

# ALMOST FREE: AN ANALYSIS OF ICANN'S 'AFFIRMATION OF COMMITMENTS'

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## INTRODUCTION

On September 30, 2009, the United States Department of Commerce (“DOC”) and the Internet Corporation for Assigned Names and Numbers (“ICANN”) signed an “Affirmation of Commitments”<sup>1</sup> (“Affirmation”) that purports to recast the public–private relationship at the heart of the management of the domain name system (“DNS”). ICANN trumpeted this document as a culmination of the move from public to private control of the DNS, one that ICANN said “completes a transition that started 11 years ago” and “places beyond doubt that the ICANN model is best equipped to coordinate” the DNS.<sup>2</sup> ICANN’s CEO Rod Beckstrom summarized ICANN’s commitments in the Affirmation as follows: “It commits ICANN to remaining a private not for profit organization. It declares ICANN is independent and is not controlled by any one entity. It commits ICANN to reviews performed BY THE COMMUNITY—a further recognition that the multi-stakeholder model is robust enough to review itself.”<sup>3</sup>

This article examines the legal and political effects of the Affirmation. It begins by asking what the Affirmation actually changes in light of the pre-existing ICANN–DOC relationship. It then asks what these changes tell us about ICANN’s current legal status and about its future. It concludes that even though the Affirmation has been overhyped, the agreement is nonetheless a significant milestone in the evolution of the management of the DNS—but more for its political than its legal import. As a legal matter, the DOC allowed one of its main agreements with ICANN to lapse, thus surrendering the most formal and visible legal control the DOC had over ICANN. In so doing, the DOC gave up its reversionary interests in contracts ICANN had with third parties—the DOC’s right to require ICANN to assign those

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1. See ICANN, AFFIRMATION OF COMMITMENTS BY THE UNITED STATES DEPARTMENT OF COMMERCE AND THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (2009) [hereinafter AFFIRMATION] (reprinted in Appendix). It is almost required in a paper of this nature to quote Jeremy Rabkin’s quip that an “Affirmation of Commitment . . . sounds a lot like marriage vows exchanged by same-sexers in a state where gay marriage is not yet legal.” Milton Mueller, *Ask Us About ICANN’s, Um, “Affirmation,”* INTERNET GOVERNANCE PROJECT BLOG (Sept. 29, 2009, 03:02 PM), [http://blog.internetgovernance.org/blog/\\_archives/2009/9/29/4336686.html](http://blog.internetgovernance.org/blog/_archives/2009/9/29/4336686.html) (quoting Jeremy Rabkin). In other words, the Affirmation reflects an attempt between a government and an NGO to make a public commitment while also making a private agreement that the law does not necessarily welcome into traditional legal categories—here contract and administrative law—as warmly as the parties might wish.

2. *The Affirmation of Commitments – What it Means*, ICANN (Sept. 30, 2009), <http://www.icann.org/en/announcements/announcement-30sep09-en.htm>.

3. *Id.* (capitalization in original).

contracts to someone else were the DOC ever to lose faith in ICANN. In exchange, ICANN promised to remain located in the U.S., thus remaining subject to U.S. jurisdiction. ICANN also committed itself to a lengthy round of accountability exercises, although whether these will amount to anything substantive is not obvious. Furthermore, ICANN again expanded the role of its Government Advisory Committee ("GAC"), a committee of government representatives open to every nation, which has a direct channel to the ICANN Board as well some agenda-setting powers.

If these changes are less legally earthshaking than the parties might have sought to make them seem, their political import is nonetheless real. By allowing its most visible agreement with ICANN to expire, the DOC made a tangible—if still incomplete—response to growing international pressure for the U.S. to abandon the control over ICANN that other nations feared gave the U.S. a dominant role over the DNS. ICANN enjoys significantly more independence after the Affirmation than it had before. And the GAC, the only direct means by which non-U.S. governments can influence ICANN, emerges from the Affirmation stronger as well.

The article then revisits two underlying issues that the Affirmation papers over: what standby or fail-safe control the United States retains over the DNS, and to what extent that (or any) control over the DNS matters. Here the picture is less clear, but some of the answers are surprising: the U.S. retains a lessened, but still real, degree of control over the DNS—but it may not matter as much as many of us think. The possible risks of having a body—be it public or private—in charge of the DNS can be grouped into four categories: (1) primarily economic issues involving market power over DNS service providers (registrars and registries), (2) economic power exercised over registrants and other third parties, (3) more general political power over speech or other uses of the Internet, and (4) geo-strategic. Some of these, notably the economic risks, the article argues, are much more real dangers than others. In particular, the article asserts, the geo-strategic risk has been greatly exaggerated.

Readers are assumed to understand the technical basis of the DNS.<sup>4</sup>

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4. Readers seeking an introduction to the DNS will find one, among other places, in Part I of A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 37-50 (2000).

## I. THE AFFIRMATION OF COMMITMENTS IN CONTEXT

### A. *A Short History of the ICANN–DOC Relationship*

More by accident than design, in the late 20th century the United States Government found itself with de facto and also probably legal control of the DNS. Oddly, at the time, this did not feel like an unmitigated blessing as it thrust the U.S. Government into controversies that seemed to have no politically palatable solutions.

In the 1980s and earlier, control of a small network used primarily by academics<sup>5</sup> was of little interest to most people. But as the Internet began to be commercialized in the late '80s and early '90s, and as its growth accelerated, DNS issues became more contentious and began to concern even the White House.<sup>6</sup> Proposals to create new top-level-domains (“TLDs”) ran into opposition from organized trademark-holders who already were concluding that the existing DNS was an obstacle to their legal rights and brand-management objectives. Creating new TLDs threatened more cybersquatting and more trademark disputes, and they wanted none of it. On the other side, would-be registries (the people with the authoritative database of domain names in each TLD) and registrars (the people who sell<sup>7</sup> domain names to end-users) wishing to enter the domain-name-selling market sought more names to sell, while firms who found themselves a little late to the Internet party wanted short memorable names. Both sides looked increasingly to the White House to solve their problems, and the White House, in the person of Ira Magaziner, wanted to get rid of the (to this day unsolved) problem as fast as possible.<sup>8</sup>

On June 5, 1998, the National Telecommunications and

5. On the early history of the Internet, see KATIE HAFNER & MATTHEW LYON, *WHERE WIZARDS STAY UP LATE: THE ORIGINS OF THE INTERNET* (1998).

6. See *id.* at 24.

7. Or lease, but let's not get into that debate. Readers wishing to know more may consult Anupam Chander, *The New, New Property*, 81 TEX. L. REV. 715, 776-781 (2003) (“Understanding domain names as property accords with how they are treated in practice.”); Juliet M. Moringiello, *What Virtual Worlds Can Do for Property Law*, 62 FLA. L. REV. 159, 179 (2010) (discussing the Virginia Supreme Court's conclusion in *Network Solutions, Inc. v. Umbro Int'l, Inc.*, 529 S.E.2d 80, 86 (Va. 2000) that a domain name represents a service contract, not property subject to garnishment); Xuan-Thao N. Nguyen, *Commercial Law Collides with Cyberspace: The Trouble with Perfection – Insecurity Interests in the New Corporate Asset*, 59 WASH. & LEE L. REV. 37, 65 (2002) (“The classification of domain names as either property or contracts is an issue of first impression with which courts have struggled.”); Xuan-Thao N. Nguyen, *Cyberproperty and Judicial Dissonance: The Trouble with Domain Name Classification*, 10 GEO. MASON L. REV. 183, 186 (2001) (recognizing domain names as intangible property).

8. See Froomkin, *supra* note 4, at 24 (describing creation of inter-agency task force headed by Magaziner).

Information Administration ("NTIA") of the DOC issued a policy statement, the "White Paper," calling on private sector Internet stakeholders to form a not-for-profit corporation to take over the administration of the DNS and the Internet numbering system.<sup>9</sup> On October 26, 1998, ICANN was incorporated as a California not-for-profit corporation, and it then asked the DOC to choose it as the DOC's private partner.<sup>10</sup> After a number of complexities that need not detain us now,<sup>11</sup> on November 25, 1998, the DOC chose a somewhat modified ICANN to be its partner or agent<sup>12</sup> and basically handed ICANN de facto control over the DNS.

The legal basis of the original ICANN-DOC relationship rested on three agreements: (1) a Memorandum of Understanding ("MOU"),<sup>13</sup>

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9. Notice, Management of Internet Names and Addresses, 63 Fed. Reg. 31,741 (June 10, 1998) [hereinafter White Paper].

10. Letter from Jon Postel to Hon. William M. Daley, U.S. Sec'y of Commerce (Oct. 2, 1998), *available* *at* <http://www.ntia.doc.gov/ntiahome/domainname/proposals/icann/letter.htm>.

11. For details, see MILTON L. MUELLER, RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE (2002); Froomkin, *supra* note 4, at 82-84.

12. For a discussion of the modifications and the surrounding complexities, see MUELLER, *supra* note 11, at 183-208; Froomkin, *supra* note 4, at 82-88.

13. MEMORANDUM OF UNDERSTANDING BETWEEN THE U.S. DEPARTMENT OF COMMERCE AND INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, <http://www.icann.org/general/icann-mou-25nov98.htm> (last updated Dec. 31, 1999) [hereinafter MOU]. The MOU had quite a history. It was originally due to expire on September 30, 2000. *See id.*; ICANN, AMENDMENT 1 TO ICANN/DOC MEMORANDUM OF UNDERSTANDING (1999), <http://www.icann.org/en/nsi/amend1-jpamou-04nov99.htm> [hereinafter MOU Amendment 1]. On September 4, 2000, ICANN announced that the U.S. Government agreed to extend ICANN's hold on the DNS for one year, or less "if ICANN and the U.S. Government agree that the work under the MOU has been completed." *ICANN and U.S. Government Agree to Extend Agreements*, ICANN (Sept. 4, 2000), <http://www.icann.org/announcements/icann-pr04sep00.htm> [hereinafter Announcement]; ICANN, AMENDMENT 2 TO ICANN/DOC MEMORANDUM OF UNDERSTANDING (2000), <http://www.icann.org/en/general/amend2-jpamou-07sep00.htm> (effective Sept. 7, 2000; generally terminates Sept. 30, 2001). This extension affected both the ICANN-DOC MOU of November 25, 1998, see MOU, *supra*, and ICANN's Cooperative Research and Development Agreement (ICANN, COOPERATIVE RESEARCH AND DEVELOPMENT AGREEMENT BETWEEN ICANN AND US DEPARTMENT OF COMMERCE, <http://www.icann.org/committees/dns-root/crada.htm> (last updated Mar. 15, 2003) [hereinafter CRADA]). In addition, ICANN reported that the DOC extended ICANN's no-fee contract to run the Internet Assigned Number Authority ("IANA"): the IANA contract extension results from ICANN's acceptance of a new provision in the contract allowing the U.S. Government unilaterally to extend the period of performance by up to six months. Announcement, *supra*. That mostly set a pattern of repeated extensions, sometimes with modifications, of the three agreements. Thus, MOU Amendment 3 (ICANN, AMENDMENT 3 TO ICANN/DOC MEMORANDUM OF UNDERSTANDING (2001), <http://www.icann.org/en/general/amend3-jpamou-25may01.htm> [hereinafter MOU Amendment 3] (effective May 25, 2001)), followed by MOU Amendment 4 (ICANN, AMENDMENT 4 TO ICANN/DOC MEMORANDUM OF UNDERSTANDING (2001), <http://www.icann.org/en/general/amend4-jpamou-24sep01.htm> (effective Sept. 24, 2001))

later replaced by a Joint Project Agreement (“JPA”); (2) ICANN’s Cooperative Research and Development Agreement (“CRADA”) with the U.S. Government;<sup>14</sup> and (3) a contract between ICANN and the U.S. Government for performance of the so-called IANA (Internet Assigned Names and Numbers) function relating to the operational management of the root zone file, and the assignment of Internet Protocol (“IP”) numbers and protocol numbers.<sup>15</sup>

Over the course of the past decade, each of these agreements was amended numerous times; the amendments gradually gave ICANN more authority and more independence. Full independence from the

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(terms of Section VII extended until Sept. 30, 2002)), followed by MOU Amendment 5 (ICANN, AMENDMENT 5 TO ICANN/DOC MEMORANDUM OF UNDERSTANDING (2002), <http://www.icann.org/en/general/amend5-jpamou-19sep02.htm> (effective Sept. 19, 2002) (termination date of Sept. 30, 2003)), then MOU Amendment 6, (ICANN, AMENDMENT 6 TO ICANN/DOC MEMORANDUM OF UNDERSTANDING (2003), <http://www.icann.org/en/general/amend6-jpamou-17sep03.htm> (effective Sept. 17, 2003) (replaces § VII; termination date of Sept. 30, 2006)). The MOU was then replaced by the Joint Project Agreement. JOINT PROJECT AGREEMENT BETWEEN THE U.S. DEPARTMENT OF COMMERCE AND THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (2006) (effective Sept. 29, 2006) (due to terminate Sept. 30, 2009) [hereinafter JPA]. The JPA ended with the Affirmation.

14. See CRADA, *supra* note 13, Amendment 1 to CRADA (ICANN, AMENDMENT 1 TO COOPERATIVE RESEARCH AND DEVELOPMENT AGREEMENT (2000), <http://www.icann.org/en/committees/dns-root/amend1-crada-07sep00.htm> (extending CRADA for one year)), and Amendment 2 to CRADA (ICANN, AMENDMENT 2 TO COOPERATIVE RESEARCH AND DEVELOPMENT AGREEMENT (2001), <http://www.icann.org/en/committees/dns-root/amend2-crada-28sep01.htm> (extending CRADA for nine months)); see also ICANN, PUBLIC SUMMARY OF REPORTS PROVIDED UNDER COOPERATIVE RESEARCH AND DEVELOPMENT AGREEMENT BETWEEN ICANN AND US DEPARTMENT OF COMMERCE (Mar. 14, 2003), <http://www.icann.org/en/general/crada-report-summary-14mar03.htm>.

A CRADA is usually an agreement in which

[t]he collaborating partner agrees to provide resources that may consist of funds, personnel, services, facilities, equipment or other resources needed to conduct a specific research or development effort while the Federal [government] agrees to provide similar resources but no direct funding to the partner. . . . The CRADA vehicle provides incentives that help speed the commercialization of Federally-developed technology[, making it an excellent technology transfer tool].

*Patents, Licenses, and CRADA's*, U.S. FISH AND WILDLIFE SERVICE, [http://www.fws.gov/techtransfer/Level-2\\_folder/2\\_Patents.html](http://www.fws.gov/techtransfer/Level-2_folder/2_Patents.html) (last visited Nov. 8, 2010).

