

**Before the  
Subcommittee on Telecommunications and the Internet  
and the  
Subcommittee on Commerce, Trade and Consumer Protection  
of the  
Committee on Energy and Commerce of the  
United States House of Representatives**

**Hearing On  
“ICANN Internet Governance: Is It Working?”**

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**Executive Summary of Prepared Testimony of Harold Feld  
Senior Vice President, Media Access Project**

The question is not “should we turn ICANN over to the U.N., as some have phrased it. We should not. Nor is the relevant question “does ICANN do internet governance well?” It doesn’t, because it shouldn’t be doing it in the first place. Unfortunately, ICANN has morphed into what nobody wanted, the Federal Communications Commission (FCC) of the internet. Worse, it does it badly, repeating every mistake ever made by the FCC in its 70+ years of history – on internet time.

The real questions, in my opinion at least, are “how to get ICANN out of the internet governance debate” and “how to make sure ICANN does the job it has to do better.” Answering the first question is significantly easier than the second. For the reasons explained below, I recommend the following:

**To Get ICANN Out of the Internet Governance Debate:**

- The U.S. should embrace the Internet Governance Forum (the successor to the World Summit on the Information Society) as the proper place to talk about “internet governance,” a category that excludes the technical management of the domain name system but includes the much more interesting things -- like cybercrime, censorship, and security -- most governments really want to talk about. Hopefully, we can remove ICANN as an attractive target for topics it has no business or interest in addressing.

- NTIA should not be the “court of last resort” for ICANN decisions, a *de facto* role it unwillingly occupies now because it can veto any important ICANN decision.
- The USG should appoint someone other than NTIA to represent the U.S. in the GAC (or transfer the MoU to a different agency. Expecting the world to treat the NTIA representative in the GAC as just another government representative when the same person has veto power over ICANN decisions is simply unreasonable.
- NTIA needs to either say up front that it will never fully transfer authority over the DNS to ICANN or it needs to set a clear path (with a projected time line) for the transfer to take place. Real dialog with concerned governments and other stakeholders cannot be premised on false positions or ambiguity on this vital issue. If full transfer is off the table, say so and begin discussions on how to make other governments as comfortable as possible with that reality.

### **To Get ICANN Functioning More Efficiently:**

- NTIA cannot act unilaterally on ICANN’s internal structures, but can use the MoU renewal and threat of rebid to force critical changes.
- First and foremost, ICANN must have a meaningful accountability mechanism. If ICANN is the FCC of the internet, it needs a D.C. Circuit Court of Appeals to keep it from exceeding its mandate and to protect DNS users (meaning everyone) from arbitrary and capricious decision making.
- ICANN needs some kind of mechanism to provide all stakeholders a way of participating. Right now, there is no formal way in which any person or entity can participate in ICANN and hope to influence ICANN’s process for developing policy if he or she does not fit into one of ICANN’s six arbitrary “constituencies.” Worse, these Constituencies were created based on which interests were present in 1998/1999 and had enough clout to force representation. The world has changed a lot since then, particularly with regard to who uses the internet. ICANN’s processes need to reflect these changes.
- ICANN needs to stop pretending it doesn’t do regulation and learn to separate regulatory issues like competition policy from technical coordination. If ICANN is going to set tariffs and price caps, which is essentially what it does for domain names, it needs to stop navigating by the seat of its pants and figure out how to come up with real numbers that makes sense.

I wish I had more specific solutions for ICANN’s problems. But NTIA has gotten good recommendations from a number of interested parties. I recommend starting with the comments of the Internet Governance Project (IGP), a consortium of academics interested in ICANN and internet

governance. They have a lot of relevant knowledge and experience.

Which, I suppose, leads to one last recommendation. It is high time for ICANN and NTIA to stop circling the wagons against critics and start looking outside its insider circle for advice. The days in which only engineers had useful things to say about DNS management, for better or for worse, are over. Public policy, economics, and law are as much specialties as engineering. Yet ICANN's Board and many key supporters continue to insist that only engineering expertise matters because ICANN is only about technical coordination. Until ICANN recognizes that it does real regulation rather than just technical coordination, it will lack the expertise it needs to do its job properly.