it is. And that is precisely
2 what stress test 18 asked. I was the first one to raise
3 this by saying the government advisory committee could
4 change its decisionmaking method, but the ICANN bylaws were
5 written in such a way that they would still have to give
6 deference to that advice.

7 So therein lies the fix that the stress test led to.
8 We have changed the bylaws, Mr. Chairman, such that the
9 governments can use any rule they want to make a decision,
10 but the only method of decision that our board at ICANN has
11 to give deference and respect to is decisions reached
12 through unanimity. And the government has resisted for two
13 years on this one because they did not want to have to lock
14 themselves into situations where the U.S. government could -
15 - with one vote -- veto what a handful or a majority of
16 other governments wanted to do. Those are the kinds of
17 fixes that we did, specifically in response to that stress
18 test.

19 Senator Cruz. But the bylaws could still change?

20 Mr. DelBianco. Mr. Chairman, the discussion of
21 whether and how the bylaws change is true of any
22 organization who lays down bylaws and articles of
23 incorporation. Any articles of incorporation always include
24 a clause that says that these articles and bylaws can be
25 changed with a majority.

1 But we have gone far beyond the typical assurances of a
2 CEO, a former, or current. We changed the bylaws. It says,
3 "it shall be in California," and if ICANN tries to change
4 those bylaws, it requires the approval of the community.
5 The community can block that.

6 The articles of incorporation indicate it has to be a
7 California corporation. If ICANN tried to change that, it
8 would require the consent of the entire community before
9 they could make that change. So we have built in as many
10 protections as we possible can to guarantee they will be
11 subject to U.S. law and situated in California.

12 Senator Cruz. You are correct that most, if not all,
13 private organizations have the ability to change their
14 bylaws. That is one of the reasons why we are not typically
15 in the practice of handing over monopolies, over vital
16 infrastructure to private organization because that is too
17 much unchecked power to trust, particularly a private
18 organization that -- the head of ICANN testified here.
19 ICANN is not bound by the First Amendment.

20 One of the great services that the United States of
21 America provides to the world is following First Amendment
22 principles to prevent censorship. The alternative -- and
23 Mr. Rosenzweig, I want to turn to you on this. Your written
24 testimony said, it is my view that it is indisputable that
25 under the current proposal, governments, foreign

1 governments, would significantly increase their power in
2 ICANN versus the status quo. The GAC, the Government
3 Advisory Committee, has a power that other advisory bodies
4 do not, an ability to convey advice to the board that the
5 board must implement unless opposed by a majority vote.

6 Would you elaborate on that, Mr. Rosenzweig?

7 Mr. Rosenzweig. Yes, Senator. Before the transition
8 occurred, the GAC was capable of providing advice to the
9 board that the board was bound by its procedures to seek to
10 negotiate with them if they disagreed with that.

11 Under the GAC's internal operating procedures at the
12 time, that advice would have had to of been by consensus,
13 and the board would have had to have -- would have been
14 capable of rejecting that advice simply by a 50 percent,
15 plus one vote of the board. In practice, the board tended
16 to seek a super majority, but the board statutory
17 requirement was simply 50 percent, plus one.

18 The bylaws with respect to that advice made two changes
19 -- one that enhanced GAC power by increasing the threshold
20 for which it would be rejected, and the other by
21 institutionalizing the consensus requirement, so maintaining
22 the status quo. So, in effect, from where we were before to
23 where we are now, the threshold for rejection has gone up.

24 In addition, and to my mind much more significantly,
25 the GAC has been invited to participate as a voting member

1 in the empowered community. That empowered community will
2 have, as Mr. Strickling and all the others have said,
3 significant oversight of the board. Indeed, that is the
4 very methodology by which we anticipate the multi-
5 stakeholder model for controlling ICANN board and staff
6 activity.

7 As of right now, the GAC has not determined whether or
8 not to seek that position, and Mr. Strickling spoke to that
9 as well. But in the event it does, it may very well seek to
10 do so by majority vote, not by consensus vote. Its current
11 internal operating procedures would suggest consensus is
12 required for that as well, but those procedures are subject
13 to majority rule change within the GAC.

14 So we have gone from a place in which the board by 50
15 percent, plus one, could reject GAC advice, and the board
16 had no formal say in oversight of the board to a position in
17 which there is a higher threshold and the GAC has been
18 invited to sit as a voting member. I suggested two years
19 ago that one of the key tests for the suitability of this
20 that governments remain in a purely advisory role, and the
21 transition changes that.

22 It remains to be seen whether or not that will have
23 significant pernicious effects, or only partially pernicious
24 effects. Again, a reason why I suggested at least a trial
25 period is necessary.

