

STATEMENT
OF
COMMISSIONER ROBERT M. McDOWELL
FEDERAL COMMUNICATIONS COMMISSION

BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON
COMMUNICATIONS AND TECHNOLOGY
AND
COMMITTEE ON FOREIGN AFFAIRS
SUBCOMMITTEE ON
TERRORISM, NONPROLIFERATION, AND TRADE
AND
COMMITTEE ON FOREIGN AFFAIRS
SUBCOMMITTEE ON
AFRICA, GLOBAL HEALTH, GLOBAL HUMAN RIGHTS, AND INTERNATIONAL ORGANIZATIONS

FIGHTING FOR INTERNET FREEDOM: DUBAI AND BEYOND

FEBRUARY 5, 2013

Thank you Chairman Upton, Ranking Member Waxman, Chairman Royce, Ranking Member Engel, Chairman Walden, Ranking Member Eshoo, Chairman Poe, Ranking Member Sherman, Chairman Smith and Ranking Member Bass. It is an honor to be before you during this rare joint hearing. Thank you for inviting me. It is a privilege to testify before such a rare meeting of three subcommittees and beside such a distinguished group on this panel.

Ladies and gentlemen, the Internet is under assault. As a result, freedom, prosperity and the potential to improve the human condition across the globe are at risk. Any questions regarding these assertions are now settled. Last year's allegations that these claims are exaggerated no longer have credibility.

In my testimony today, I will make five fundamental points:

- 1) Proponents of multilateral intergovernmental control of the Internet are patient and persistent incrementalists who will never relent until their ends are achieved;
- 2) The recently concluded World Conference on International Telecommunications ("WCIT") ended the era of an international consensus to keep intergovernmental hands off of the Internet in dramatic fashion, thus radically twisting the one-way ratchet of even more government regulation in this space;
- 3) Those who cherish Internet freedom must *immediately* redouble their efforts to prevent further expansions of government control of the Internet as the pivotal 2014 Plenipotentiary meeting of the International Telecommunication Union ("ITU")¹ quickly draws nearer;

¹ ITU was founded in Paris in 1865 as the International Telegraph Union. Throughout the years various treaties have expanded ITU's scope. History, ITU, <http://www.itu.int/en/about/Pages/history.aspx> (last visited January 31, 2013).

- 4) Merely saying “no” to any changes is – quite obviously – a losing proposition; therefore we should work to offer alternate proposals such as improving the long-standing and highly successful, *non-governmental*, multi-stakeholder model of Internet governance to include those who may feel disenfranchised; and
- 5) Last year’s bipartisan and unanimous Congressional resolutions clearly opposing expansions of international powers over the Internet reverberated throughout the world and had a positive and constructive effect.

I. Proponents of multilateral intergovernmental control of the Internet are patient and persistent incrementalists who will never relent until their ends are achieved.

First, it is important to note that as far back as 2003 during the U.N.’s Summit on the Information Society (“WSIS”), the U.S. found itself in the lonely position of fending off efforts by other countries to exert U.N. and other multilateral control over the Internet. In both 2003 and 2005, due to the highly effective leadership of my friend Ambassador David Gross – and his stellar team at the Department of State – champions of Internet freedom were able to avert this crisis by enhancing the private sector multi-stakeholder governance model through the creation of entities such as the Internet Governance Forum (“IGF”) where all stakeholders, including governments, could meet to resolve challenges. Solutions should be found through consensus rather than regulation, as had always been the case with the Internet’s affairs since it was opened up for public use in the early 1990’s.²

Nonetheless, countries such as China, Russia, Iran, Saudi Arabia and scores of their allies never gave up their regulatory quest. They continued to push the ITU, and the U.N. itself, to

² Internet Growth Statistics, INTERNET WORLD STATS, <http://www.internetworldstats.com/emarketing.htm> (last visited Jan. 31, 2013). For more background information, please refer to Exhibit A, Statement by FCC Commissioner Robert M. McDowell, *International Proposals to Regulate the Internet* (May 31, 2012), attached.

regulate both the operations, economics and content of the Net. Some proposals were obvious and specific while others were insidious and initially appeared innocuous or insignificant. Many defenders of Internet freedom did not take these proposals seriously at first, even though some plans explicitly called for:

