From: Edward Morris
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By way of introduction, my name is Edward Morris.

An American citizen currently living in the United Kingdom I am the Chief Executive Officer of Safe Drugs Saves Lives, a UK charity dedicated to saving lives by promoting drug testing at festivals, clubs and concerts throughout Europe. These comments, however, are mine alone and are the result of five years of involvement in the ICANN community, including, during that time, as a member of the GNSO Council, twice elected by the noncommercial community, as the only individual selected as a rapporteur for subgroups in both stage one and stage two of the ICANN transition project, as past Treasurer of the Noncommercial Stakeholders Group and as a former member of the Executive Committee of the Noncommercial Users Constituency. I am no longer involved as a volunteer at ICANN, for reasons that shall be made apparent in this missive.

I thank the National Telecommunications and Information Administration for the opportunity to make this submission. I have long enjoyed a positive relationship with NTIA staff members I have worked with at ICANN. At the outset of this comment, though, I would like to express the hope that the work of the NTIA today represents that of the administration it is a part of. President Trump made it very clear during his successful Presidential campaign of his misgivings concerning the handover of the DNS functions to ICANN. A fair review of the performance of ICANN since the October 2016 transition can only confirm that the concerns expressed by President Trump during the campaign were valid and well founded. A review of the ICANN transition is appropriate at this time, one that needs to be based upon empirical reality rather than upon the aspirational linguistics of multi-stakeholder ideology.

The world relies upon American leadership to ensure that the internet remains open, free and stable, not only in theory but in fact. It is the responsibility of the United States government, above all, to ensure that without exception or compromise those principles apply within the United States itself and to American citizens worldwide. I am deeply concerned that the extraterritorial application of the law of foreign legal entities, most notably the European Union, is currently dampening the ability of American citizens to engage in the free flow of information that is vital to meeting our civic responsibilities as U.S. citizens. The NTIA needs to proactively work with other units within the United States government to counteract these actions by foreign legal entities, well intentioned though they may be, that are and will continue to have a chilling effect on Americans ability to engage in free speech. The First Amendment rights of American citizens should not be sacrificed on the altar of diplomatic convenience.

With reference to the specific topic areas mentioned in the Notice of Inquiry:

1. **The Free Flow of Information and Jurisdiction**

It needs to be recognized that the utopian ideal of "One World, One Internet" is dead. It has taken governments some time to catch up with the technology, but in reality the internet is increasingly becoming territorialized and subject to the laws and cultures of a myriad of national and subnational jurisdictions.

Although I certainly would encourage the United States government to continue to advocate for a unified, open and free internet globally, it should at all times remember that its principle remit is to ensure access to such a communications instrument for American citizens, both within and outside the United States. Foreign laws and regulations should not in any way be allowed impede or block Americans access to the global internet.

The Free Flow of Information has a special status under international law. Many human rights instruments contain not only a reference to free expression and speech but also to the rights of all to access information. For example, article 19(2) of the International Covenant on Civil and Political Rights reads:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Governments routinely violate this clause of the ICCPR on a daily basis. China, Saudi Arabia, Russia and Turkey are just a few well known examples of jurisdictions that censor access to online information by filtering content at the border. Yet it must be said that countries that purport to value free expression in all forms do the same. In the United Kingdom Cleanfeed filters an increasing amount of online material, depriving those within the U.K. of the ability to access information sources of their choice.

The United States government should continue to support free expression and the free flow of information online in any and all international forums available to it. Although I understand the reasoning for the United States leaving the United Nations Human Rights Council (HRC), and largely agree with the move, I do note the positive contribution the United States government made within the HRC that resulted in internet access and the free flow of information being declared a basic human right. The American government should be commended for its leadership role in those initiatives and should continue to exert its leadership in the ITU and other venues in a similar vein.

The problem with most human rights initiatives is that they lack binding force and as a result are often no more than aspirational in nature. Our national commitment to free speech deserves better. That is why I would encourage the NTIA to closely work with the State Department, the United States Trade Representative, the United States Mission to the World Trade Organization, and other interested divisions of the United States government, to ensure compliance by other nations with the relevant portions of the General Agreement on Trade in Services (GATS) pertaining to the free flow of data and information across borders. Article 5(c) of the Annex of Telecommunications is of particular interest:

Each Member shall ensure that service suppliers of any other Member may use public telecommunications transport networks and services for the movement of information within and across borders, including for intra-corporate communications of such service suppliers, and for access to information contained in data bases or otherwise stored in machine-readable form in the territory of any Member. Any new or amended measures of a Member significantly affecting such use shall be notified and shall be subject to consultation, in accordance with relevant provisions of the Agreement.