1 Senator Cruz. I want to make sure it is absolutely
2 clear to this committee and to the American people your
3 testimony is that if the Obama Administration's proposed
4 transition goes forward, that it is indisputable that it
5 will give foreign governments more influence and power,
6 including Russian, China, and Iran, and other regimes
7 hostile to free speech on the Internet.

8 Mr. Rosenzweig. I think the only government that
9 loses power in this transition is the United States
10 government. All the others gain power.

11 Senator Cruz. And why, possibly, would it be in the
12 interests of the United States to put forward a proposal
13 that weakens the authority of the United States and that
14 strengthens the authority of Russia, and China, and Iran?

15 Mr. Rosenzweig. I am not in a position to answer that
16 question on behalf of the United States government, sir.

17 Senator Cruz. Well, hopefully the United States
18 Congress is in a position to answer that.

19 No one answer that we have been given by some witnesses
20 is we should rest comfort that ICANN, once unaccountable to
21 the United States government, once lacking any supervision,
22 we can still be confident will remain domiciled in the
23 United States and California. And yet, Mr. Rosenzweig, in
24 reading your testimony, you also wrote, "The idea that ICANN
25 would pack up and move has been contemplated by ICANN's

1 leadership."

2 Specifically, you focus on the testimony that we
3 discussed earlier in this hearing of Mr. Chehadé discussing
4 a, "parallel legal international structure, maybe in
5 Switzerland, for ICANN." And in Senator Coons' exchange
6 with Mr. Strickling it was suggested that, perhaps, that
7 referred to something completely separate and independent
8 and not ICANN itself.

9 And yet your written testimony suggests that
10 interpretation is incorrect. Specifically, you said, in
11 July, the French Senate published a lengthy report in French
12 building on Chehadé's testimony and the report proposed the
13 "Swiss model" that would instead of transforming Internet
14 governance to a one-country, one-vote system like the ITU,
15 have ICANN assume international legal personality as a,
16 "world ICANN" on the model of the Red Cross. Is that
17 correct?

18 Mr. Rosenzweig. That is my understanding of the
19 French Senate report which I also understand to have been in
20 reaction to Mr. Chehadé's testimony. I do not know if that
21 translation from Mr. Chehadé to the French Senate was
22 accurate, but it certainly is their interpretation of what
23 he was saying.

24 Senator Cruz. And one final question, your testimony
25 also gets into the .mil and .gov top level domain names.

1 And it is that there is no concrete assurance beyond an
2 exchange of correspondence that .gov and .mil will remain
3 under the control of the United States government. Right
4 now for consumers that is an essential consumer protection.
5 If you go to senate.gov to see official government records,
6 you have some degree of confidence that that is not an
7 illegal scammer. If you go to irs.gov, you have some degree
8 of confidence that this is not a phishing scam designed to
9 perpetuate identity theft.

10 Under this transition, there is no assurance .gov and
11 .mil remain with the United States government. Is that
12 correct, Mr. Rosenzweig?

13 Mr. Rosenzweig. There is no assurance beyond the
14 letters that have been exchanged, which as I understand, are
15 not enforceable contracts. To the extent that you think
16 that the letters are, themselves, an assurance, then they
17 stand in that stead.

18 But I am puzzled by the argument that entering into a
19 contract about these is somehow a derogation of sovereignty.
20 I had not heard that until Assistant Secretary Strickling
21 said that earlier today. So I had not had the chance to
22 think about that, but the government enters into contracts
23 about its intellectual property and other property all the
24 time. So I want to see that analysis and think about that
25 some more. I do not have that piece of answer for you.

1 Senator Cruz. Okay. Thank you.

2 Senator Coons?

3 Senator Coons. Thank you, Mr. Chairman.

4 This has been an interest, engaging, and long hearing.
5 And I am grateful to this broad and diverse committee of
6 folks who have been actively engaged in some of the
7 challenging issues here about intellectual property, about
8 governance, and about control. I will try my best, in a few
9 minutes, to get to what I think are some core issues that
10 still are very much deserving of our time.

11 First, Mr. Rosenzweig, I must complement you in using
12 the word "rococo" in your testimony. We both agree that it
13 is just all too rare that we have hearings in which the term
14 "rococo" is casually dropped into conversation.

15 Mr. Rosenzweig. Thank you.

16 [Laughter.]