- Changing basic definitions contained in treaty text so the ITU would have unrestricted jurisdiction over the Internet;³
- Allowing foreign phone companies to charge global content and application providers internationally mandated fees (ultimately to be paid by all Internet consumers) with the goal of generating revenue for foreign government treasuries;⁴
- Subjecting cyber security and data privacy to international control, including the creation of an international “registry” of Internet addresses that could track every Internet-connected device in the world;⁵

³ See, e.g., *Arab States Common Proposals for the Work of the Conference*, Algeria (People’s Democratic Republic of), Bahrain (Kingdom of), Comoros (Union of the), Djibouti (Republic of), Egypt (Arab Republic of), Iraq (Republic of), Jordan (Hashemite Kingdom of), Kuwait (State of), Lebanon, Libya, Mauritania (Islamic Republic of), Morocco (Kingdom of), Oman (Sultanate of), Qatar (State of), Saudi Arabia (Kingdom of), Somali (Democratic Republic of), Sudan (Republic of the), Tunisia, United Arab Emirates and Yemen (Republic of), Contribution 7, at Art. 2 (Oct. 24, 2012), <http://www.itu.int/md/S12-WCIT12-C-0007/en> (“*Arab States Contribution 7*”); *African Common Proposals for the Work of the Conference*, African Telecommunication Union Administrations, Contribution 19, at Art. 2 (Nov. 2, 2012), <http://www.itu.int/md/S12-WCIT12-C-0019/en> (“*Africa Contribution 19*”); *Proposals for the Work of the Conference*, India (Republic of), Contribution 21, at Art. 2 (Nov. 3, 2012), <http://www.itu.int/md/S12-WCIT12-C-0021/en> (“*India Contribution 21*”); *Proposals for the Work of the Conference*, Russian Federation, Contribution 27, at Art. 2 (Nov. 17, 2012), <http://www.itu.int/md/S12-WCIT12-C-0027/en> (“*Russia Contribution 27*”); *Proposals for the Work of the Conference*, Algeria, Saudi Arabia, Bahrain, China, United Arab Emirates, Russian Federation, Iraq, Sudan, Contribution 47, at Art. 2 (Dec. 11, 2012), <http://www.itu.int/md/S12-WCIT12-C-0047/en> (“*Algeria, Saudi Arabia, Bahrain, China, United Arab Emirates, Russian Federation, Iraq, Sudan Contribution 47*”).

⁴ See, e.g., *Arab States Contribution 7* at Arts. 6.0.5, 6.0.6; *Africa Contribution 19* at Arts. 6.0.1-6.0.6; *Algeria, Saudi Arabia, Bahrain, China, United Arab Emirates, Russian Federation, Iraq, Sudan Contribution 47* at Arts. 6.0.3, 6.0.4; *Revisions of the International Telecommunications Regulations – Proposals for High Level Principles to be Introduced in the ITRs*, ETNO, CWG-WCIT12 Contribution 109, at 2 (2012), <http://www.itu.int/md/T09-CWG.WCIT12-C-0109/en>.

⁵ See, e.g., Letter dated 12 September 2011 from the Permanent Representatives of China, the Russian Federation, Tajikistan, and Uzbekistan to the United Nations addressed to the Secretary-General, Item 93 of the provisional agenda - Developments in the field of information and telecommunications in the context of international security, 66th Session of the United Nations General Assembly, Annex (Sep. 14, 2011),

- Imposing unprecedented economic regulations of rates, terms and conditions for currently unregulated Internet traffic swapping agreements known as “peering;”⁶
- Establishing ITU dominion over important non-profit, private sector, multi-stakeholder functions, such as administering domain names like the .org and .com Web addresses of the world;⁷
- Subsuming into the ITU the functions of multi-stakeholder Internet engineering groups that set technical standards to allow the Net to work;⁸
- Centralizing under international regulation Internet content under the guise of controlling “congestion,” or other false pretexts; and many more.⁹