15. Contract Between ICANN and the United States Government for Performance of the IANA Function (Mar. 17, 2003), <http://www.icann.org/en/general/iana-contract-17mar03.htm> [hereinafter IANA Contract] (includes three options to extend until Mar. 31, 2006); Amendment of Solicitation/Modification of Contract (Aug. 28, 2003), <http://www.icann.org/en/general/iana-contract-02sep03.pdf>; Letter from Joel L. Perlroth, U.S. Dept. of Commerce, to Paul Twomey, ICANN, Preliminary Notification of the Governments [sic] Intent to Extend the Term of Contract No. DG1335-03-SE-0336 (Aug. 1, 2003); U.S. Dept. of Commerce Award/Contract to ICANN, § C.4.1 (Aug. 11, 2006), <http://www.icann.org/en/general/iana-contract-14aug06.pdf> (includes four options to extend until Sept. 30, 2011). On IANA see *Introducing IANA*, IANA, <http://www.iana.org/about> (last visited Nov. 9, 2010).

U.S. was clearly ICANN's goal. But the U.S. retained leverage over ICANN for a number of reasons. Some were contractual and are discussed below. Others were political or institutional. Of these, likely the most important was the role played by Network Solutions, Inc. ("NSI," now VeriSign),<sup>16</sup> a private for-profit company that had made a fortune selling domain names, especially in the .com domain for which it served as registry and first monopoly, and then primary, and then *primus inter pares* registrar. The actual root zone file<sup>17</sup> (sometimes abbreviated as "the root") was and is housed on a computer run by NSI/VeriSign, not ICANN, seemingly a source of some heartburn in ICANN headquarters. ICANN had a long and sometimes adversarial relationship with NSI/VeriSign. At best, the relationship was certainly arms-length. This allowed the U.S. Government significant leverage: there was, at the end of the day, little chance that someone at NSI/VeriSign would take orders from ICANN if the U.S. Government told them not to.

The MOU was repeatedly amended during its life.<sup>18</sup> Ultimately in September 2006, the DOC and ICANN rebadged the MOU as a "Joint Project Agreement." By that point, ICANN's obligations to perform specific work items was much reduced.<sup>19</sup> In contrast, however, the legal relationship between ICANN and the U.S. was not that different from what it had been, and ICANN continued to press for full independence. While the U.S. Government may have had some concerns about its legal authority to cut ICANN free, the political ramifications of being accused of "losing" the Internet<sup>20</sup> likely loomed larger. Despite this, ICANN's

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16. In 2000, NSI was acquired by VeriSign, Inc. *Company History*, NETWORK SOLUTIONS, <http://about-networksolutions.com/corporate-history.php> (last visited Nov. 9, 2010). In 2003, VeriSign sold NSI's registrar business, which resumed operations as NSI; VeriSign remained in the registry business. *Id.* See also *infra* note 77 (further details of NSI/VeriSign relationship).

17. A zone file is a plain text file that describes—and, if it is authoritative (i.e. relied on by most others), effectively defines—a layer of the hierarchical domain name structure of the DNS. The zone file contains mappings between names and IP addresses and other resources. The root zone file is the master definition for the DNS and contains the authoritative list of top-level domains and the information needed to find the authoritative domain name servers for each domain name. The procedure for adding any TLD to the Internet that most of us use is to add a single line to the root zone file containing the name of the new TLD, the address of the computer that has the authoritative information about that domain's registry, and a few items of technical data. For the full technical details, see Memorandum from P. Mockapetris to Internet Engineering Task Force Network Working Group, Domain Names – Implementation and Specification, § 5 (Nov. 1987), *available at* <http://www.ietf.org/rfc/rfc1035.txt>, and more generally, see Memorandum from P. Mockapetris to Internet Engineering Task Force Network Working Group, Domain Names – Concepts and Facilities (Nov. 1987), *available at* <http://www.ietf.org/rfc/rfc1034.txt>.

18. See *supra* note 13.

19. Compare JPA, *supra* note 13, § II, with MOU, *supra* note 13, § V.C.

20. For an example of the sort of criticism the DOC rightly feared, see Jeremy Rabkin & Jeffrey Eisenach, *The U.S. Abandons the Internet*, WALL ST. J., Oct. 3, 2009, at A13.

case for independence continued to gather steam.

ICANN's formal arguments rested in part on commitments in the White Paper that had called ICANN into being,<sup>21</sup> and on the various statements from U.S. Government officials since then.<sup>22</sup> In response to the objectives set by the U.S., ICANN established a lengthy paper record—sometimes even congruent with reality—designed to demonstrate that it was achieving each of the objectives set for it in the MOU. And indeed, even if the objectives had not all been met on the original short timetable, the checklist of objectives that the U.S. was willing to say had not been achieved kept shrinking in the MOU, amendment by amendment.

If, as explained below, the legal regime of the MOU and even the JPA retained features entrenching the U.S. Government's residual authority,<sup>23</sup> that same authority was under increasing assault in the international political realm. Non-U.S. governments and interest groups increasingly asked why it should be that the U.S. Government should have a uniquely controlling position in the DNS. Where once the bulk of Internet users had been in the U.S. and perhaps a handful of other countries, now the Internet was increasingly global. Influential voices in the European Union and Japan, soon joined by others from every continent and region, began to push for the U.S. to divest itself of its controlling position, or for ICANN's role to be turned over to a more international body.<sup>24</sup>

ICANN responded to the threat of the creation of a transnational competitor (or successor) with several initiatives. The initiatives were designed, on the one hand, to appeal to non-U.S. government and technical constituencies, while on the other hand to not anger the U.S. Government, on whose good will, or at least acquiescence, ICANN still depended if it were ever to achieve its goal of independence.

ICANN opened a branch office in Brussels, where the European

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21. The U.S. Government originally suggested that the transition to full private control of the DNS should be completed no later than September 30, 2000. White Paper, *supra* note 9, at 31,744. ("The U.S. Government would prefer that this transition be complete before the year 2000. To the extent that the new corporation is established and operationally stable, September 30, 2000 is intended to be, and remains, an 'outside' date.")

22. See Froomkin, *supra* note 4, at 31 n.43 (collecting contradictory statements by U.S. Government officials).

23. See *infra* Part I.B.2 (describing ways in which the U.S. retained limited ability to exercise authority over the root).

24. E.g., *Changes Loom for ICANN*, TERRA DAILY (Sept. 27, 2009), [http://www.terradaily.com/reports/Changes\\_loom\\_for\\_ICANN\\_999.html](http://www.terradaily.com/reports/Changes_loom_for_ICANN_999.html) (reporting that European Commissioner Viviane Reding stated that Europeans expect to see ICANN become a "fully independent organization, accountable to the global Internet community" because "it is not defensible that the government department of only one country has oversight of an internet function which is used by hundreds of millions of people in countries all over the world[.]").

Commission has its headquarters.<sup>25</sup> ICANN revamped its country-code TLD (“ccTLD”) operations to remove some of the practices that had most irritated foreign governments.<sup>26</sup> It also supported every foreign government that sought to take over its own domestic ccTLD, whether or not this move was opposed by the incumbent—a policy likely at odds with earlier Internet norms.<sup>27</sup>

More importantly, ICANN gradually expanded the role of its Government Advisory Committee. ICANN’s GAC began in 1998 as an advisory organ consisting of one representative of each participating national government, and selected international governmental organizations.<sup>28</sup> The ICANN Board, when considering decisions that “substantially affect the operation of the Internet or third parties,” was to provide notice to the GAC for comment,<sup>29</sup> and to consider the GAC’s comments before making a final decision.<sup>30</sup> From the start, membership was open to all national governments and also to international organizations, such as the World Intellectual Property Organization (“WIPO”), when invited by the GAC or the Board.<sup>31</sup>

In 2002, new ICANN Bylaws expanded the GAC’s powers considerably: in the event of a conflict between a GAC “comment” and the Board’s decision, the Bylaws mandated negotiation towards mutual resolution.<sup>32</sup> However, the Board maintained the power to take action notwithstanding conflicting advice, so long as its reasoning was included in the final decision.<sup>33</sup> The 2002 Bylaws further gave the GAC unilateral power to directly recommend Board action.<sup>34</sup> Furthermore, comments

25. ICANN opened its Brussels office in 2003. *See Adopted Resolutions from ICANN Board Meeting*, ICANN (Nov. 22, 2006), <http://www.icann.org/en/minutes/resolutions-22nov06.htm>. It also opened an office in Sydney in 2006. *See id.*

26. *See, e.g.*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, DIRECTORATE FOR SCIENCE, TECHNOLOGY, AND INDUSTRY, WORKING PARTY ON TELECOMMUNICATION AND INFORMATION SERVICES POLICIES, EVOLUTION IN THE MANAGEMENT OF COUNTRY CODE TOP-LEVEL DOMAIN NAMES (ccTLDs) (2006).

27. *See* Peter K. Yu, *The Neverending ccTLD Story*, in ADDRESSING THE WORLD: NATIONAL IDENTITY AND INTERNET COUNTRY CODE DOMAINS 1, 3-4 (Erica S. Wass ed., 2003); A. Michael Froomkin, *Form and Substance in Cyberspace*, 6 J. SMALL & EMERGING BUS. L. 93, 106-08 (2002); A. Michael Froomkin, *How ICANN Policy Is Made (II)*, ICANNWATCH (Sept. 5, 2001, 2:29 AM), <http://www.icannwatch.org/article.pl?sid=01/09/05/072945&mode=thread>.

28. ICANN, BYLAWS art. VII § 3(a) (Nov. 6, 1998), <http://www.icann.org/en/general/archive-bylaws/bylaws-06nov98.htm>.

29. *Id.* art. VII § 3(a), art. III § 3(b).

30. *Id.* art. VII § 3(a).

31. ICANN, BYLAWS art. VII § 3(a) (May 27, 1999), <http://www.icann.org/en/general/archive-bylaws/bylaws-27may99.htm>.

32. ICANN, BYLAWS art. XI §§ 2(1)(i)-(j) (Dec. 15, 2002), <http://www.icann.org/en/general/archive-bylaws/bylaws-15dec02.htm>.

33. *Id.* art. XI § 2(1)(k).

34. *Id.* art. XI § 2(1)(i).

could now be solicited by the GAC from external sources on recommendation by the GAC or decision by the Board.<sup>35</sup> The GAC was given further representation in ICANN governance through participation in Board meetings,<sup>36</sup> the Generic Names Supporting Organization policy recommendations,<sup>37</sup> and the country-code Names Supporting Organization.<sup>38</sup> Its presence in management was solidified through its exemption from forced removal procedures.<sup>39</sup>

In enhancing the GAC's power, ICANN achieved a trifecta. It made friends in foreign governments and created constituencies in the ministries that sent delegates to ICANN GAC meetings. Often these ministries were commerce-and-trade-based, and thus internal competitors to the communication ministries that attended International Telecommunications Union ("ITU") plenaries. Having a different ministry invested in ICANN created a constituency for the proposition that even if ICANN was not perfect, an ICANN with a strong GAC was a good deal. Even without this piece of internal politics, many non-U.S. governments concluded that an independent ICANN was better than the status quo in which the U.S. had a dominant role.<sup>40</sup> Those governments in turn became more likely to pressure the U.S. to make good on its White Paper promise to make ICANN independent despite the U.S. Government's subsequent vacillation and doubt.<sup>41</sup>

Amidst all this, ICANN also began some projects designed to increase its power and independence. For example, from an early stage ICANN floated a trial balloon that it, not NSI/VeriSign, should control the root servers directly.<sup>42</sup> This suggestion met with more than a little opposition, and was eventually dropped—only to resurface.<sup>43</sup> Meanwhile,

35. *Id.* art. XI-A § 1(3)(a).

36. *Id.* art. VI §§ 9(1)(a), 9(5).

37. *Id.* art. X § 3(1).

38. ICANN, BYLAWS art. IX § 3(2), annex B § 5(a) (June 26, 2003), <http://www.icann.org/en/general/archive-bylaws/bylaws-26jun03.htm>.

39. ICANN, *supra* note 32, art. VI § 11(2).

40. *Cf.* Wolfgang Kleinwoechter, *From Self-Governance to Public-Private Partnership: The Changing Role of Governments in the Management of the Internet's Core Resources*, 36 LOY. L.A. L. REV. 1103, 1110-11 (2003).

41. Some of the U.S.'s contradictory statements are summarized in Froomkin, *supra* note 4, at 31 n.43.

42. *See, e.g.*, M. STUART LYNN, PRESIDENT'S REPORT: ICANN – THE CASE FOR REFORM (2002), <http://www.icann.org/en/general/lynn-reform-proposal-24feb02.htm>. *See also* A. Michael Froomkin, *IP: Where Goes ICANN – the Second of Two Notes*, INTERESTING-PEOPLE (Feb. 27, 2002, 09:00), <http://www.interesting-people.org/archives/interesting-people/200202/msg00259.html>; David Post, *ICANN ver. 2.0 and "Mission Creep,"* ICANNWATCH (Feb. 28, 2002, 01:45 AM), <http://www.icannwatch.org/article.pl?sid=02/02/28/064529&mode=thread>; Jon Weinberg, *Busy with the Root,* ICANNWATCH (May 10, 2001, 3:10 AM), <http://www.icannwatch.org/article.pl?sid=01/05/10/081012&mode=thread>.

43. *See infra* note 78 (describing ICANN suggestion that it should have sole control over

ICANN started to explore whether it could become a true international organization like the ITU, the Universal Postal Union, or WIPO. From the outside it is difficult to gauge just how serious ICANN was about transmogrifying into a Geneva-based multinational organization, or whether this was just a bargaining chip to persuade the U.S. to reduce its ties. In 2006, ICANN's President's Strategy Committee took up the question of whether ICANN's "ability to scale internationally" was being harmed by "its legal personality being based in a specific jurisdiction."<sup>44</sup> In its 2007 Final Report, that same committee "encourage[d] the ICANN Board to explore with the U.S. Government, other governments, and the ICANN community, whether there are advantages and appropriate mechanisms for moving ICANN's legal identity to that of a private international organization based in the U.S."<sup>45</sup> And it further "encourage[d] the Board to consider . . . the benefits of the international private organization model and its related potential immunities to limit liabilities or instabilities."<sup>46</sup> From ICANN's viewpoint, the prospect of international status certainly seemed to offer everything that ICANN's critics feared ICANN most wanted: immunity from suit in the U.S., international stature, a lack of outside supervision and control, no need to have a 'membership' or file California and U.S. tax returns,<sup>47</sup> not to mention all the international travel a body could stand. On the other hand, the chances of achieving such stature without an international agreement, especially without U.S. blessing, were slim at best. Although non-U.S. governments were not happy with the status quo, nor with the U.S.'s very slow approach to changing it, there was never any sign that they were prepared to support a move by ICANN to abandon its U.S. base in the face of opposition from the DOC.