17 Senator Coons. It, perhaps, is a good sort of byword
18 to summarize the entire underlying challenge here, which is
19 that the construct, the very thing about which we are
20 talking is very complicated. It has an architecture that is
21 almost literally rococo in nature and getting right what is
22 at stake and what is not at stake, and what is in transition
23 and what is not in transition is challenging. That is
24 exactly why misleading or overheated rhetoric about what is
25 and is not underway -- avoiding that is really important.

1 Mr. Zuck, I think you had, for me, the most compelling
2 sentence of this panel which was, "seeking to exert control
3 where no exists only results in the loss of influence." And
4 it is exactly this, sort of, basic assumption that the
5 transition is handing over a monopoly, a lever that allows
6 complete control over the Internet. It is exactly that, I
7 think, misunderstanding that is at the core of perhaps the
8 different trajectory of the questioning that the Chairman
9 and I have pursued today.

10 So first, if I might, Mr. Zuck, what is the risk of a
11 fractured Internet? By handing over the clerical role and
12 the DNS function currently exercised by NTIA over IANA, are
13 we handing over the keys to the kingdom and inviting in
14 control and ownership of the Internet by authoritarian
15 regimes hostile to free speech, or are we demonstrating our
16 good will and reducing the threat that there will be a
17 parallel competitive structure for the DNS and that that
18 will lead to a future fracturing of the Internet?

19 Mr. Zuck. Thank you, Senator, for your question. I
20 agree with you that it is the latter. I think that the
21 question we are really asking here is whether or not we will
22 keep to our own commitments to a governance structure that
23 is multi-stakeholder in nature. That is really the only
24 question we are answering because the entire system we are
25 discussing is, in fact, voluntary. So what we have in this

1 instance is influence. And that influence is borne of
2 integrity, and good behavior, and keeping promises that we
3 make.

4 Ambassador Gross did an amazing job for the Bush
5 Administration in pushing back on authoritarian regimes that
6 were, in fact, trying to get some momentum about bringing
7 ICANN functions to an intergovernmental body. And he did so
8 by reaffirming America's commitment to the multi-stakeholder
9 model and to an open Internet.

10 So you disempower people like Ambassador Gross when you
11 turn around now and say, just kidding. We actually think it
12 is really important that we keep control over this, even
13 though that control is elusory. I mean, that is the point I
14 guess I need to say -- Chairman Cruz said, what is the
15 problem, what is the downside consequence to a delay. And I
16 think that this is all symbolism. So the symbolic gesture
17 of saying government needs to be involved, it needs to be
18 us, we do not think the multi-stakeholder community is
19 capable of governing the Internet. I think saying that has
20 dire consequences.

21 Senator Coons. And let me make sure I have asked an
22 important questions here because Ms. Grove articulated in
23 great detail a very unsatisfactory experience with an
24 auction process. And as someone who previously worked for a
25 private company that also lived and died by its trademarks

1 and where I was also involved in some very unsatisfactory
2 action to secure our trademark website, that sounds like a
3 very bad experience.

4 I just want to make sure, Mr. DelBianco, I understand.
5 You said something that surprised me because I, perhaps, had
6 not read fully enough your testimony in advance, that the
7 changes in accountability -- several of you have testified
8 you have been critics of ICANN for a long time, and yet are
9 very actively engaged in this process.

10 The changes in accountability and transparency in the
11 process improvements that have been agreed to are condition
12 upon transition. Is that correct?

13 Mr. DelBianco. They are, Senator Coons. The board of
14 ICANN put them in place, but said that they take effect upon
15 the date of transition. Now they committed that if the
16 transition were delayed, that they would work with the
17 community to figure out what parts of those new bylaws could
18 still survive, because remember the changes we made, over
19 215 pages, assume that now the community can fire ICANN if
20 they do not run the protocol names and services correctly.
21 We would lose all of that capability if we never turn it
22 over to ICANN. Then we would relitigate all of the new
23 accountability powers that are essential to ensure that we
24 have decreased the power of governments in ICANN, not
25 increased it.

1 Senator Coons. So let us just stress test Mr.
2 Rosenzweig's proposition. We have got at both ends of the
3 table folks that say the transition, in general, is a good
4 idea. We should have this transition. We should privatize
5 fully. But it is not ready yet. This is too risky. We
6 should not be leaping into the dark because there are some
7 demonstrated differences where ICANN has not performed to
8 the level we had hoped.

9 Mr. Horton raises a variety of areas where one can
10 debate whether it really is or is not ICANN's function to
11 fully and thoroughly police the actions of registrars, but
12 certainly there are some examples where ICANN's actions have
13 not held up to the highest standards we would hope.

14 In your view, do the risks of delay in this transition
15 outweigh the risks of a staged transition where it is, sort
16 of, temporarily given, where the transition is done in a
17 series of stages?