Despite these repeated efforts, the unanimously adopted 1988 treaty text that helped insulate the Internet from international regulation, and make it the greatest deregulatory success story of all time, remained in place. Starting in 2006, however, the ITU’s member states

http://www.cs.brown.edu/courses/csci1800/sources/2012_UN_Russia_and_China_Code_o_Conduct.pdf (last visited Jan. 31, 2013); *Arab States Contribution 7* at Art. 5A; *Proposals for the Work of the Conference*, Cameroon (Republic of), Contribution 15, at Art. 5A (Oct. 2, 2012), <http://www.itu.int/md/S12-WCIT12-C-0015/en> (“*Cameroon Contribution 15*”); *Africa Contribution 19* at Art. 5A; *India Contribution 21* at Art. 5A; *Common Proposals for the Work of the Conference*, ITU Member States, Members of the Regional Commonwealth in the Field of Communications (RCC), Contribution 14, at Art. 5A (Oct. 1, 2012), <http://www.itu.int/md/S12-WCIT12-C-0014/en> (“*RCC Contribution 14*”); *Algeria, Saudi Arabia, Bahrain, China, United Arab Emirates, Russian Federation, Iraq, Sudan Contribution 47* at Art. 3C.

⁶ See, e.g., *Arab States Contribution 7* at Art. 6.0.4; *India Contribution 21* at 6.0.4; Internet Society Background Paper, *International Telecommunications Regulations*, available at http://www.isoc.org/pubpolpillar/docs/itr-background_201108.pdf (last visited Jan. 31, 2013).

⁷ See, e.g., *Arab States Contribution 7* at Art. 3.5; *Russia Contribution 27* at 3A.2; *Algeria, Saudi Arabia, Bahrain, China, United Arab Emirates, Russian Federation, Iraq, Sudan Contribution 47* at Art. 3B.

⁸ See, e.g., *Africa Contribution 19* at Art. 3.4A; *Russia Contribution 27* at 3A; *Algeria, Saudi Arabia, Bahrain, China, United Arab Emirates, Russian Federation, Iraq, Sudan Contribution 47* at Arts. 1.6, 3.1, 4.2, 4.3.

⁹ See, e.g., *Arab States Contribution 7* at Art. 5A; *Africa Contribution 19* at Art. 5B. Some member states also called for requiring network operators to disclose to the government identification information about every communication carried over their networks or to give the governments control of the routing of those communications. *Arab States Contribution 7* at Arts. 3.3, 3.6; *Africa Contribution 19* at Arts. 3.3, 3.4B; *RCC Contribution 14* at Art. 3.3; *Algeria, Saudi Arabia, Bahrain, China, United Arab Emirates, Russian Federation, Iraq, Sudan Contribution 47* at Arts. 3.3, 3B.3; *Cameroon Contribution 15* at Art. 3.6.

(including the U.S.) laid the groundwork for convening the WCIT.¹⁰ The purpose of the WCIT was to renegotiate the 1988 treaty. As such, it became the perfect opportunity for proponents of expanded regulation to extend the ITU's reach into the Internet's affairs. In fact, in 2011, then-Russian Prime Minister Vladimir Putin summed it up best when he declared that his goal, and that of his allies, was to establish "international control over the Internet" through the ITU.¹¹

Last month in Dubai, Mr. Putin largely achieved his goal.

II. December's WCIT ended the era of international consensus to keep intergovernmental hands off of the Internet in dramatic fashion.

Before the WCIT, ITU leadership made three key promises:

- 1) No votes would be taken at the WCIT;
- 2) A new treaty would be adopted only through "*unanimous consensus*;" and
- 3) Any new treaty would not touch the Internet.¹²

¹⁰ Review of the International Telecommunication Regulations, Resolution 146 (Antalya 2006), *available at* <http://www.itu.int/ITU-T/itr-eg/files/resolution146.pdf>.

¹¹ *Prime Minister Vladimir Putin meets with Secretary General of the International Telecommunication Union Hamadoun Touré*, GOV'T OF THE RUSSIAN FED'N, <http://government.ru/eng/docs/15601/print/> (last visited Jan. 31, 2013) ("The International Telecommunication Union is one of the oldest international organisations; it's twice as old as the United Nations. Russia was one of its co-founders and intends to be an active member. We are thankful to you for the ideas that you have proposed for discussion. One of them is establishing international control over the Internet using the monitoring and supervisory capabilities of the International Telecommunication Union (ITU). If we are going to talk about the democratisation of international relations, I think a critical sphere is information exchange and global control over such exchange. This is certainly a priority on the international agenda.").