Read broadly, Article 5(c) prohibits restrictions on the use of local telecommunications networks to access machine readable data or information stored cross border in a signatory to the GATS. Yet as most online content consists of machine readable data content, filtering

systems do precisely that. The United States government should proactively use the mechanism provided by this provision of the Telecommunications Annex of the GATS to enhance the free flow of information across borders, a concept that is increasingly being defeated by protectionist statutes worldwide.

The United States is to be commended for its focus on Virtual Private Networks (VPN) in its February 23, 2018 communication to Members of the Council on Trade in Services regarding "Measures Adopted and Under Development By China Relating To Its Cybersecurity Law". In doing so the United States government is proactively protecting the right of its citizens to access the global internet regardless of their physical location. Indeed, with the increasing bordered internet the use of a VPN is indispensable for those wishing to assert their right to access information under 19(2) of the ICCPR, and other human rights treaties, and to effectively engage in cross border trade in services.

The NTIA should work with other units of the United States government to ensure that VPN access is available to American citizens worldwide and should proactively target for enforceable GATS action those nations that attempt to restrict VPN access.

Indeed, as an American citizen currently residing in the European Union it is only because I have VPN access that I am able to participate in political discussion in my hometown, and the city where I vote, of Tucson, Arizona. The EU General Data Protection Regulation (GDRP) has been judged to be so onerous by many newspaper publishers, including the publisher of the *Arizona Daily Star*, that they no longer allow access to their websites for those located in the European Union. Ironically, it is not at all clear that such blocking tactics will shield U.S. entities from GDRP liability. As EU residents are able to access such websites by using TOR or VPN, among other modalities, some commentators have argued that strict liability for GDRP compliance attaches to the American company, whether it overtly markets to European residents or not.

The European Union is increasingly enacting legislation that attempts to bind not only its own member states but also those who have no contact at all with Europe. I personally believe that the GDRP is a horrid piece of overreaching legislation that is a homage to privacy extremists that will do more to chill free expression than it will to protect personal privacy. However, I would hope that even those who support the GDRP would admit that it's extraterritorial application is contrary to the representative democratic principles the Union is supposed to represent.

The United States government needs to open bilateral talks with the European Union that concern themselves not only with the GDRP but other initiatives (such as the "right to be forgotten" and proposed Articles 11 and 13) that impact cross border information services. The goal would be to reach an agreement similar to past Safe Harbor agreements that gave certainty to American corporations. Failing such efforts, the administration should propose legislation shielding American corporations and individuals from having any judgments rendered under GDRP, and similar statutes, from being enforced within the United States.

Americans, not Europeans, should be responsible for creating and promulgating the laws and norms under which our society operates. The unilateral imposition of the GDRP and like acts upon our citizens, the attempt to use European law as a global benchmark, is a form of neocolonialism that the United States government needs to reject.

1. **Multistakeholder Approach to Internet Governance**

I wish to make one thing very clear: I have nothing but admiration and respect for the individuals and ICANN staff members with whom I spent well over a thousand hours, on countless conference calls and in cities on five continents, attempting to create a model multi-stakeholder organization: the new Internet Corporation for Assigned Names and Numbers.

These were and are largely good people who in a rushed manner did a remarkable job in attempting to create a private corporation that could in the very best sense provide a public good: stable and secure management of the DNS.

I should also note that I still believe in the potential of multistakeholder international governance. There are still a number of problems to be considered and debated, notably who selects the stakeholders, but all systems have problems and I'm a big believer in not letting the perfect get in the way of the good.

It is because of my admiration for the people I worked with on the transition, and for my belief in the concept of multistakeholder governance, that I can not say this transition has worked and that ICANN can be seen as a responsible and trusted guardian of the DNS. The United States government should act before ICANN itself implodes and the DNS fractures in an unplanned manner contrary to the interests of the American people. The IANA Stewardship Transition needs to be unwound or rethought. The current approach has not worked.

As we were about to approve the Transition in early 2016, the Heritage Foundation recommended that the Transition proposal be approved with the caveat that final independence for ICANN only be granted after a two-year trial period. We were doing something unprecedented. Heritage opined that it might be a good idea to make sure that what we had come up with worked before creating a truly independent and largely unaccountable ICANN.

The Heritage proposal was never seriously considered for one reason: widespread fear in the ICANN community that a Clinton or Trump administration would not approve of the Transition. Indeed, the rush to conclude the Transition itself during the Obama administration was the principle organizing mechanism for the entire group. That was just plain wrong.

I did not support the Heritage proposal, something I now regret.