18 Mr. DelBianco. Yes, the entire premise for a test
19 drive or test period is completely mistaken. It actually
20 assumes that the new mechanisms that we have designed would
21 have any reasonable probability of actually being tested in
22 two months or two years. Remember these are extraordinary
23 powers, spill the board, to block a bylaw change, and block
24 a budget. It could be years, many years before those are
25 ever invoked. So the notion that all of those mechanisms

1 have to be tested would never provide an assurance that the
2 transition would ever occur. It is as if the U.S.
3 Constitution had lots of powers in there, like articles of
4 impeachment, but by golly, England should never let go of
5 America until a test period occurred where are all of the
6 powers could be tested to their full degree.

7 You have to take a leap of faith. The Internet is
8 about a leap of faith, and we have powers to contain what
9 governments do at ICANN, but more importantly, the private
10 sector community can challenge what ICANN does. I would
11 invite Ms. Grove and Mr. Horton to actually engage within
12 ICANN where we can change the rules for the next round of
13 new top level domains. Let us ask Ms. Grove what kind of a
14 disqualification criteria would we have so that an applicant
15 with a history -- like the one you claimed you are competing
16 with -- would not be allowed to compete.

17 And as far as Mr. Horton said, help us to design ways
18 to force ICANN's compliance to investigate and respond
19 because NTIA, under the current contract, has no power to do
20 anything whatsoever to help Ms. Grove or Mr. Horton. Only
21 the community can, and only with the new bylaws. See,
22 without the new bylaws, the community could never have the
23 capability to force ICANN into a tighter level of
24 compliance.

25 Senator Coons. Ms. Burr, you are going to take a seat

1 on the ICANN board. Is Mr. DelBianco correct?

2 Ms. Burr. He is, and I would like to just add on to
3 his point about the test drive, that the purpose of these
4 powers is to encourage -- one of them -- is to proactively
5 encourage good behavior. Nobody wants to spill the entire
6 board of directors. What we want is to make sure that the
7 policy development processes are respected, that ICANN
8 implements those properly, and the like. So I agree with
9 that.

10 I think that as I move on to the ICANN board, to me,
11 the huge challenge is that the ICANN board has to embrace
12 this, and they have to create a culture in ICANN that
13 embraces these changes. I think that the process of
14 unpacking the current accountability provisions in the
15 bylaws would take years and be very disruptive to the
16 community.

17 The other thing is, Steve talks a lot about the powers.
18 I want to talk about the creation of an independent
19 judiciary at ICANN, which we now have for the first time.
20 That leg, that fundamental leg of government, has been
21 missing at some level. Although we know that IRPs are
22 effective. Now they are going to be much more accessible.
23 They are going to be binding, and they are going to test
24 ICANN against a very clearly limited and enumerated mission
25 statement, and a set of commitments, and core values that

1 form the compact between ICANN and the community.

2 I think that setup creates an entirely new atmosphere
3 that will, hopefully, change.

4 Senator Coons. Well, I just want to thank the entire
5 panel for your testimony on this very complicated and
6 important subject. It seems to me, from what I have heard,
7 that it is important for us to grasp that ICANN and the
8 current DNS structure is not the only way for the
9 architecture of the Internet to be managed and governed
10 going forward, and that the risk we face of indefinitely
11 delaying this transition or failing to keep America's word
12 expressed over several administrations or several actions of
13 Congress, that those risks outweigh the risks of these new
14 structures succeeding. And on some level, what we are being
15 asked to do in this transition is to trust that the American
16 private sector has actually done a terrific job of improving
17 some of the flaws, and failures, and challenges in ICANN in
18 the past, and to trust that exactly the open architecture
19 and governance structure, and deliberative nature of the
20 Internet can work.

21 Thank you for your testimony today.

22 Senator Cruz. Thank you, Senator Coons.

23 Ms. Grove and Mr. Horton, Mr. DelBianco made reference
24 to your testimony. Would either of you care to respond to
25 what he suggested? Ms. Grove?

1 Ms. Grove. Yes, please. Thank you so much, Senator
2 Cruz.

3 You referred to our experience as a bad experience, and
4 I understand how it could be chalked up to that. But I
5 think it is a lot deeper than that.

6 There was actually a statement in the applicant
7 guidebook that prevented ICANN from being able to give our
8 name to the other applicant because they had a number of
9 uniformed dispute resolution policy decisions against it
10 already. That should have prevented it right there, but
11 ICANN did not follow its own applicant guidebook, and we
12 were very shocked to find there was no one to hold them
13 accountable to do that. The only group that could hold them
14 accountable was the NTIA, and they had decided to take a
15 hands-off approach to it.