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the keys used to sign the root).

44. *President's Strategy Committee Consultation with the ICANN Community Improving the Inherent Strength of the Multi-stakeholder Model*, ICANN, <http://www.icann.org/en/announcements/psc-consultation-en.htm> (last modified Aug. 13, 2010).

45. ICANN, FINAL PRESIDENT'S STRATEGY COMMITTEE REPORT 3 (2007).

46. *Id.* at 5.

47. The President's Strategy Committee commissioned Ambassador Hans Corell, the former Under-Secretary-General for Legal Affairs and a former Legal Counsel of the United Nations, to produce a report on the international status option. See *ICANN Meetings in Lisbon Portugal: Transcript – President's Strategy Committee Workshop*, ICANN (Mar. 28, 2007), <http://www.icann.org/en/meetings/lisbon/transcript-psc-28mar07.htm>. Ambassador Corell's report is published at Hans Corell, *Educational Material to Assist ICANN in Deciding What Status the Corporation Should Aim for as a Private International Entity in Its Host Country*, ICANN, <http://www.icann.org/en/psc/corell-24aug06.html> (last modified Aug. 13, 2010). Ambassador Corell's report emphasized a proposed Swiss law granting special privileges and immunities to international organizations, including "international quasi governmental organisation[s]" and "other international organisms," having Switzerland as their host State. *Id.* § 7.

This quick survey of a very tangled set of relationships sets the scene for the Affirmation of Commitments.

### B. *Key Aspects of the Affirmation*

“U.S. Cedes ICANN Control to the World” read the headline at Internetnews.com.<sup>48</sup> Both ICANN and the DOC trumpeted the Affirmation of Commitments as a major milestone. The DOC’s official statement said,

Today’s announcement bolsters the long-term viability of the Internet as a force for innovation, economic growth, and freedom of expression . . . . This framework puts the public interest front and center, and it establishes processes for stakeholders around the world to review ICANN’s performance. The *Affirmation of Commitments* also reinforces a long-standing relationship between ICANN and the Department of Commerce. The Department looks forward to playing an active role along with other stakeholders in ensuring that ICANN is successful, accountable, and transparent.<sup>49</sup>

The *Affirmation* is consistent with public comments submitted to NTIA earlier this year that reflected strong support for the model of multi-stakeholder, private-sector-led coordination of the DNS that ICANN represents, but also expressed continuing concerns about ICANN’s transparency and accountability in decision-making.<sup>50</sup>

Yet, from a legal standpoint, the Affirmation of Commitments is, on the whole, quite vacuous. Indeed, the Affirmation’s greatest significance may lie in what it is not.

#### 1. What’s There

The most important aspect of the Affirmation appears in its first paragraph: the Affirmation recognizes the lapsing of the JPA—and unlike the many amendments to the MOU that preceded it, this time ICANN and the DOC were not extending the agreement. Instead, in

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48. Sean Michael Kerner, *U.S. Cedes ICANN Control to the World*, INTERNETNEWS.COM (Sept. 30, 2009), <http://www.internetnews.com/infra/article.php/3841671/US+Cedes+ICANN+Control+to+the+World.htm>.

49. Press Release, Nat’l Telecomms. and Info. Admin., Commerce’s NTIA and ICANN Establish a Long-Lasting Framework for the Technical Coordination of the Internet’s Domain Name and Addressing System (Sept. 30, 2009), [http://www.ntia.doc.gov/press/2009/ICANN\\_Affirmation\\_090930.html](http://www.ntia.doc.gov/press/2009/ICANN_Affirmation_090930.html).

50. *Id.* (emphasis in original).

the subsequent sections ICANN and the DOC recited some commitments. The parties described those commitments in broad and ringing terms:

This document affirms key commitments by DOC and ICANN, including commitments to: (a) ensure that decisions made related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent; (b) preserve the security, stability and resiliency of the DNS; (c) promote competition, consumer trust, and consumer choice in the DNS marketplace; and (d) facilitate international participation in DNS technical coordination.<sup>51</sup>

Sounds great. But, in fact, the DOC didn't really promise anything enforceable, and neither, in the main, did ICANN. Indeed, from a strictly legal viewpoint there is a case to be made that whatever the Affirmation is, it is not a contract as there is no exchange of consideration. Rather, it is a repetition of things the parties had, in the main, previously said they were already doing. Arguably, the DOC's allowing the JPA to lapse could be seen as a form of consideration for ICANN's binding itself to its promises, but since the JPA would have lapsed without both parties extending it, and it's unclear where the DOC gets the statutory authority to enter into a contract such as the Affirmation, this seems odd consideration at best.

#### *a. DOC's Promises*

The Affirmation contains no binding promises by the U.S. Government. Given the history of the agreements it replaced, which consisted of commitments almost solely by ICANN, the absence of explicit statutory authority for the DOC's management of ICANN and of the root, and the equal nonexistence of any formal rulemaking or adjudicatory process, it is hardly surprising that the U.S. Government was not in a position to promise much.

Instead, the DOC "affirm[ed] its commitment" to the Internet equivalent of Motherhood, "a multi-stakeholder, private sector led, bottom-up policy development model for DNS technical coordination that acts for the benefit of global Internet users."<sup>52</sup> The DOC also affirmed its commitment to the GAC and (in principle, subject to more on the details) to multinational character sets for internationalized TLDs.<sup>53</sup>

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51. AFFIRMATION, *supra* note 1, ¶ 3.

52. *Id.* ¶ 4.

53. *Id.* ¶¶ 4-6.

And that's it. The rest of the Affirmation consists of statements about what ICANN will do.

*b. ICANN's Promises*

ICANN makes some sweeping promises in the Affirmation. ICANN promises:

to adhere to transparent and accountable budgeting processes, fact-based policy development, cross-community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration[;] . . . to provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied[;]<sup>54</sup> . . . [to] remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community; . . . to operate as a multi-stakeholder, private sector led organization with input from the public, for whose benefit ICANN shall in all events act[;]<sup>55</sup> . . . to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders . . .<sup>56</sup>

These are significant-sounding commitments about almost every aspect of ICANN's operations. Fully realized, they would likely defang all but the most overly zealous or nationalistic of ICANN's critics. But any jaundiced veteran of the DNS wars will immediately notice two things about this list: almost nothing on this list is new, and none of it is enforceable.

All but one of these commitments could have been lifted from any of a number of previous similar documents that ICANN has produced. With the exception of its explicit promise to stay headquartered in the USA—which is significant<sup>57</sup>—ICANN not only has made these or similar commitments many times in the past,<sup>58</sup> it has also congratulated

54. *Id.* ¶ 7.

55. *Id.* ¶ 8.

56. *Id.* ¶ 9.1.

57. See *infra* text accompanying notes 120-20.

58. See, e.g., *Accountability and Transparency Frameworks and Principles: Accountability in the Public Sphere*, ICANN (Feb. 15, 2008), <http://www.icann.org/en/accountability/frameworks-principles/public-sphere.htm> (explaining ICANN's role in performing a public trust function); *Accountability and Transparency Frameworks and Principles: Legal and Corporate Accountability*, ICANN (Feb. 15, 2008), <http://www.icann.org/en/accountability/frameworks-principles/legal-corporate.htm> (discussing the legal and corporate accountability ICANN has under the legal system and its Bylaws); *Accountability and Transparency Frameworks and Principles: Accountability to the*

itself for making good on these or similar objectives.<sup>59</sup> Anyone concerned (with reason)<sup>60</sup> that perhaps ICANN is not as open and transparent as it has consistently claimed will find little comfort in a reiteration of those promises—although there is always hope when management changes.<sup>61</sup>

Many of ICANN's commitments in the Affirmation turn out to be less than they might seem. For example, the promise "to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders"<sup>62</sup> turns out to have four sub-parts describing implementation. Each of these sub-parts commits ICANN to actions with words like "assessing and improving," "assessing . . . and making recommendations," "continually assessing and improving," and "continually assessing."<sup>63</sup> As if that were not enough, ICANN commits to "organize a review of its execution of the above commitments no less frequently than every three years"<sup>64</sup> to make sure that all the assessing and improving is proceeding. ICANN also undertook to issue "an annual report that sets out ICANN's progress against ICANN's bylaws, responsibilities, and strategic and operating plans[,]"<sup>65</sup> and to report on an ongoing basis regarding "the positive and negative effects of its decisions on the public, including any financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS."<sup>66</sup> This example is drawn from paragraph 9.1 of the Affirmation, but the commitments in paragraphs 9.2 ("Preserving security, stability

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*Participating Community*, ICANN (Feb. 15, 2008), <http://icann.org/en/accountability/frameworks-principles/community.htm> (asserting ICANN's accountability to the public at large); *see also* ICANN, ACCOUNTABILITY AND TRANSPARENCY FRAMEWORKS AND PRINCIPLES (2008) (discussing how ICANN's various types of accountability support its operating model); ONE WORLD TRUST, INDEPENDENT REVIEW OF ICANN'S ACCOUNTABILITY AND TRANSPARENCY – STRUCTURES AND PRACTICES (2007) (evaluating ICANN's standards of accountability and transparency against other international organizations).

59. *E.g.*, KIERAN MCCARTHY, LEAVING REPORT OF GENERAL MANAGER OF PUBLIC PARTICIPATION (2009).

60. To pick just the most obvious example, most ICANN Board meetings are held in secret, are not recorded, and the public is given corporate-style summaries of its actions some days later. When the ICANN Board has a public meeting, it first meets in secret in advance to discuss the issues that will come up in public. *Cf.* John Palfrey, *The End of the Experiment: How ICANN's Foray Into Global Internet Democracy Failed*, 17 HARV. J.L. & TECH 409, 437-47 (2004).

61. Rod Beckstrom took over as ICANN President and CEO on July 1, 2009. *See, e.g.*, Rod Beckstrom, *President and CEO*, ICANN, <http://www.icann.org/en/biog/beckstrom.htm> (last modified Aug. 13, 2010).

62. AFFIRMATION, *supra* note 1, ¶ 9.1.

63. *Id.*

64. *Id.*

65. *Id.* ¶ 7.

66. *Id.* ¶ 4.

and resiliency”) and 9.3 (“Promoting competition, consumer trust, and consumer choice”) are little different.<sup>67</sup>

The means by which the triennial assessment teams will be constituted does say something about where ICANN sees its future. The teams will be made up of ex officio members and “volunteer community members” selected by ICANN’s Board Chair and the Chair of the GAC.<sup>68</sup> It is possible that the triennial assessments may matter, because delivery of the reports will provide an occasion for ICANN to agenda their recommendations. Indeed, in the Affirmation, ICANN promises that “[t]he Board will take action within six months of receipt of the recommendations.”<sup>69</sup> Of course that’s carefully vague as to what sort of action the Board might take; it is certainly not a promise to agree with the teams or implement their recommendations.

One thing is clear: in contrast with the MOU and JPS regime, no more will ICANN’s reports be directed to DOC.<sup>70</sup> Whatever its practical import, this is high symbolism, marred only a little by the guarantee that the DOC will have an ex officio seat among the members of one of the four report-writing teams.<sup>71</sup>

67. A few differences between these sections are noted *infra* note 71.

68. On the GAC, see *supra* text accompanying notes 28–41. The current chair is Mr. Janis Karklins of Latvia. *Elected Officers*, GAC, <http://gac.icann.org/elected-officers> (last visited Nov. 6, 2010). Former chairs were Sharil Tarmizi of Malaysia who served from 2002–2006 and Paul Twomey of Australia, 1999–2002. *Id.* Following his stint at the GAC, Mr. Twomey served as ICANN President and CEO from March 2003 to June 2009. *Paul Twomey*, ICANN, <http://www.icann.org/en/biog/twomey.htm> (last modified Aug. 13, 2010).

69. AFFIRMATION, *supra* note 1, ¶¶ 9.1–9.3.

70. ICANN President and CEO Beckstrom seemed to see this as particularly significant: But there’s no separate or unique or separate reporting to the United States government. All the reporting is to the world; that’s the real change. Under the JPA the reporting was just to the U.S. government, and some of it was handled publicly, and now all the reporting is global.

*ICANN CEO Talks About the New Affirmation of Commitments*, ICANN (Sept. 30, 2009), <http://www.icann.org/en/announcements/announcement-30sep09-en.htm>.

71. This provision is unique to ¶ 9.1:

[T]he review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the Chair of the Board of ICANN, the Assistant Secretary for Communications and Information of the DOC, representatives of the relevant ICANN Advisory Committees and Supporting Organizations and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the Chair of the Board of ICANN.

AFFIRMATION, *supra* note 1, ¶ 9.1. In contrast, in ¶ 9.2 the composition of the team is broader:

The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and

Symbolism may indeed be the strongest affirmative characteristic of the Affirmation: nothing in the Affirmation, nor anything else ICANN has said on the subject, suggests that any of these promises are enforceable by the U.S. Government, much less by an interested third party. The Affirmation can be terminated by either party on 120 days notice.<sup>72</sup> But since the MOU and the JPA are no more, termination is an empty threat—there's nothing to revert to if the Affirmation bites the dust. As Rod Beckstrom noted, "The Affirmation is effectively a perpetual agreement."<sup>73</sup>

## 2. What's Not There

The most interesting aspects of the Affirmation are not what it says, but rather the parts of ICANN's relationship with the U.S. that are not addressed explicitly. Some remain unchanged; for others the change in political relations symbolized by the Affirmation may make a difference. And, in one case, the lapse of the MOU/JPA regime creates a legal opening for ICANN to further liberate itself from any threat the U.S. Government might make to displace it.

**Final authority over changes to the root zone file.** The root zone file is a simple text document that, because it is copied and relied on by others, defines which TLDs are visible to most users on the Internet and defines which registry controls registrations in each of those domains.<sup>74</sup> Prior to the Affirmation, the U.S. Government, not ICANN, had final authority over changes to the key root zone file. The physical root zone file resides on a computer controlled by VeriSign (formerly NSI), a U.S. Government contractor.<sup>75</sup> The contractual relationship between the U.S. and NSI/VeriSign was itself fraught with conflict, but while the U.S. Government generally prodded NSI/VeriSign to cooperate with and even obey ICANN, there was one key exception. As spelled out in Amendment 11 to the U.S.–NSI contract, NSI (as it then was called)

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the CEO of ICANN.

*Id.* ¶ 9.2. Likewise, in ¶ 9.3:

The reviews will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN.

*Id.* ¶ 9.3.

72. *Id.* ¶ 11.

73. *ICANN CEO Talks About the New Affirmation of Commitments*, *supra* note 70.