¹² *WCIT-12: Clarification Needed During Open Letter Session*, ITUBLOG (Nov. 15, 2012), <http://itu4u.wordpress.com/2012/11/15/wcit-12-clarification-needed-during-open-letter-session/> (last visited Feb. 1, 2013) ("Internet Control is simply not in the ITU mandate and ITU will continue to fully support the multi-stakeholder approach which it initiated some ten years ago for the World Summit of the Information Society."); Hamadoun I. Touré, *U.N. Must Lead Internet Regulation Effort*, WIRED.COM (Nov. 7, 2012), <http://www.wired.com/opinion/2012/11/head-of-itu-un-should-internet-regulation-effort/> (last visited Feb. 1, 2013) (stating "[n]o proposal will be accepted if it is not agreed upon by all participants through consensus."); Hamadoun I. Touré, *Global Media Briefing on WCIT*, ITU (June 22, 2012), <http://www.itu.int/en/osg/speeches/Pages/2012-06-22.aspx> (last visited Feb. 1, 2013) ("We all know that, in the true tradition of the ITU, we will not vote on any issues – just like in January, at the World Radiocommunication Conference, where in four weeks we did not vote once, but came to consensus on every issue."); Speech by ITU Secretary-General Touré, *The Challenges of Extending the Benefits of Mobile*, ITU (May 1, 2012), <http://www.itu.int/en/osg/speeches/Pages/2012-05-01.aspx> (last visited Jan.

All three promises were resoundingly broken.¹³ As a result of an 89-55 vote, the ITU now has unprecedented authority over the economics and content of key aspects of the Internet.¹⁴

Although the U.S. was ultimately joined by 54 other countries in opposition to the new treaty language, that figure is misleading. Many countries, including otherwise close allies in Europe, were willing to vote to ensnare the Internet in the tangle of intergovernmental control until Iran complicated the picture with an unacceptable amendment. In short, the U.S. experienced a rude awakening regarding the stark reality of the situation: when push comes to shove, even countries that purport to cherish Internet freedom are willing to surrender. Our experience in Dubai is a chilling foreshadow of how international Internet regulatory policy could expand at an accelerating pace.

Specifically, the explicit terms of the new treaty language give the ITU policing powers over “SPAM,” and attempt to legitimize under international law foreign government inspections of the content of Internet communications to assess whether they should be censored by governments under flimsy pretexts such as network congestion.¹⁵ The bottom line is, 89

31, 2013). (“You will, I am sure, have seen and read various media articles talking about the UN or the ITU trying to take over the Internet. Let me say quite plainly and clearly: This is simply ridiculous.”); David McAuley, *WCIT ‘Internet Governance’ Hype Distracts Attention From Serious Issues, ITU Head Says*, BLOOMBERG, Sept. 11, 2012, <http://www.bna.com/itus-toure-wcit-b17179869586/> (last visited Jan. 31, 2013) (quoting ITU Secretary-General Touré that WCIT “has nothing to do with [Internet] Governance.”).

¹³ Remarks by Assistant Secretary Strickling at the PLI/FCBA Telecommunications Policy & Regulation Institute (Dec. 14, 2012), http://www.ntia.doc.gov/Remarks_by_Assistant_Secretary_Strickling_at_PLI/FCBA (last visited Jan. 31, 2012) (“The International Telecommunication Union had made two important promises in advance of the conference. First, that it would operate by consensus and second, that Internet issues would not be appropriate for inclusion in the ITRs. As it turned out, the ITU could not deliver on either of these promises. When around 40 percent of the participating countries do not sign the final documents of the conference, it is obvious that the ITU did not achieve the consensus it had promised.”).

¹⁴ Notably, at the end of the WCIT, a “resolution to foster the greater growth of the Internet” was adopted “resolving to instruct the Secretary-General to continue to take necessary steps for ITU to play an active and constructive role” in Internet governance. This will serve to broaden the scope of the ITU’s rules to include the Internet, undermining the highly successful, multi-stakeholder model of Internet governance.

¹⁵ INTERNATIONAL TELECOMMUNICATION UNION, FINAL ACTS: WORLD CONFERENCE ON INTERNATIONAL TELECOMMUNICATIONS, at Art. 5B (Dubai 2012) (“FINAL ACTS”). The new ITRs provide signing nations with a

countries have given the ITU jurisdiction over the Internet's operations and content. Many more were close to joining them.