16 So even though it is complicated, and even though
17 people have spent a lot of time working on it, and we do
18 have a person that is involved in a multi-stakeholder group
19 on our behalf, you do not have to spend thousands of hours
20 doing that or be a \$800 an hour ICANN attorney, or a
21 computer guru to see that if you have to bring the whole
22 world of multi-stakeholders together to hold ICANN to follow
23 its own rules, it is going to be very challenging to hold
24 them accountable at all.

25 Senator Cruz. Mr. Horton?

1 Mr. Horton. Thank you, Mr. Chairman, for the
2 opportunity to respond to that.

3 As to the suggestion that I spend time getting involved
4 in the ICANN process, I have already lost countless hours of
5 my life doing that, talking about compliance and other
6 issues.

7 The problem is that ICANN does not follow what is
8 already written and has already been developed by the
9 multi-stakeholder community in the Registrar Accreditation
10 Agreement. As to why that happens, the problem is a
11 fundamental one of transparency. When you try to get to the
12 core of the problem, it is like a secret court.

13 Now, part of the problem here is that the multi-
14 stakeholder community is -- the fact that it is open is a
15 good thing, but anybody can be involved in what is a very
16 complicated process, and it is hard for a lot of entities
17 that have a stake in the future of the Internet to be
18 involved in these complicated and very bureaucratic groups
19 without dedicating a full-time employee or employees to
20 these processes. Some of the most motivated sectors are the
21 registrar and the registry sectors which have a lot of power
22 in the multi-stakeholder community and do not want
23 compliance to exercise the functions that are clearly
24 written in the registrar accreditation agreement. So that
25 is part of the problem.

1 Senator Cruz. Thank you, Mr. Horton. And I want to
2 thank each of the witnesses on the panel.

3 I will say we heard a lot of interesting expert
4 testimony. I thank you for the time you put into writing
5 your testimony, to coming here and answering these
6 questions.

7 In my judgment, the most powerful and most troubling
8 testimony we heard today was that it was indisputable that
9 this administration's transition, if it went forward, would
10 increase the power of foreign governments, including
11 Russian, and China, and Iran, and decrease the power of the
12 United States of America, which is the only entity bound by
13 and able to fight to vindicate the First Amendment. I am
14 reminded of the 1970s, when President Jimmy Carter chose to
15 give away the Panama Canal, which America had built, and I
16 believe that undermined U.S. interests and U.S. sovereignty.

17 Likewise, today, the Internet is working, and this is a
18 solution in search of a problem that poses real risks to the
19 liberties of Americans. So it is my hope that Congress
20 continues to exercise its Article 1 authority to protect
21 free speech on the Internet to keep the Internet free of the
22 coercive authority of foreign governments that would love
23 nothing more than to silence and censor free speech.

24 I want to thank each of the witnesses again for coming
25 and testifying, and we will keep the hearing record open for

1 an additional five business days, which means that the
2 record will be closed at the end of the business day on
3 Wednesday, September 21, 2016.

4 This hearing is adjourned.

5 [Whereupon, at 1:13 p.m., the Subcommittee was
6 adjourned.]

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

	PAGE
STATEMENT OF:	
THE HONORABLE TED CRUZ A United States Senator from the State of Texas	2
THE HONORABLE CHRISTOPHER COONS A United States Senator from the State of Delaware	7
THE HONORABLE CHARLES GRASSLEY A United States Senator from the State of Iowa	13
A Panel Consisting of:	
THE HONORABLE LAWRENCE E. STRICKLING Assistant Secretary for Communications and Information and Administrator National Telecommunications and Information Administration (NTIA) United States Department of Commerce Washington, DC	17
GÖRAN MARBY CEO and President Internet Corporation for Assigned Names and Numbers (ICANN) Los Angeles, CA	22
A Panel Consisting of:	
BERIN SZOKA President Tech Freedom Washington, DC	86
JONATHAN ZUCK President ACT The App Association Washington, DC	91
DAWN GROVE Corporate Counsel Karsten Manufacturing Phoenix, AZ	96

C O N T E N T S (Continued)

PAGE

STATEMENT OF:

J. BECKWITH (BECKY) BURR Deputy General Counsel and Chief Privacy Officer Neustar Washington, DC	101
JOHN HORTON President and CEO LegitScript Portland, OR	106
STEVE DELBIANCO Executive Director NetChoice Washington, DC	111
PAUL ROSENZWEIG Former Deputy Assistant Secretary for Policy U.S. Department of Homeland Security Washington, DC	116