74. See Froomkin, *supra* note 4, at 43-44.

75. As noted above, at times the contractor has been known as VeriSign and at times as Network Solutions, Inc. (NSI). See *supra* text accompanying note 16.

could not change the root file on ICANN's instructions without a counter-signature from a federal official:

While NSI continues to operate the primary root server, it shall request written direction from an authorized USG official before making or rejecting any modifications, additions or deletions to the root zone file. Such direction will be provided within ten (10) working days and it may instruct NSI to process any such changes directed by [ICANN] when submitted to NSI in conformity with written procedures established by [ICANN] and recognized by the USG.<sup>76</sup>

In other words, before the Affirmation, if ICANN wanted to add, change, or remove a TLD, it needed the DOC's permission, or at least acquiescence. Nothing in the Affirmation changes that,<sup>77</sup> and it remains true unless the U.S. amends its contract with VeriSign, or if the technical means by which the root zone file is authenticated change in a way that makes ICANN the only party controlling the cryptographic certification process.<sup>78</sup>

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76. Special Award Conditions, NCR-9218742, Amendment No. 11, *available at* <http://www.ntia.doc.gov/ntiahome/domainname/proposals/docnsi100698.htm> (Oct. 7, 1998) [hereinafter Amendment 11]. As ICANN had not formally been recognized by the DOC at the time the DOC entered into this agreement with NSI, ICANN was identified only as "NewCo" in Amendment 11.

77. In 2000, NSI was acquired by VeriSign, Inc. *Company History*, NETWORK SOLUTIONS, <http://about-networksolutions.com/corporate-history.php> (last visited Nov. 6, 2010). The Cooperative Agreement remained in effect between the DOC and VeriSign. ICANN, AMENDMENT 24 TO COOPERATIVE AGREEMENT BETWEEN NSI AND U.S. GOVERNMENT (2001), <http://www.icann.org/en/nsi/coopagmt-amend24-25may01.htm> (amending Section I(A)(4) of Amendment 19) ("NSI refers to Network Solutions, Inc., a wholly owned subsidiary of VeriSign, Inc., and its successors and assigns. From the date of execution of this amendment, the Cooperative Agreement will refer to 'VeriSign' as the non-government party to this agreement."). No subsequent amendments have expressly changed the Amendment 11 provision. The root responsibilities of Amendment 11 have been referred to in other subsequent contracts, which is evidence of their continued validity at least as late as August, 2006. *See, e.g.*, U.S. Dept. of Commerce Award/Contract to ICANN, *supra* note 15, § C.4.1 ("This purchase order, in itself, does not authorize modifications, additions, or deletions to the root zone file or associated information. (This purchase order does not alter root system responsibilities as set forth in Amendment 11 of the Cooperative Agreement NCR-9218742 between the DOC and VeriSign, Inc.)").

78. Subsequent to the Silicon Flatirons Conference, ICANN altered the procedure for authenticating—and thus, perforce, for changing—the content of the root. ICANN generates, and uses, the Key Signing Key ("KSK"), while VeriSign generates/uses the Zone Signing Key ("ZSK"). *See* JOE ABLEY ET AL., ROOT DNSSEC ROOT DESIGN TEAM, DNSSEC ROOT ZONE HIGH LEVEL TECHNICAL ARCHITECTURE 2 Fig. 1 (2010). ICANN originally proposed to manage the whole DNSSEC procedure for the root, including editing, signing, and publishing the zone file. *See* ICANN, ICANN PROPOSAL TO DNSSEC-SIGN THE ROOT ZONE (2008). VeriSign objected to this plan. *See* Brenden Kuerbis, *ICANN's DNSSEC Root Signing Proposal D.O.A.?*, INTERNET GOVERNANCE PROJECT BLOG (Oct. 3, 2008, 1:57 PM), [http://blog.internetgovernance.org/blog/\\_archives/2008/10/3/3899192.html](http://blog.internetgovernance.org/blog/_archives/2008/10/3/3899192.html);

**U.S. Government power to make a unilateral change in the root.** A re-delegation of a TLD is a change in control (from one registry to another) of the master file that defines who is registered in it. Re-delegations are by no means unheard of among the ccTLDs. Since the registry that controls a TLD's master database has in effect total power over who can register in it, ICANN has a moderately involved process, run through its IANA subsidiary, for determining whether to accept a re-delegation application.<sup>79</sup> The process for re-delegating a ccTLD involves a period of consultation with local stakeholders, although oddly the process is not very public. Even so, it is far from instantaneous.

In 2001, the U.S. Government decided to put the Neustar Corporation in charge of the .us ccTLD. The change was not especially controversial by ICANN standards, but it happened in a very rushed manner and bypassed the usual IANA procedures,<sup>80</sup> thus demonstrating the U.S. Government's unilateral power over the root.<sup>81</sup> Nothing has formally changed as a result of the Affirmation that would alter the U.S. Government's ability to order or persuade VeriSign to insert a change into the root without a recommendation from ICANN (acting through IANA). On the other hand, the U.S. Government's participation in the Affirmation, and especially its statements about ICANN's independence,<sup>82</sup> may be seen as a promise not to take any such action.<sup>83</sup> Plus, the one example of U.S. unilateralism in this arena relates to the .us TLD. As many governments see management of the ccTLD bearing their country code as something that is or should be primarily an internal

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VERISIGN, INC., ROOT ZONE SIGNING PROPOSAL (2008). The NTIA ultimately chose not to give ICANN the sole power to define the root. *See* NAT'L TELECOMMS. & INFO. ADMIN., TESTING AND IMPLEMENTATION REQUIREMENTS FOR THE INITIAL DEPLOYMENT OF DNSSEC IN THE AUTHORITATIVE ROOT ZONE (2009). The critical point for current purposes is that ICANN cannot act unilaterally; it must still get cooperation from an outside party—here, VeriSign—to make changes in the root.

79. *See generally Understanding the ccTLD Delegation and Redellegation Procedure*, IANA (Oct. 1, 2007), <http://www.iana.org/domains/root/delegation-guide>, for the current procedures.

80. *See Redellegation of .us Country-Code Top-Level Domain*, ICANN (Nov. 19, 2001), <http://www.icann.org/en/announcements/announcement-19nov01.htm> (admitting that “re-delegation occurred before the completion of the normal IANA requirements”). Interestingly, that announcement also promised that “[a] full IANA report will be posted as soon as it is complete.” *Id.* But, as of October 2010, I have not been able to find the report and am told it was never released. Another peculiarity is that the ITU's account of the transition, based on information provided by the U.S. Government, completely glosses over the issue. *See* INT'L TELECOMM. UNION, .US RE-DELEGATION CASE STUDY (2003), *available at* [http://www.itu.int/itudoc/itu-t/workshop/cctld/cctld037\\_ww9.doc](http://www.itu.int/itudoc/itu-t/workshop/cctld/cctld037_ww9.doc).

81. *See generally* Marc Schneiders & Simon Higgs, Root Fix for the .US Top Level Domain (Mar. 2002) (working paper), *available at* <http://tools.ietf.org/id/draft-higgs-schneiders-root-fix-us-00.txt>.

82. *See supra* text accompanying note 50.

83. *Cf. infra* Part II.D (discussing national security considerations relating to control of the root).

matter,<sup>84</sup> the precedent set may be of little value were the U.S. to try similar tactics with any other non-proprietary TLD in the future.

**The U.S. Government's reversionary interest in ICANN's contracts with key third parties.** The MOU specified that the U.S. Government kept the right to replace ICANN, and if it did, NSI/VeriSign, the other registrars, and the other registries—the people who run the mechanics of the DNS—must terminate their relationships with ICANN, thus allowing them to substitute the Government's new choice.<sup>85</sup> In furtherance of this duty, ICANN's early standard contract with, for example, registries, terminated if ever the DOC “withdraws its recognition of ICANN.”<sup>86</sup> There is, however, no evidence that the Government ever contemplated using this nuclear option or even threatened to do so. These contractual terms between ICANN and others remain in effect after the Affirmation, although there remains no way other than perhaps terminating the Affirmation itself for the U.S. to “withdraw its recognition of ICANN.” Furthermore, there appears to be no reason why ICANN could not, if it chose, amend its standard form agreement to remove the clause, and gradually amend the agreements in place as they come up for renewal. The lapse of the U.S. Government's pre-existing ability to credibly threaten to replace ICANN and force it to assign its contracts with the registries and registrars may be the most significant legal consequence of the Affirmation.

**The IANA Agreement is a separate agreement from the MOU.** Many of ICANN's most important powers—such as the ability to re-delegate domains and its control over IP number block allocations—derived not from the MOU but from a separate, most peculiar, purchase order by which ICANN contracted to provide the “IANA function” to the U.S. Government for an annual fee of \$0.<sup>87</sup> The IANA agreement is unaffected by the Affirmation. The current version of the IANA

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84. Cf. A. Michael Froomkin, *When We Say US™, We Mean It!*, 41 HOUS. L. REV. 839 (2004).

85. See MOU Amendment 3, *supra* note 13, § IV (“If the DOC withdraws its recognition of ICANN or any successor entity by terminating this MOU, ICANN agrees that it will assign to the DOC any rights that ICANN has in all existing contracts with the registries and registrars, including any data escrow agreement(s) between VeriSign and ICANN with respect to the .com, .net, and .org registries.”). See also MOU, *supra* note 13, § VII; MOU Amendment 1, *supra* note 13, § 3.

86. ICANN, ICANN-NSI REGISTRY AGREEMENT ¶ 24 (1999), <http://www.icann.org/en/nsi/nsi-registry-agreement-04nov99.htm> (“In the event that, prior to the expiration or termination of this Agreement under Section 14 or 16(B), the United States Department of Commerce withdraws its recognition of ICANN as NewCo under the Statement of Policy pursuant to the procedures set forth in Section 5 of Amendment 1 (dated November 10, 1999) to the Memorandum of Understanding between ICANN and the Department of Commerce, this Agreement shall terminate.”).

87. See Froomkin, *supra* note 4, at 86.

agreement is due to expire in 2011,<sup>88</sup> and there has been no word on whether it will be extended, amended, or allowed to die a quiet death. So long as the agreement remains in force, however, the U.S. retains the ability to threaten, albeit less credibly than before, to shift those powers to a different organization if ever ICANN does something so weird or dangerous that the U.S. felt moved to try to wrest control from it.<sup>89</sup>

C. *What the Affirmation Tells Us About ICANN's Legal Status and About Its Future*

The Affirmation suggests that one of the many competing explanations for ICANN's status is in ascendency. In *Wrong Turn in Cyberspace* I described twin narratives put forth by ICANN and the DOC. One was the "standard-setting story"<sup>90</sup> in which ICANN did not make policy or political decisions, but only proclaimed standards set by a bottom-up consensus process and then implemented them.<sup>91</sup> Another was the "private party story"—ICANN described as a not-for-profit California corporation genuinely created spontaneously without involvement of Ira Magaziner or other federal officials.<sup>92</sup> This private body, it was said, made its decisions independently, without overt or tacit instructions from the U.S. Government. A large number of ICANN's actions might have been designed to fulfill the objectives set in the White Paper—a mere government policy statement, and thus one with no legal force—but that was because those were good policies and ICANN believed in them. I contrasted these stories with competing critical

88. U.S. Dept. of Commerce Award/Contract to ICANN, *supra* note 15.

89. What exactly would happen if the U.S. were to attempt to assign the IANA function to a new body is a slightly complicated question. On the one hand, if the U.S. had the authority to enter into the IANA agreement with ICANN, then it ought logically to have the same authority to enter into a successor agreement with some other party. On the other hand, IANA's most important functions depend on the consent and cooperation of many third parties who all agree to treat IANA's decisions as authoritative. Thus, with regard to the IP numbering function for example, any new IANA's ability to do anything would depend in large part on being recognized by the five Regional Internet Registries ("RIRs"). *See infra* text accompanying note 139.

90. Froomkin, *supra* note 4, at 35.

91. The counter-narrative here is that the focus on "bottom-up" process is often a sham. *E.g.*,

Although ICANN likes to posit itself as an organisation rooted in communities, where policy is developed from the bottom up, this wonderfully democratic discourse stands in rather ugly contrast to the quite questionable practices that are all too frequently reported from the organisation (the rather stepsisterly treatment meted out to noncommercial users in ICANN in recent times, for example, immediately comes to mind.)

Anja Kovacs, *The ICANN-US DOC 'Affirmation of Commitments' - A Step Forward?*, NONCOMMERCIAL USERS CONSTITUENCY (NCUC) (Oct. 7, 2009, 4:43 AM), <http://ncdnhc.org/profiles/blogs/the-icannus-doc-affirmation-of>.

92. Froomkin, *supra* note 4, at 34.

narratives in which ICANN was political and in which the U.S. Government's ability to pull the plug on ICANN, combined with signs that the DOC might be quietly advising ICANN on policy matters, made ICANN a candidate for state actor status.<sup>93</sup>

The Affirmation explicitly states that ICANN is a private body.<sup>94</sup> Indeed, whatever the case a decade ago, the lapse of the MOU-JPA certainly strengthens the case for the private party story today as regards U.S. law, although ironically the reverse is partly true in the international arena. ICANN achieved this domestic de-governmentalization despite the fraying of the "standard setting story"—even ICANN's counsel admitted long ago that ICANN does policy.<sup>95</sup> ICANN's growing independence from the U.S.—even if it is not yet complete—weakens, I think fatally, the case for labeling ICANN a state actor under U.S. law in the future.

To date, criticisms of the Affirmation have tended to focus on accountability concerns.<sup>96</sup> Some argue that the lack of defined criteria and standards of measurement for ICANN's performance are likely to diminish the effectiveness of the review panels.<sup>97</sup> The power to select the review panels is concentrated in the hands of insiders—ICANN's CEO, the leader of the body being reviewed, chief among them. This led the Coalition Against Domain Name Abuse to criticize the Affirmation as making ICANN "a regulator that has been captured from within."<sup>98</sup> Others note that the review panels' recommendations are not binding,

93. *See id.*; *see also* Jennifer Arenett-Mitchell, *State Action Debate Reborn Again: Why the Constitution Should Act as a Checking Mechanism for ICANN's Uniform Dispute Resolution Policy*, 27 HAMLINE J. PUB. L. & POL'Y 307 (2006).

94. AFFIRMATION, *supra* note 1, ¶ 8 ("ICANN is a private organization").

95. *See* Joe Sims & Cynthia Bauerly, *A Response to Professor Froomkin: Why ICANN Does Not Violate the APA or the Constitution*, 6 J. SMALL & EMERGING BUS. L. 65, 66 (2002).

On the other hand, ICANN's official pronouncements still push the standard-setting story in the face of all the evidence. For example, "ICANN does not create or make Internet policy. Rather, policy is created through a bottom-up, transparent process involving all necessary constituencies and stakeholders in the Internet Community." *ICANN Factsheet*, ICANN, <http://www.icann.org/en/factsheets/fact-sheet.html> (last modified Aug. 13, 2010).