Kieren McCarthy observed, in a June 1, 2018 article in the Register, that since the Transition ICANN's:

own staff repeatedly interfered in independent processes; that it broke its own rules and bylaws to reach a pre-decided conclusion; that it secretly rewrote reports and then lied about it; that staff misled its own board and then claimed otherwise; that its board members lied about looking into allegations; that it hid millions of dollars of payment to Washington lobbyists; and many, many more. For those that have heard of it, the organization has become a shorthand for dysfunction and unaccountable power. It is the internet's FIFA scandal.

These events are all public knowledge, as is the difficulty ICANN has continued to have properly reforming WHOIS. Had we adopted the Heritage proposal it is inconceivable that ICANN would upon review would be approved to continue to function as an independent entity without major changes. What we created simply has not worked.

I strongly believe that if the community members who worked on the transition had been able to create a new organization to manage the DNS we could have creditably done so. That

wasn't the case. We inherited an organization whose lack of competence and lack of accountability caused the NTIA to require the Accountability project before granting ICANN independence. The NTIA was right to do so.

My own experience at ICANN strongly suggests that what Mr. McCarthy has reported is only one small portion of the lack of accountability that continues to infest this organization post transition. I have personal knowledge of the following:

1. My own departure from the ICANN community for "personal reasons" was a result of what I can only call extortion by ICANN's General Counsel and Ombudsman, acting jointly. The concept of due process was entirely lacking when I received the proverbial "offer I couldn't refuse".

ICANN was public service for me. I donated the stipends I received for travel to charity and never received one penny for my services otherwise. As a student at the University of Southern California I was mentored by Jon Postel and my work at ICANN was a tribute to him. I lost thousands of dollars participating in the organization. I was willing to do that. What I wasn't willing to do was to spend my time and money as a volunteer battling well paid ICANN employees, and certain professional volunteers, who were more concerned with self preservation than advancing the public interest.

What should most concern the NTIA, and others, is not me. Regaining my life from constant uncompensated conference calls and travel has been a blessing. Rather it is the idea that the Ombudsman, an important part of our Accountability mechanism, would join with the General Counsel, ignore stated rules and procedures, to effect his desired outcome upon a volunteer. This is both disappointing and dangerous. ICANN has always been challenged with the concept of due process (the XXX decision being one example). Nothing has changed.

2. I am aware of a situation where an elected member of an ICANN constituency Executive Committee was removed in a secret process led by one of the founders of the Constituency. The instigator didn't like the outcome of the election that installed the EC member so removed him. The matter was reported to the Ombudsman who stalled the process until the term of the effected individual was over. Once again, the concept of due process was ignored by ICANN and Constituency members were effectively disenfranchised.

3. The lack of development of ICANN's structures has led to ICANN filing incorrect tax returns with the Internal Revenue Service. Although not malicious in intent, ICANN appears unaware of certain receipts and expenditures relating to portions of its organization. It can not report that which it is unaware of.

4. Further relating to finance, I am aware of funds donated to an ICANN structure that have disappeared. ICANN staff was made aware of the problem, by others, and I'm unaware of any action by ICANN or criminal charges being brought or the funds being returned.

5. The NTIA should be aware that there is a valid question as to whether ICANN's bylaws currently comply with California law. Under the statutes governing California's public benefit corporations, the Board must have the ultimate authority over the corporation. ICANN's Bylaws currently have situations where the GAC can overrule the Board. I would suggest that the NTIA confirm with the Attorney General of the State of

California to ensure all is in order. During the transition itself, conflicting opinions were offered as to the legality of the Bylaws.

I should note that I have absolutely no desire to ever again involve myself with ICANN. This submission is being made out of respect for the process begun by Jon Postel and the belief he would be deeply disappointed by what it has become. Jon was a unique individual but one whose integrity and honesty was questioned by no one. If details of any of the situations I'm aware of, detailed above, would be of value to the NTIA feel free to let me know and I'll be happy to provide the specifics.

ICANN is an unregulated monopoly. Recent proposals to artificially inflate application fees for the next round of new gTLDs, ostensibly to prevent bad travelers from applying for the domain names, are the most recent example of ICANN actions, or proposals, that resemble actions one would expect from a monopoly. ICANN has gone from being a fairly unique form of government contractor to perhaps being the least regulated monopoly on the planet. When ATT was broken up, the "Baby Bells" continued to be regulated. The same should be true of ICANN.

The form of regulation should be subject to discussion instituted by the NTIA but should be one accessible to those both inside and outside the ICANN community. The DNS space is and should be part of the public commons, not a private reserve. ICANN is not working as some of us hoped and envisioned and President Trump was right to oppose the transition. We now need the NTIA and his administration to step up and save the multistakeholder model by more firmly guiding ICANN to a more sustainable and functioning model.

Respectfully submitted,

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