96. *E.g.*, R. Shawn Gunnarson, *ICANN's Weak Accountability Remains a Problem*, CIRCLEID (Jan 19, 2010, 1:09 PM PST), [http://www.circleid.com/posts/icanns\\_weak\\_accountability\\_remains\\_a\\_problem](http://www.circleid.com/posts/icanns_weak_accountability_remains_a_problem); Kieren McCarthy, *Accountability and Transparency at ICANN? Not Looking Good*, KIEREN MCCARTHY [DOTCOM] (June 16, 2010), <http://kierenmccarthy.com/2010/06/16/accountability-and-transparency-at-icann-not-looking-good>.

97. *See, e.g.*, Grant Gross, *New ICANN Agreement Runs Into Criticism*, TECHWORLD (Oct. 2, 2009, 06:39), [http://www.techworld.com.au/article/320747/new\\_icann\\_agreement\\_runs\\_into\\_criticism](http://www.techworld.com.au/article/320747/new_icann_agreement_runs_into_criticism).

98. Press Release, Coal. Against Domain Name Abuse, CADNA Asserts That the ICANN Affirmation of Commitments Falls Short (Sept. 30, 2009), <http://www.cadna.org/en/newsroom/press-releases/iccan-affirmation-of-commitments-falls-short>.

leaving the ICANN Board with the same decision-making autonomy it has enjoyed since it revised its Bylaws to dispense with the need for community consensus.<sup>99</sup>

Another line of critique has focused on who gained power as the U.S. gave some up: the GAC and insider business interests. The GAC's increasing ascendancy is somewhat ironic as ICANN was originally founded as a means to *privatize* the DNS. Version 1.0 of the ICANN Bylaws imagined an international board, but one drawn entirely from the private sector—government officials were not allowed to be Board members.<sup>100</sup> As described above, over time ICANN allied itself with non-U.S. governments as a way to extract the U.S. from its directly controlling role, and also as a way to head off non-U.S. support for alternatives to ICANN based in the ITU or the United Nations. In ICANN's latest evolution, rather than being fully privatized, the DNS is instead semi-internationalized.<sup>101</sup>

The role of business interests remains strong. As one perceptive critic put it,

[W]hile ICANN may be a public interest organisation on paper, in practice it is heavily dominated by large businesses, in particular those US-based, who seem to be willing to go to considerable lengths to defend their interests. The [Affirmation] has done nothing to check these tendencies. The review panels suggested are an internal affair, where those who develop policy will get to appoint the people who will assess the policy development processes, and most of those appointed, too, will come from within the organisation. While the suggested wider involvement of ICANN communities, including governments, in reviewing the organisation is a welcome move, it remains to be seen, then, to what extent these review panels will have teeth – in any case their recommendations are not binding. But some go even further and argue that the [Affirmation] has effectively removed the one democratic control that existed over ICANN's Board: that of the US Government. As the communities that supposedly make up ICANN do not have the power to unseat the Board, the Board now is effectively accountable . . . to none.<sup>102</sup>

Indeed, if it didn't have it before, the Affirmation now clearly gives

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99. MILTON MUELLER, IGP, ICANN, INC.: ACCOUNTABILITY AND PARTICIPATION IN THE GOVERNANCE OF CRITICAL INTERNET RESOURCES 17 (2009).

100. "Notwithstanding anything herein to the contrary, no official of a national government or a multinational entity established by treaty or other agreement between national governments may serve as a Director." ICANN, *supra* note 28, art. V § 5.

101. Cf. Avri Doria, *Post JPA: Tempered Happiness*, CIRCLEID (Sept. 30, 2009, 7:36 PM PST), [http://www.circleid.com/posts/post\\_jpa\\_tempered\\_happiness](http://www.circleid.com/posts/post_jpa_tempered_happiness) (making a similar critique).

102. Kovacs, *supra* note 91.

ICANN the freedom to decide what sort of organization it wants to be. Perhaps it will live up to its Affirmation of some very fine goals and commitments. Yet the very process that produced the Affirmation itself—one characterized by near-total secrecy in both drafting and approval,<sup>103</sup> followed by what appears to have been selective advance release of the text to friendly outside parties in order to get good press<sup>104</sup>—suggests that ICANN’s unusually limited definition of “maximum feasible” transparency<sup>105</sup> remains evidence of ICANN’s persisting lack of commitment to genuine transparency and accountability.

ICANN has the freedom to change. The question is whether, now that it is freed from many of the political constraints that have shaped, or perhaps even deformed it, ICANN sees a need to change or is happy as it is.<sup>106</sup>

## II. DOES THE DNS MATTER?

Ten years ago, I asserted that “[c]ontrol of the root potentially confers substantial economic and political power.”<sup>107</sup> The removal of a part of the United States’s control over ICANN provides an occasion to revisit that assertion.

It may seem odd to even address that issue at this juncture. After all, much of the pressure that convinced the U.S. Government to relax its hold on ICANN came from foreign allies convinced that there was something unfair, improper, or at least unseemly about the U.S.’s dominant role over a critical piece of an increasingly global network.

103. See Edward Hasbrouk, *ICANN’s New Commitment to Transparency Arrives Via Secret Process*, ICANNWATCH (Sept. 30, 2009, 6:59 AM), <http://www.icannwatch.org/article.pl?sid=09/09/30/165214>.

104. “It is extremely obvious that ICANN and NTIA gave advance preview access to a select number of cheer leading insiders in order to accumulate a nice opening day press release.” Karl Auerbach, *Independent – Not So Fast*, Comment to *New Agreement Declares ICAAN Independent*, CIRCLEID (Sept. 30, 2009, 2:49 PM PST), [http://www.circleid.com/posts/new\\_agreement\\_declares\\_icann\\_independent/#5796](http://www.circleid.com/posts/new_agreement_declares_icann_independent/#5796).

105. “ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.” ICANN, BYLAWS art. III § 1 (Sept. 30, 2009), <http://www.icann.org/en/general/archive-bylaws/bylaws-30sep09-en.htm#III>.

106. A related question is whether ICANN will burnish its claims to legitimacy. On the issue of ICANN’s legitimacy, see Sebastian Botzem & Jeanette Hofmann, *Transnational Governance Spirals: The Transformation of Regulatory Authority in Internet Governance and Corporate Financial Reporting* (2010) (unpublished manuscript), available at [http://duplox.wzb.eu/people/jeanette/pdf/BotzemHofmann\\_2010\\_draft.pdf](http://duplox.wzb.eu/people/jeanette/pdf/BotzemHofmann_2010_draft.pdf); Jonathan Weinberg, *Non-State Actors and Global Informal Governance -- The Case of ICANN*, in INTERNATIONAL HANDBOOK ON INFORMAL GOVERNANCE (Thomas Christiansen & Christine Neuhold eds. forthcoming 2011), available at <http://faculty.law.wayne.edu/Weinberg/informal.governance.chapter.revised.pdf>.

107. Froomkin, *supra* note 4, at 21.

Academics complained; one went so far as to bemoan “the totalitarian control of the Internet by the United States.”<sup>108</sup> Similarly, influential voices in the U.S. warned that to let go of the DNS would be to abandon a unique strategic asset. For example, leading members of the House Subcommittee on Communications Technology and the Internet wrote to the DOC as the JPA was due to expire, requesting many of the features that ultimately found their way into the Affirmation—and ended by requesting “a continued role for the Department of Commerce” in ICANN.<sup>109</sup>

The possible risks of having a body—be it public or private—in charge of the DNS can be grouped into four categories: (1) primarily economic issues involving market power over DNS service providers (registrars and registries), (2) economic power exercised over registrants and other third parties, (3) more general political power over speech or other uses of the Internet, and (4) geo-strategic.<sup>110</sup> Some of these, it turns out, are much more real dangers than others.

Many of the concerns about who controls the root remain valid, particularly those relating to the ability to shape or control the market for domain names, and a number of trademark-related issues, or issues arising from attempts to solve the trademark issues. But some other worries about the DNS now seem somewhat inflated. Still others, perhaps like the DNS itself someday, may be falling victim to technical change.

#### *A. Economic and Market Power Over Domain-Name Service Providers*

Most obviously, the power to control the root includes the ability to decide which TLDs are visible to the vast majority of Internet users who rely on the legacy root. The power to create is also, largely, the power to destroy. Thus, ICANN can make visible and usable—or nearly invisible and largely useless—TLDs such as .com or .ibm. It can re-delegate a TLD from one registry to another.<sup>111</sup>

TLDs are valuable<sup>112</sup> and people want them. Further, the power to

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108. Konstantinos Komaitis, *Aristotle, Europe and Internet Governance*, 21 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 57, 57 (2008).

109. Letter from Henry A. Waxman, Chairman, Comm. on Energy & Commerce, et al., to Hon. Gary Locke, Sec’y, U.S. Dep’t of Commerce (Aug. 4, 2009), *available at* <http://internetgovernance.org/pdf/doc044-2.pdf>.

110. Other issues, not considered in this paper, have to do with the specification of technical parameters such as new character sets (IDNs), DNSSEC, and IPv6.

111. All that is required, technically, is a change to one line in the root zone file. *See supra* note 17.

112. Estimates of new TLD values vary widely depending upon the TLD name, its relationship to established TLDs, and the estimated demand for second-level registrations. *See*

control TLDs can be leveraged into power over registries, and through them registrars. ICANN has used its power to limit the number of new TLDs, pick winners (or, some would claim, play favorites), and determine business models and domain name market structure (in both pro- and anti-competitive fashions). Since ICANN reserves the right to pass on the semantic validity of names, it has also been drawn into controversies about what terms are suitable for registration. Controversies include ICANN's rejection of ".iii" at the eleventh hour on the ground that it was hard to say,<sup>113</sup> and the rejection of ".xxx"—a decision subsequently found to be “not consistent with the application of neutral, objective and fair documented policy” in an International Chamber of Commerce arbitration held pursuant to ICANN's Independent Review Process.<sup>114</sup>

As it creates new TLDs, ICANN has also imposed various limits on what names they can register and to whom they can be offered. ICANN requires new global top level domains (“gTLDs”) to use a “landrush” system in which trademark holders get first dibs on names matching their trademarked character strings—even if the term has multiple meanings or is generic for some other use.<sup>115</sup> It also has a list of reserved words, primarily country names, that new gTLDs are not allowed to allocate to anyone.<sup>116</sup> This is an exercise of real power, and it is being exercised in service to the interests represented in the GAC, even though there is no relevant law in most countries, nor at the international level, that would require the owner of the TLD to withhold those potentially valuable names from the market.<sup>117</sup>

ICANN also uses its power over the root to “tax” (require

Alex Tajirian, *Examining Value in New ICANN TLDs on Search and Navigation, Companies, Domain Registries*, CIRCLEID (Aug. 14, 2009, 11:21 AM PST), [http://www.circleid.com/posts/examininng\\_value\\_in\\_new\\_icann\\_tlds](http://www.circleid.com/posts/examininng_value_in_new_icann_tlds). In 2000, the government of Tuvalu leased out their ccTLD “.tv” for \$50 million over a twelve-year period. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/tv.html> (click on the drop box entitled “Introduction”) (last visited Nov. 6, 2010).

113. See Jonathan Weinberg, *ICANN, “Internet Stability,” and the New Top Level Domains*, in COMMUNICATIONS POLICY AND INFORMATION TECHNOLOGY: PROMISES, PROBLEMS, PROSPECTS 3, 18 (Lorrie Faith Cranor & Shane M. Greenstein eds., 2002).

114. See ICM Registry, LLC v. Internet Corp. for Assigned Names & Nos., Int'l Ctr. for Dispute Resolution, at 70 (Feb. 19, 2010).

115. The classic example is an imaginary claim by the holder of the (then valid) trademark on “computer brand socks,” COMPUTER, Registration No. 1,282,545, to be given the rights to computer.tld, even though “computer” is generic for something other than footwear.

116. See ICANN, DRAFT APPLICANT GUIDEBOOK, VERSION 4 annex Separable Country Names List (2010); TIMOTHY DENTON & MAWAKI CHANGO, ICANN AND IANA RESERVED NAMES (2007); see also, e.g., ICANN, .AERO AGREEMENT APPENDIX 6 SCHEDULE OF RESERVED NAMES (2009), <http://www.icann.org/en/tlds/agreements/aero/aero-appendix-6-11jun09-en.htm>.

117. Froomkin, *supra* note 84, at 840.

contractual payments from) the registrars and registries,<sup>118</sup> costs that in most cases are passed on to the end-user. That ICANN determines the market structure for domain names is not a critique, but rather a design feature—something built into its DNA from the seminal White Paper that called ICANN into being. And while ICANN has not created nearly as much competition among registry terms of service as one might hope for, its early moves in particular broke NSI/VeriSign's monopoly as the only commercial domain registrar that mattered. There is now a flourishing competitive market in new domain name registrations, albeit one marked by a certain lack of attractive new stock and by various technology-based attempts to corner the market in abandoned names.<sup>119</sup>

One economic risk is that ICANN (or any other party controlling the DNS) might abuse its power by seeking extortionate payments (rents) from the registrars or registries. As ICANN's status as a nongovernmental body becomes increasingly solidified, it should become increasingly uncontroversial that the appropriate constraint on these negotiations come from private law and ordinary regulation, particularly anti-trust law.<sup>120</sup> In this context, ICANN's promise to remain in the U.S., and thus remain subject to U.S. anti-trust law is significant. So too is its promise to have offices around the globe, potentially making it subject to local private law remedies where it has offices, and also to the competition law jurisdiction of the EU.<sup>121</sup>

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118. In the 2009 fiscal year, ICANN raised \$60 million, \$54.8 million of which came from domain name registry and registrar fees. ICANN, 2009 COMPLETE REPORT: ADDRESSING THE GLOBAL INTERNET 58 (2009). This represents a \$10 million revenue increase over 2008, nearly all of which came from the domain name registry and registrar fees. *Id.*

119. *See, e.g.* Jonathan Zittrain & Benjamin Edelman, *Technical Responses to Unilateral Internet Authority: The Deployment of VeriSign "Site Finder" and ISP Response*, BERKMAN CENTER FOR INTERNET & SOCIETY, <http://cyber.law.harvard.edu/tlds/sitefinder> (last updated Oct. 7, 2003); Declan McCullagh, *ICANN Approves Wait List for Desired Domains*, CNET NEWS (Mar. 9, 2004), [http://news.cnet.com/ICANN-approves-wait-list-for-desired-domains/2100-1038\\_3-5171809.html](http://news.cnet.com/ICANN-approves-wait-list-for-desired-domains/2100-1038_3-5171809.html); ICANN SEC. & STABILITY ADVISORY COMM., SAC 022: SSAC ADVISORY ON DOMAIN NAME FRONT RUNNING (2007) (describing "front running," the practice of monitoring and preemptive registration of domain names searched for but not reserved by a potential registrant).

120. *See* Coalition for ICANN Transparency, Inc. v. VeriSign, Inc., 611 F.3d 495, 505-07 (9th Cir. 2010) (citing A. Michael Froomkin & Mark A. Lemley, *ICANN & Antitrust*, 2003 U. ILL. L. REV. 1, 72-73) (rejecting application of Noerr-Pennington immunity doctrine to VeriSign's transactions with ICANN).

121. Prior to the Affirmation, European Union Media and Telecommunications Commissioner Viviane Reding called for an "independent, international tribunal" to review ICANN's decisions. *See* Eric Pfanner, *New Chief Defends U.S. Base for Agency that Manages Web*, N.Y. TIMES (July 13, 2009), <http://www.nytimes.com/2009/07/13/technology/internet/13iht-icann13.html>. Having ICANN present in the EU and subject to its jurisdiction would seem at least as likely to achieve the EU's regulatory objectives regarding competition law, although perhaps not as much in other realms where the court option is less likely to be effective.

Another economic risk is that control of the DNS could be abused to erect anti-competitive barriers to entry to the market for new domain names, or structure the market oligopolistically. At present in the registry market, there are not significant barriers to entry, but there are some obstacles to price and service competition. ICANN's levies on market participants put a floor on prices. And ICANN's requirement that registrars impose some standard contract terms on registrants limits service competition in the service of third parties, that is, trademark holders.<sup>122</sup> This in turn creates the possibility that, as a result of limitations in the domain names available, late entrants to the Internet and especially smaller businesses and startups might find it more difficult to market online due to the shortage of semantically attractive domain names.<sup>123</sup>

### B. *Regulatory Power Over Registrants and Other End-Users*

More importantly, ICANN's power over the end-user extends well beyond the economic realm in which it can set a fee of a dollar or more per domain name. By requiring the registries—as a condition of being listed in the root—to require the registrars to include standard form terms in their contracts with registrants, ICANN gains a degree of control over registrants, at least to the extent that a registrar could impose terms in a contract with the end-user. To date, ICANN has used this power only for matters ostensibly relating to trademark issues raised by domain name registrations, most notably its imposition of the Uniform Domain Name Process (“UDRP”)<sup>124</sup> and retention of anti-privacy rules relating to the “whois” function.<sup>125</sup>

The interesting question, therefore, is how much this ability to impose contractual legal duties on domain name registrants could be used for other things, too. In theory, ICANN (or any other entity controlling the root) could attempt to leverage that control in either of two ways. First, and more plausibly, control over the root could be used to impose additional contract terms on registrants in service of social goals. Various suggestions have been floated over the past decade,

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122. See generally A. Michael Froomkin, *ICANN's “Uniform Dispute Resolution Policy”—Causes and (Partial) Cures*, 67 BROOK. L. REV. 605 (2002).

123. See Karl Manheim & Lawrence Solum, *An Economic Analysis of Domain Name Policy*, 25 HASTINGS COMM. & ENT L.J. 359 (2003); see also Jonathan G.S. Koppell, *Pathologies of Accountability: ICANN and the Challenge of “Multiple Accountabilities Disorder,”* 65 PUB. ADMIN. REV. 94, 101 (2005).

124. See Froomkin, *supra* note 122, at 651-52 (relating to imposition of UDRP).

125. On conflicts between ICANN's Whois policy and privacy laws, see Letter from EPIC & NGO to ICANN Board on Need for Whois Reform (Oct. 30, 2007), available at <http://ipjustice.org/wp/2007/10/30/epic-ngo-letter-to-icann-board-on-need-for-whois-reform>.

including proposals that ICANN require registrants to enforce copyright laws, remove some classes of hate speech, agree to takedown provisions, or otherwise assist law enforcement or others in the enforcement of legal or social policies. These suggestions have all differed from the UDRP in one critical fashion: whatever its merits or evils, the UDRP is designed to combat an ill—cybersquatting—that is a direct result of the structure of the DNS. In contrast, all of the other proposals that have bubbled up from time to time involve harms that are not direct results of the DNS; they may be torts or crimes that result from use of the Internet, but they are not specific to the DNS<sup>126</sup> and so far ICANN, to its credit, has shown no appetite for taking them on.

Somewhat less plausibly, control over the root also might be used to require that registrants themselves impose terms on parties with whom they contract either directly or indirectly via “web wrap”<sup>127</sup> contracts with people who visit their websites or read their e-mails. Thus, everyone registering a domain name would have to agree, for example, that it would never be used to infringe a copyright or send a threatening e-mail from a user address at that domain. In theory, this obligation on the registrant to bind his customers or readers would work in a manner akin to the way that ICANN requires registrars to impose contracts on their registrants. But in fact, the scope for such terms in domain name agreements must be extremely limited. For starters, it is far from obvious that such terms would be effective, especially in consumer contracts, in many parts of the globe. More fundamentally, there is only so much that most registrants would put up with before walking away from domain names and towards some alternative.<sup>128</sup>

### C. *Political Power Over Speech and Other Uses of the Internet*

Control of the root arguably might translate into political power. In particular some have warned that control of the root could be used to limit freedom of expression,<sup>129</sup> while others have sought to harness the

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126. The theoretical exception to this principle might be second (or higher-level?) domain names that were themselves obscene, harassing, or threatening. Presumably because this is at most a very minor problem compared to the number of names registered, there has been no serious effort to address this through the ICANN process.

127. Also known as “browsewrap” agreements, a “web wrap” contract is one in which the consumer is said to be bound by viewing the agreement. On the validity of these agreements, *compare* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996), *with* Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91 (3d Cir. 1991), *and* Ticketmaster Corp. v. Tickets.com, Inc., CV 99-7654 HLH (BQRx), 2000 U.S. Dist. LEXIS 4553 (C.D. Cal. Mar. 27, 2000).

128. Many social networks flourishing online already use addressing schemes independent of the DNS. Twitter, for example, handles all message traffic between users within its single domain. *See also infra* text at note 151 (noting importance of online search).

129. The danger is already manifest in cases of product or brand criticism, which can lead to a domain name being reassigned under ICANN’s uniform dispute resolution policy. *See*

power conferred by the root for what they see as the good,<sup>130</sup> causing yet others to warn of ICANN-enforced domination of the Internet.<sup>131</sup>

Control over the DNS can clearly be used to restrict the semantic content of TLDs—and as noted above, it is being used that way today. Under the current ICANN regime there is never going to be a .god or .satan domain name both because too many people would find it offensive or at least controversial, and because the process of picking the body to run them would be highly contentious. I and many others long ago proposed that ICANN should not attempt to control the semantic content of TLDs, but rather should only pass on the technical and organizational bona fides of applicants. Once cleared, they could pick any name they wanted that was not already taken. This proposal would have made highly controversial names possible, yet shielded ICANN from the blame. Even so, it did not attract much support, perhaps because it would have reduced ICANN's power over applicants, or because it created the possibility of conflicts between TLDs if someone picked a name too similar (in the eye of some beholder) to an already-existing name.<sup>132</sup>

But even if deities and demons will not be TLDs, they can be, and are, second-level domains.<sup>133</sup> The lost expressive value of a TLD seems

SUSAN SCHIAVETTA & KONSTANTINOS KOMAITIS, ICANN'S ROLE IN CONTROLLING INFORMATION ON THE INTERNET (2003); Froomkin, *supra* note 122, at 664; Jonathan L. Schwartz, *Making the Consumer Watchdog's Bark As Strong As Its Gripe: Complaint Sites and the Changing Dynamic of the Fair Use Defense*, 16 ALB. L. J. SCI. & TECH. 59, 78 (2006).

130. *E.g.* Cheryl B. Preston, *Internet Porn, ICANN, and Families: A Call To Action*, 12 J. INTERNET L. 3 (2008).

131. For example, there is this somewhat overwrought warning:

Down the road, one can imagine demands from Brussels that ICANN cooperate with EU efforts to tax commercial sales negotiated over the Internet. Or perhaps it will demand a new understanding aimed at forcing top level domain managers to uphold EU privacy standards against U.S. government security measures.

Jeremy Rabkin, *Careful What You Wish For: Why ICANN "Independence" is a Bad Idea*, CIRCLEID (June 22, 2009, 5:50 AM PST), [http://www.circleid.com/posts/20090622\\_careful\\_what\\_you\\_wish\\_icann\\_independence\\_bad\\_idea](http://www.circleid.com/posts/20090622_careful_what_you_wish_icann_independence_bad_idea).

132. The desire to prevent semantic confusion must be seen as a policy goal of ICANN and/or of governments influencing it although the right to protect a TLD from confusion by excluding alternatives is not rooted in law: most authorities agree that a TLD cannot be a trademark. *See, e.g.*, U.S. DEPT. OF COMMERCE, PATENT & TRADEMARK OFFICE, EXAMINATION GUIDE NO. 2-99, MARKS COMPOSED, IN WHOLE OR IN PART, OF DOMAIN NAMES (1999), *available at* <http://www.uspto.gov/trademarks/resources/exam/guide299.jsp> ("When a trademark, service mark, collective mark or certification mark is composed, in whole or in part, of a domain name, neither the beginning of the URL (<http://www>.) nor the TLD have any source indicating significance.").

133. *E.g.*, god.com and satan.com, both of which are registered to a party protecting its identity, with only the following showing under whois: c/o Nameview Inc. Whois IDentity Shield, PO Box 152, Britton's Hill, St. Michael, Barbados. (This information can be obtained by running the "whois" command on any UNIX computer connected to the Internet; i.e. by

quite small when so many second-level alternatives are available. As for the suggestion that the DNS could be leveraged to work a major change in privacy law, it is hard to see how the controller of the root would pull this off—other than an end-user's contract with a registrar possibly being used as a jurisdictional hook by which a national government would seek extraterritorial application of a local law.

So much then for what a rational master of the root could do. But there is no certainty that the master will always be rational. The Affirmation states that "ICANN is a private organization and nothing in this Affirmation should be construed as control by any one entity."<sup>134</sup> Yet independence from capture is not achieved by fiat. Suppose that through a nefarious and careful plot some interest group—political, religious, or economic—were able to capture ICANN and then attempted to make the most of their control of the root without regard for long-term political or economic consequences.<sup>135</sup> At present, the danger of most forms of political or religious capture seems somewhat remote if only because the U.S. Government retains some leverage over ICANN as described above in part I.B.2. (Of course, some people might suggest that the U.S. Government itself might be subject to capture, or has been captured, by an interest group. But in that scenario, we have much bigger problems than misuse of the DNS.) Admittedly, the risk of capture by an economic interest group seems less far-fetched, especially given arguments that ICANN was or is captured by an alliance of trademark interests and early movers in the TLD space who conspired together—perhaps with the tacit blessing of the U.S. Government—to block new entrants into the TLD market.<sup>136</sup> But as noted previously, the remedy for this sort of abuse remains, for better or worse, a reference to anti-trust law.<sup>137</sup>

What then might a fanatical political or religious group be able to

typing "whois satan.com.").

134. AFFIRMATION, *supra* note 1, ¶ 8.

135. ICANN itself seems concerned about this prospect. See ICANN, IMPROVING INSTITUTIONAL CONFIDENCE IN ICANN (2008), <http://www.icann.org/en/jpa/iic/improving-confidence.htm> (noting dangers of capture and making recommendations to lessen danger of capture).

136. Todd Davies, *A Behavioral Perspective on Technology Evolution and Domain Name Regulation*, 21 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 1, 24 (2008) (arguing that ICANN is at risk of "oligarchic" control); Comments of the Center for Democracy and Technology submitted to the National Telecommunications and Information Administration, U.S. Dept of Commerce, Regarding the Continued Transition of the Technical Coordination and Management of the Internet's Domain Name and Addressing System: Midterm Review of the Joint Project Agreement 8 (Jan. 25, 2008), [http://www.cdt.org/dns/icann/20080128\\_CDT-JPA-comments.pdf](http://www.cdt.org/dns/icann/20080128_CDT-JPA-comments.pdf) (warning of capture by of ICANN by governments); Jonathan Zittrain, *ICANN: Between the Public and the Private Comments Before Congress*, 14 BERKELEY TECH. L.J. 1071, 1091 (1999).

137. See *supra* text accompanying note 120.

do? As noted earlier, there are opportunities for financial gain. And there are ways to twist the future growth of the domain system to support, or avoid hurting, beliefs about offensive semantic content of TLDs. Onerous contracts with new TLDs might limit their registrations only to approved names, or perhaps attempt to require that they police their users, but it would be no simple matter to enforce similar rules on either the existing gTLDs or ccTLDs. The gTLDs have contractual rights in their delegations, and so long as courts remain open to enforce them, ICANN is subject to their jurisdiction, and the physical root is in VeriSign's control, the ordinary procedures of the courts should be fully adequate to guard against any chicanery. The ccTLDs often have a government behind them, and short of pulling the plug or re-delegating the domain to someone else—the nuclear option—in the current contractual regime there may be little that ICANN could do to seriously damage a ccTLD.<sup>138</sup>

At the end of the day, the greatest risk to the domain system from control of the root comes only if governments act in concert with the root's controller. At that point, instead of civil law and diplomatic pressure working to counter-balance an attempt to leverage control of the root to achieve a social or political aim, both the technical and legal arms would be working together. That might be bad. And that is why the increasing power of the GAC might give one a slight pause. On the one hand, the existence of the GAC provides a source of external supervision over ICANN's activities; on the other hand, GAC also provides a route by which governments—in the somewhat rare event that they can broadly agree on a common goal—might be able to harness the root to some extraneous end. If, for example, governments around the globe were to decide that Internet anonymity was a bad thing that needed to be stamped out, and if they passed domestic laws prohibiting it, the field might then be open to use the root to make life difficult for Internet Service Providers (“ISPs”) and website operators who provided

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138. As ICANN's previous fight with ccTLDs demonstrated, there are things ICANN can do to annoy them, notably to refuse routine redelegation requests when, say, a ccTLD operator changes its machinery around. But the ccTLDs managed to muddle through a lengthy period in which ICANN mistreated them in this way, and they could surely do it again if they had to. See Froomkin & Lemley, *supra* note 120, at 54. It has been suggested that the U.S. leaned on ICANN to redelegate domains in countries of strategic importance to it:

[T]wice United States-backed governments (namely Iraq and Afghanistan) have petitioned for redelegation of a country's ccTLD. Both requests were approved. While there is no evidence that the United States explicitly instructed ICANN to redelegate the .iq or the .af top-level domains, it is reasonable to conclude that ICANN felt pressure to comply because the Department of Commerce still has authority over it.

Scott P. Sonbuchner, *Master Of Your Domain: Should the U.S. Government Maintain Control Over the Internet's Root?*, 17 MINN. J. INT'L L. 183, 202 (2008).

anonymizing services.

The real prize, and the real danger here, is not the DNS: it is the IP numbering system. It is not complex to exist online without a domain name. It is impossible to exist online in today's Internet without the use of an IP number. The power over IP numbers, such as it is, comes with the IANA function. It is IANA that hands out blocks of IP numbers to the Regional Internet Registries ("RIRs"), who in turn hand them out to ISPs and others who demonstrate a need for them. And recall that IANA, at least at present, remains in ICANN's hands through a separate contract from the U.S. Government. So long as the U.S. keeps at least a reversionary interest in IP numbers by having contracts with ICANN that require routine renewal and that contain a termination clause, this danger remains fairly small. In any case, the RIRs are independent of ICANN, so there is not much ICANN can do to them except not give them new numbers. There are only five RIRs and they could act together in self-defense if ICANN were ever to try to starve them or, worse, attempted to destroy the Internet by giving the same number blocks to multiple recipients in an attempt to create IP number conflicts. The Affirmation is silent on IANA's fate, but there are powerful reasons why both the U.S. Government and ICANN might wish to preserve the status quo. On the U.S. Government's side, the IANA arrangement remains a less controversial fail-safe against the eventuality that if ICANN were ever to be captured by fanatics or otherwise go off the rails, the theoretical ability to reassign the IANA function creates a lever that the DOC could use to cripple a runaway ICANN. On ICANN's side, its status as a government contractor supplying numbers in accordance with U.S. federal policy provides a valuable shield against what might otherwise be plausible anti-trust risks. Then again, third parties outside the U.S. are watching carefully and clearly hope that the U.S. will internationalize this relationship.<sup>139</sup>

#### D. *The Myth of the DNS's Geo-Strategic Power*

Perhaps the strangest canard about the DNS is that control over it confers some sort of geo-strategic power.<sup>140</sup> From time to time writers

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139. See, e.g., Neelie Kroes, Vice-President, European Comm'n Responsible for the Digital Agenda, The Need for Accountability in Internet Governance, ICANN's 38th International Meeting (June 21, 2010), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/323> ("I am hopeful that the expiry of the IANA contract next year will be turned into an opportunity for more international cooperation serving the global public interest.").

140. Various forms of this view can be found in Kim G. von Arx & Gregory R. Hagen, *Sovereign Domains: A Declaration of Independence of ccTLDs from Foreign Control*, 9 RICH. J.L. & TECH. 1, 26-28 (2002) (ccTLDs as potential military resource and DNSs role in "Strategic Information Warfare"); Larry Barker, *Information Assurance: Protecting the Army's Domain-*

have suggested that by controlling the DNS the United States enjoys some potential advantage that might be deployed in case of real war or cyber-war. The first assertion is clearly wrong; the second seems implausible also.

The scenario seems to go something like this. The United States gets into a shooting war with Ruritania. The Ruritarians rely on the Internet for critical military and civilian communications. If the U.S. could knock out Ruritanian Internet communications, it would secure a material military advantage. So far, so good. But how is control of the DNS supposed to achieve this? Apparently by the U.S. using its power over the DNS to delete Ruritania's ccTLD, bringing the nation to its virtual knees.

Like every nation, the Ruritarians have a ccTLD, which we will imagine is .rt.<sup>141</sup> There is no question that whoever controls the root can delete .rt from the root:

In theory, the United States could demand that a specific country's ccTLD be erased. [In this view,] [b]ecause the Department of Commerce still has ultimate authority over ICANN, it [would be] able to bypass ICANN procedure and make demands [either that ICANN instruct VeriSign to delete .rt, or make the demand of VeriSign directly, or seize control of the computer with the root zone file.] Erasing a top-level domain would effectively [cause] all websites using that suffix [to become inaccessible to most users] and prevent . . . e-mailing [from reaching] any such addresses. An entire country's Internet presence would disappear for the majority of Internet users. [Fear of this scenario may explain] why some of the main critics of ICANN are countries with poor relationships with the United States.<sup>142</sup>

The introduction of DNS Security Extensions ("DNSSEC")<sup>143</sup> into the root zone alteration process only changes the details of this scenario in that seizing the computer controlling the root zone is no longer enough: now the U.S. Government needs access to VeriSign's key

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*Name System*, ARMY COMMUNICATOR, SUMMER 2001, at 39, available at <http://www.signal.army.mil/ocos/ac/Edition,%20Summer/Summer%2001/dnsia.htm> (risks to military operations); Ariel Rabkin, *Who Controls the Internet?*, WKLY STANDARD, MAY 15, 2009, at 14 (political and economic influence via DNS); Sonbuchner, *supra* note 138, at 207 (controller of the DNS could create and enforce "terms of . . . use" for the Internet).

141. The list of genuine ccTLDs appears at IANA, Root Zone Database, <http://www.iana.org/domains/root/db> (last visited Nov. 27, 2010). At present (November, 2010), there is no .rt.

142. Sonbucher, *supra* note 138, at 203.

143. A lawyer's introduction to DNSSEC in the root can be found at Notice, Enhancing the Security and Stability of the Internet's Domain Name and Addressing System, 73 Fed. Reg. 59,608 (Oct. 9, 2008). A software engineer's introduction can be found at *Documentation*, ROOT DNSSEC, <http://www.root-dnssec.org/documentation> (last visited Nov. 27, 2010).

signing key as well.<sup>144</sup> Otherwise, as before, in order to achieve the change it wants, the U.S. Government must persuade ICANN and VeriSign, or just VeriSign, to make the change the U.S. Government demands.<sup>145</sup>

If, for whatever reason, the root zone file were changed to eliminate .rt, then in the ordinary course of things, as the new root zone file propagates across the net, addresses ending in .rt will stop functioning because computers no longer know where to find the .rt registry's file that would tell them where to send packets destined for .rt domains. Ruritania is in chaos! U.S. forces are met with flowers . . . wait, wrong movie . . . .

The scenario gains some potential plausibility due to the location of the root zone file in the U.S. Even if ICANN has rules prohibiting political deletions or surreptitious change of control of a domain, it is possible that if faced with a claim of national emergency VeriSign or whoever was running the server hosting the root zone file would allow the U.S. to do whatever it asked. That at least appears to be what several phone companies did when asked to allow illegal wiretaps in the name of national security.<sup>146</sup>

Even so, it could never work that way, and it certainly could never work that way twice.

For starters, unless the government of Ruritania is technically clueless,<sup>147</sup> it will have taken two simple steps that will protect it against

144. See *supra* note 78.

145. Other than the fact that VeriSign operates this computer as a U.S. Government contractor, I am not aware of any legal authority that would require VeriSign to accede to such a request. The IANA contract might arguably provide legal cover for this act, although there is certainly nothing in there that would require it. The IANA Contract states that the IANA function

includes receiving delegation and redelegation requests, investigating the circumstances pertinent to those requests, and making its recommendations and reporting actions undertaken in connection with processing such requests. This function, however, does not include authorizing modifications, additions, or deletions to the root zone file or associated information that constitute delegation or redelegation of top level domains. (This purchase order does not alter root system responsibilities as set forth in Amendment 11 of the Cooperative Agreement NCR-9218742 between the DoC and VeriSign, Inc.).

IANA Contract, *supra* note 15, § C.2.1.1.2. Amendment 11, *supra* note 76, does not explicitly consider whether NSI/VeriSign could ever act independently of ICANN, although the section on "Recognition of NewCo" could be read to suggest not. In any event, the U.S. Government could always request, even demand, VeriSign's cooperation citing national security, even if there were no contractual grounds for doing so. And VeriSign, if it agreed cooperation was in the national interest, or otherwise served a corporate interest, might agree to do what it was asked.

146. See *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 700 F.Supp.2d 1182 (N.D. Cal. 2010) (most recent proceeding in a lawsuit alleging systematic surreptitious and illegal domestic wiretaps by NSA).

147. Just as all criminals are not clever, so too all governments are not technically adept.

the disappearance of the .rt domain. First, it will have registered many names in .com or some other TLD and pointed those names to its critical sites as backups. Second, it will have recorded the IP numbers of the most critical sites, burned them to CDs, and distributed those disks to its military and critical infrastructure. If the .rt domain suddenly starts disappearing, then forewarned internet users in Ruritania will start using the alternate domain names or will fire up the emergency CD and write over their cached copy of the zone file.

More insidiously, the U.S. could quietly enter a re-delegation into the root, grabbing control of .rt. Then the U.S. would mirror the old .rt information on its new machine and use its control to enable traffic analysis and perhaps even eavesdropping. As the U.S. built up a database of .rt second-level domains from the queries it received, or by other national technical means, it could quietly insert some changes in the .rt second level records that would send all traffic to a U.S. machine before being sent on to its original destination. This attack is subtler, but Ruritanian technologists should be able to detect it almost instantly by monitoring the root which, after all, is public and must be visible in order to achieve its function. If the delegation of .rt changed, they could sound the alarm and apply the same counter-measures as in the more direct deletion scenario.

Next, consider the reaction of key Internet players such as major ISPs. Ordinarily they set their computers to mechanically copy alterations in the master zone file and to use the most recent file to serve their users. But if they become aware that the file has been intentionally tampered with for political reasons, at least some of them will go to their backup copies and manually restore .rt to their cached copies of the root. Certainly any ISPs in .rt will be forced to restore it, and internal .rt communications will recover quickly; how much the outside world will be able to send in data will depend on how the world internet technical community responds initially.

But that's not all. Even if the disruption were effective for a day or two due to the Ruritanian failure to anticipate and plan for the problem, the international community would ensure that it never happened again by switching to an alternate system that no longer relied on a file that the U.S. could manipulate single-handedly.<sup>148</sup> The bottom line is that whatever geo-strategic power exists over the root, it can only be exercised

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Even so, what are the odds of there being a large number of foreign governments technically adept enough to have their militaries rely on Internet communications and addresses provided via the national ccTLD, yet not take basic steps to protect those communications?

148. See Froomkin, *supra* note 4, at 49 (arguing that such a ploy would work only once because the international community would immediately stop mirroring ICANN's root server regardless of whether it split the root).

once, if at all.

## CONCLUSION

As a legal document, the Affirmation itself is a paper tiger. It may not be a contract; even if it is a contract, there is no practicable way for either of the parties to enforce it (and almost no promises by the U.S. Government). Although both parties have a right to cancel the Affirmation upon notice, it is difficult to imagine circumstances in which either party would have anything to gain by such an act—and is also not that easy to imagine circumstances in which the cancellation would actually make a legal difference to either party. Indeed, the most important legal aspect of the Affirmation is that it is not the JPA which it replaced, for the JPA had some teeth.

In contrast, the Affirmation likely will be much more meaningful as a political document. By announcing in the Affirmation that it would allow the JPA to lapse, the U.S. signaled that it was giving up the most visible of its claims to direct control of ICANN. In so doing, it gave up powers that it could reasonably have calculated it would be unlikely to use: there must be some non-zero risk that ICANN could be captured by an ideological faction but, unlike the risk of economic capture, ideological capture does not seem a major worry at present. By further enhancing the power of the GAC, the U.S. DOC sought, with it appears some success, to meet the most vociferous critics of the unique U.S. role in the governance of the DNS (or, if you prefer, background supervision of the governor of the DNS) more than half way, yet without completely giving up its fail-safe powers, those deriving from the IANA contract and from ICANN's domicile in California.

If the U.S. won some breathing room from its critics, and the international community achieved a large step towards its agenda of internationalizing the control of the governance of the DNS, the biggest winner from the Affirmation undoubtedly remains ICANN itself. ICANN is now free of U.S. Government control (except perhaps at the extreme margin) and yet still substantially free of real control by other governments. World governments must channel their influence via the GAC. The GAC has real influence over ICANN, but it does not have control. This fact, and the fact that the residual U.S. influence is not totally eradicated, has caused some non-U.S. leaders to call for yet more divestment by the U.S., but so far these calls have been rare.<sup>149</sup>

Newly unchained, or at least on a very long leash, ICANN enjoys unprecedented freedom to shape its own fate and to decide what sort of body it wants to be. In losing the specter of undue U.S. influence,

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149. See e.g., Kroes, *supra* note 139.

ICANN has also lost its major excuse for failing to live up to its professed ideals of transparency and accountability to the wider Internet community. What will happen next depends in large part on the extent to which ICANN's struggle for autonomy has shaped its DNA, and to what extent ICANN is ready to transcend its past. Developments to watch include the unfolding of the ICANN–GAC relationship, whether ICANN's budget continues its rapid growth or stabilizes, and whether ICANN's new freedom allows it to move forward on new gTLDs.

The DOC's next big decision will come no later than September 30, 2011, when the DOC must decide the fate of the IANA contract.<sup>150</sup> Until then at least, ICANN is unlikely to make any new moves to leverage its power over the legacy root in order to control the behavior, much less the speech, of end-users in any realm other than the trademark arena already occupied by the UDRP. The fear that it might attempt to expand its reach, either on its own or if captured by some outside group, remains the major argument for the U.S. to retain its hold on the IANA function. On the other hand, if the U.S. accepts that, as argued above, the DNS lacks geo-strategic value, the U.S. may be more willing to let go.

In time, geo-strategy may not be the only arena in which the DNS's centrality diminishes. If it is true that “[e]ighty percent of all online sessions begin with search,”<sup>151</sup> then the DNS's importance to the World Wide Web is well into its decline. Of course, the Web is not the Internet; many other services from e-mail to video transport rely on the DNS also. But the example of search, combined with the growth of “walled garden” discursive communities such as MySpace and Facebook, plus virtual worlds such as Second Life and World of Warcraft, all suggest that the long-predicted moment when the human-readable names for Internet addresses that the DNS enables begins to lose its importance really is just around the corner.

Meanwhile, however, until something contactless like phone-to-phone Bluetooth takes off, we will still need a human-friendly address to give to new potential correspondents in one-to-one relationships. Internet broadcasters, or their fine-tuned heavily personalized successors, will need some way to advertise their presence and make it easy for users to find them. At present, a nice memorable Web address works well on a business card, the side of a bus, or in a short radio or TV commercial. Thus, ICANN remains important because even if control of the DNS has limited political relevance, that control still has substantial economic importance—so long as the DNS's hegemony of convenience continues.

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150. *See supra* note 15.

151. Jonathan Richman, *4 Technologies That Are Killing the URL*, IMEDIA CONNECTION (July 27, 2009), <http://www.imediaconnection.com/content/23912.asp>.

## POSTSCRIPT

As this article went to press, the National Telecommunications and Information Administration (NTIA), the agency within the Department of Commerce charged with interacting with ICANN, set off the U.S. government's first public post-Affirmation dispute with ICANN in a letter from Assistant Secretary of Commerce Lawrence E. Strickling protesting ICANN's plans to restart the new generic top-level domain ("gTLD") application process.<sup>152</sup>

The gTLD issue has been one of the most contentious and long-running disputes at ICANN. There are many applicants who seek new gTLDs for a variety of reasons, ranging from a desire to enter the registry (and in some cases also registrar) market for second-level domains to a desire for a branded bespoke gTLD for internal use or marketing purposes. On the other hand, there are powerful forces both within and outside ICANN that oppose new gTLDs. Some intellectual property rights-holders fear that new gTLDs will increase trademark infringement opportunities and monitoring costs, and although they don't come out and say it, some incumbent gTLD operators—many of whom are now ICANN insiders—wish to hold on to first- and second-mover advantages.<sup>153</sup> Some governments also have expressed concerns as to the semantic content of potential new gTLDs on public order grounds, while other non-governmental actors have expressed technical or aesthetic objections to the proliferation of gTLDs.

After years of delay, ICANN, in 2010, took significant steps towards restarting the gTLD application process, most notably by proposing a new gTLD Applicant Guidebook,<sup>154</sup> and opening it up for public comment until January 15, 2011. The results and a timetable were to be voted on at ICANN's Board Meeting in Cartagena in December 2010, a few days after Assistant Secretary Strickling sent his letter.<sup>155</sup>

The Strickling letter contained a specific complaint about the new gTLD process and a more general complaint about ICANN's failure to re-engineer its decision-making processes "to meet the obligations

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152. See Letter from Lawrence E. Strickling, Assistant Sec'y for Commc'ns and Info. for the Dep't of Commerce, and Adm'r, of the Nat'l Telecomm. and Info. Admin., to Rod Beckstrom, ICANN President and CEO (Dec. 2, 2010), *available at* <http://forum.icann.org/lists/5gtld-guide/msg00013.html> [hereinafter Strickling Letter].

153. See, e.g. Milton Mueller, Comment to *Why ICANN Should Ignore the NTIA's Letter*, IGP BLOG (Dec. 5, 2010, 2:35 PM EST), [http://blog.internetgovernance.org/blog/\\_archives/2010/12/3/4694980.html#1386865](http://blog.internetgovernance.org/blog/_archives/2010/12/3/4694980.html#1386865).

154. See ICANN, GTLD APPLICANT GUIDEBOOK: PROPOSED FINAL VERSION (2010).

155. See *Welcome to the New Generic Top-Level Domains (gTLDs) Proposed Final Applicant Guidebook Public Comment Forum*, ICANN, <http://icann.org/en/topics/new-gtlds/comments-5-en.htm> (last visited Dec. 18, 2010).

identified in the *Affirmation* (e.g., transparency, accountability, fact-based policy development).<sup>156</sup> The specific complaint was that NTIA had previously emphasized the importance of doing a full economic analysis of the possible impact of new gTLDs and that ICANN had failed to complete these studies and make them available for public comment. In his letter, Assistant Secretary Strickling asked ICANN to further delay the opening of the new gTLD application process until all the economic studies were complete. Notably absent from the Strickling letter, however, was any suggestion about what, if anything, NTIA planned to do about its complaint other than to discuss them within the GAC.<sup>157</sup>

There are at least three ways to read this silence: One could see the absence of any real threat as a case of the mailed fist in the velvet glove: if NTIA really has power over ICANN, it may have no need to rub ICANN's nose in it. On the other hand, the absence of any credible threat other than recourse to GAC may reflect the reality that in the post-Affirmation world there is nothing much else that NTIA could do short of invoking the nuclear options of either re-assigning the IANA contract,<sup>158</sup> or perhaps telling VeriSign to ignore ICANN's instructions to enter any new TLD into the root.<sup>159</sup> As a legal matter, the second view seems to me to be the correct one. As a political matter, there seems no chance that NTIA would unilaterally invoke either of these nuclear options just to prevent the creation of new gTLDs.

A third, and also plausible, view paints the entire exercise as simple political theater. The Commerce Department has tended to be very solicitous of the interests of intellectual property rights holders. It is likely that they have complained about ICANN's moves towards re-opening the gTLD application process. In this view, the NTIA's letter is little more than a sop to powerful interests, a way of showing that the Obama administration is doing what it can, but one sent without any real expectation that it will derail the process. This cynical view gains some support from the relative weakness of Assistant Secretary Strickling's substantive case regarding the lack of economic analysis of new gTLDs. As explained by Milton Mueller, there have in fact been a plethora of economic studies of the impact of new gTLDs, and the likely effects are well understood.<sup>160</sup>

On the other hand, Assistant Secretary Strickling's specific

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156. Strickling Letter, *supra* note 152, at 2.

157. *Id.*

158. See *supra* text accompanying notes 88-89; see also *supra* text following note 150.

159. See *supra* note 78.

160. See Milton Mueller, *Why ICANN Should Ignore the NTIA's Letter*, IGP BLOG (Dec. 3, 2010, 4:52 PM EST), [http://blog.internetgovernance.org/blog/\\_archives/2010/12/3/4694980.html](http://blog.internetgovernance.org/blog/_archives/2010/12/3/4694980.html).

complaint has some procedural validity, and ties in to his more general complaint about the lack of transparency and regularity in ICANN's decision-making. Even if there have been improvements in the year since the Affirmation was signed, when measured by the relatively demanding standards of the U.S. Administrative Procedures Act for example, ICANN's decision-making still leaves a great deal to be desired. It is a bedrock principle of U.S. administrative law that an agency limits its decisions to the record before it and discloses all the facts on which it plans to rely when setting out a proposed rule. ICANN works on a much more relaxed system in which it is not necessarily easy to identify all the relevant facts on which a decision may be based. For example, some of the economic studies to which Prof. Mueller refers—all of which are surely known to ICANN—were not formally part of the record ICANN assembled for public comment. And whenever the ICANN Board meets, as it was scheduled to do in Cartagena to discuss the gTLD issue, there was always the possibility that it would emerge from its (private) deliberations with an unexpected result—one that, were a U.S. administrative agency to try, would be thrown out as a “bolt from the blue” rather than a “logical outgrowth” of its proposed policy.<sup>161</sup> In the event, the Board voted in Cartagena to accept many of the gTLD-related recommendations, but to delay the new gTLD process in order to continue discussions with the GAC regarding its continuing claim that governments should have a right to block new gTLDs they dislike on grounds that they violate “morality and public order” or contain geographic identifiers.<sup>162</sup>

In the past, ICANN's explanations for its decisions have varied in detail, rarely reaching the level that U.S. administrative agencies must achieve in a final Notice of Rulemaking. Such flexibility is on the one hand the hallmark of privatized governance, and on the other hand also its bane.

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161. *See, e.g.*, *Shell Oil Co. v. EPA*, 950 F.2d 741, 750 (D.C. Cir. 1991) (holding final rule cannot be a “bolt from the blue”); Phillip M. Kannan, *The Logical Outgrowth Test in Rulemaking*, 48 ADMIN. L. REV. 213, 214-15 (1996).

162. *See* ICANN, ADOPTED BOARD RESOLUTIONS § 2 (Dec. 10, 2010), <http://icann.org/en/minutes/resolutions-10dec10-en.htm#2>.

## APPENDIX

## AFFIRMATION OF COMMITMENTS BY THE UNITED STATES DEPARTMENT OF COMMERCE AND THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

1. This document constitutes an Affirmation of Commitments (Affirmation) by the United States Department of Commerce (“DOC”) and the Internet Corporation for Assigned Names and Numbers (“ICANN”), a not-for-profit corporation. In recognition of the conclusion of the Joint Project Agreement and to institutionalize and memorialize the technical coordination of the Internet’s domain name and addressing system (DNS),<sup>1</sup> globally by a private sector led organization, the parties agree as follows:

2. The Internet is a transformative technology that will continue to empower people around the globe, spur innovation, facilitate trade and commerce, and enable the free and unfettered flow of information. One of the elements of the Internet’s success is a highly decentralized network that enables and encourages decision-making at a local level. Notwithstanding this decentralization, global technical coordination of the Internet’s underlying infrastructure - the DNS - is required to ensure interoperability.

3. This document affirms key commitments by DOC and ICANN, including commitments to: (a) ensure that decisions made related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent; (b) preserve the security, stability and resiliency of the DNS; (c) promote competition, consumer trust, and consumer choice in the DNS marketplace; and (d) facilitate international participation in DNS technical coordination.

4. DOC affirms its commitment to a multi-stakeholder, private sector led, bottom-up policy development model for DNS technical coordination that acts for the benefit of global Internet users. A private coordinating process, the outcomes of which reflect the public interest, is best able to flexibly meet the changing needs of the Internet and of Internet users. ICANN and DOC recognize that there is a group of participants that engage in ICANN’s processes to a greater extent than Internet users generally. To ensure that its decisions are in the public interest, and not just the interests of a particular set of stakeholders,

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1. For the purposes of this Affirmation the Internet's domain name and addressing system (DNS) is defined as: domain names; Internet protocol addresses and autonomous system numbers; protocol port and parameter numbers. ICANN coordinates these identifiers at the overall level, consistent with its mission.

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

5. DOC recognizes the importance of global Internet users being able to use the Internet in their local languages and character sets, and endorses the rapid introduction of internationalized country code top level domain names (ccTLDs), provided related security, stability and resiliency issues are first addressed. Nothing in this document is an expression of support by DOC of any specific plan or proposal for the implementation of new generic top level domain names (gTLDs) or is an expression by DOC of a view that the potential consumer benefits of new gTLDs outweigh the potential costs.

6. DOC also affirms the United States Government's commitment to ongoing participation in ICANN's Governmental Advisory Committee (GAC). DOC recognizes the important role of the GAC with respect to ICANN decision-making and execution of tasks and of the effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the Internet DNS.

7. ICANN commits to adhere to transparent and accountable budgeting processes, fact-based policy development, cross-community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, and to publish each year an annual report that sets out ICANN's progress against ICANN's bylaws, responsibilities, and strategic and operating plans. In addition, ICANN commits to provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied.

8. ICANN affirms its commitments to: (a) maintain the capacity and ability to coordinate the Internet DNS at the overall level and to work for the maintenance of a single, interoperable Internet; (b) remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community; and (c) to operate as a multi-stakeholder, private sector led organization with input from the public, for whose benefit ICANN shall in all events act. ICANN is a private organization and nothing in this Affirmation should be construed as control by any one entity.

9. Recognizing that ICANN will evolve and adapt to fulfill its limited, but important technical mission of coordinating the DNS, ICANN further commits to take the following specific actions together with ongoing commitment reviews specified below:

9.1 Ensuring accountability, transparency and the interests of

global Internet users: ICANN commits to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders by: (a) continually assessing and improving ICANN Board of Directors (Board) governance which shall include an ongoing evaluation of Board performance, the Board selection process, the extent to which Board composition meets ICANN's present and future needs, and the consideration of an appeal mechanism for Board decisions; (b) assessing the role and effectiveness of the GAC and its interaction with the Board and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS; (c) continually assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof); (d) continually assessing the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet community; and (e) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development. ICANN will organize a review of its execution of the above commitments no less frequently than every three years, with the first such review concluding no later than December 31, 2010. The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the Chair of the Board of ICANN, the Assistant Secretary for Communications and Information of the DOC, representatives of the relevant ICANN Advisory Committees and Supporting Organizations and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the Chair of the Board of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations. Each of the foregoing reviews shall consider the extent to which the assessments and actions undertaken by ICANN have been successful in ensuring that ICANN is acting transparently, is accountable for its decision-making, and acts in the public interest. Integral to the foregoing reviews will be assessments of the extent to which the Board and staff have implemented the recommendations arising out of the other commitment reviews enumerated below.

9.2 Preserving security, stability and resiliency: ICANN has developed a plan to enhance the operational stability, reliability, resiliency, security, and global interoperability of the DNS, which will be

regularly updated by ICANN to reflect emerging threats to the DNS. ICANN will organize a review of its execution of the above commitments no less frequently than every three years. The first such review shall commence one year from the effective date of this Affirmation. Particular attention will be paid to: (a) security, stability and resiliency matters, both physical and network, relating to the secure and stable coordination of the Internet DNS; (b) ensuring appropriate contingency planning; and (c) maintaining clear processes. Each of the reviews conducted under this section will assess the extent to which ICANN has successfully implemented the security plan, the effectiveness of the plan to deal with actual and potential challenges and threats, and the extent to which the security plan is sufficiently robust to meet future challenges and threats to the security, stability and resiliency of the Internet DNS, consistent with ICANN's limited technical mission. The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

9.3 Promoting competition, consumer trust, and consumer choice: ICANN will ensure that as it contemplates expanding the top-level domain space, the various issues that are involved (including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection) will be adequately addressed prior to implementation. If and when new gTLDs (whether in ASCII or other language character sets) have been in operation for one year, ICANN will organize a review that will examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion. ICANN will organize a further review of its execution of the above commitments two years after the first review, and then no less frequently than every four years. The reviews will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and

Supporting Organizations, and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

9.3.1 ICANN additionally commits to enforcing its existing policy relating to WHOIS, subject to applicable laws. Such existing policy requires that ICANN implement measures to maintain timely, unrestricted and public access to accurate and complete WHOIS information, including registrant, technical, billing, and administrative contact information. One year from the effective date of this document and then no less frequently than every three years thereafter, ICANN will organize a review of WHOIS policy and its implementation to assess the extent to which WHOIS policy is effective and its implementation meets the legitimate needs of law enforcement and promotes consumer trust. The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, as well as experts, and representatives of the global law enforcement community, and global privacy experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

10. To facilitate transparency and openness in ICANN's deliberations and operations, the terms and output of each of the reviews will be published for public comment. Each review team will consider such public comment and amend the review as it deems appropriate before it issues its final report to the Board.

11. The DOC enters into this Affirmation of Commitments pursuant to its authority under 15 U.S.C. 1512 and 47 U.S.C. 902. ICANN commits to this Affirmation according to its Articles of Incorporation and its Bylaws. This agreement will become effective October 1, 2009. The agreement is intended to be long-standing, but may be amended at any time by mutual consent of the parties. Any party may terminate this Affirmation of Commitments by providing 120 days written notice to the other party. This Affirmation contemplates no transfer of funds between the parties. In the event this Affirmation of Commitments is terminated, each party shall be solely responsible for the

payment of any expenses it has incurred. All obligations of the DOC under this Affirmation of Commitments are subject to the availability of funds.

FOR THE NATIONAL  
TELECOMMUNICATIONS  
INFORMATION ADMINISTRATION:

FOR THE INTERNET CORPORATION  
AND FOR ASSIGNED NAMES AND  
NUMBERS:

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Name: Lawrence E. Strickling  
Title: Assistant Secretary for  
Communications and Information

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Name: Rod Beckstrom  
Title: President and CEO

Date: September 30, 2009

Date: September 30, 2009