More broadly, pro-regulation forces succeeded in upending decades of consensus on the meaning of crucial treaty definitions that were universally understood to insulate Internet service providers, as well as Internet content and application providers, from intergovernmental control by changing the treaty's definitions.¹⁶ Many of the same countries, as well as the ITU itself,¹⁷ brazenly argued that the old treaty text from 1988 gave the ITU broad jurisdiction over the Internet.¹⁸ If these regulatory expansionists are willing to conjure ITU authority where clearly none existed, their control-hungry imaginations will see no limits to the ITU's authority over the Internet's affairs under the new treaty language. Their appetite for regulatory expansionism is

greater ability to regulate the blocking of "SPAM," opening the door to the regulation of content on the Internet, including possible blockage of political dissent or other forms of protected speech under the First Amendment of the U.S. Constitution. *See id.*

¹⁶ FINAL ACTS at Art. 1 abis). For example, an early disagreement at the WCIT over the reach of the international treaty's application resulted in a vague, undefined new term that could have far-reaching consequences. Prior to the WCIT, the ITRs applied only to "Recognized Operating Agencies" (ROAs), or telecommunications operators in each country. During the WCIT, some countries sought to change the term to "Operating Agencies," expanding the ITRs applicability. This debate was resolved by the adoption of "Authorized Operating Agencies" (AOA), undefined in the ITU Constitution. At present there is no definitive interpretation of which entities this provision applies to, likely precipitating disputes between member states regarding which entities specifically qualify as AOAs. Most assuredly, however, given current trends, key member states will push aggressively for definitions that are as expansive as possible.

¹⁷ The ITU can serve as a useful and constructive forum for the resolution of many important international communications policy matters, such as harmonization of spectrum and the allocation of satellite orbital slots. In contexts such as these, reaching international consensus through the ITU can produce positive outcomes. The danger, however, lies with unwarranted ITU "mission creep" into new spheres, such as the complex ecosystems of the Internet. Replicating the ITU's antiquated telecommunications regulations for modern digital communications technologies and services that do not operate like, or in any way resemble, traditional telecom services would be highly counterproductive. Although maintaining strong U.S. involvement in the pre-WCIT-12 ITU mission is vital, on a going forward basis, we should reassess America's support for new ITU actions we find harmful to freedom, prosperity, our national interest, and the well-being of all nations, but especially the developing world.

¹⁸ Speech by ITU Secretary-General Touré, *WCIT-12 – Myths and Reality* (Sept. 24, 2012) <http://www.itu.int/en/osg/speeches/Pages/2012-09-24.aspx> (last visited Feb. 1, 2013) (stating that "ITU's day-to-day activities [] are already fundamental to promoting Internet growth."); *WCIT-12 Myth Busting Presentation*, ITU, Slides 24, 25, <http://www.itu.int/en/wcit-12/Pages/WCIT-backgroundbriefs.aspx> (last visited Feb. 4, 2013) (stating that "[m]any consider that [the ITU definition of telecommunications] includes communications via the Internet, which runs on telecom infrastructure" and that it is an incorrect myth that the "ITU's scope does not include the Internet" and that "WCIT is about the ITU or the UN extending their mandate so as to control the Internet.").

insatiable as they envision the omniscience of regulators able to replace the billions of daily decisions that allow the Internet to blossom and transform the human condition like no other technology in human history.

At the same time, worldwide consumer demand is driving technological convergence. As a result, companies such as Verizon, Google, AT&T, Amazon, Microsoft, Netflix, and many more in the U.S. and in other countries, are building across borders thousands of miles of fiber optics to connect sophisticated routers that bring voice, video and data services more quickly to consumers tucked into every corner of the globe. From an engineering perspective, the technical architecture and service offerings of these companies look the same. Despite this wonderful convergence, an international movement is *growing* to foist 19th Century regulations designed for railroads, telegraphs and vanishing analog voice phone monopolies onto new market players that are much different from the monoliths of yore.

To be blunt, these dynamic new wonders of the early 21st Century are inches away from being smothered by innovation-crushing old rules designed for a different time. The practical effect of expanded rules would be to politicize engineering and business decisions inside sclerotic intergovernmental bureaucracies. If this trend continues, Internet growth would be most severely impaired in the developing world. But even here, as brilliant and daring technologists work to transform the world, they could be forced to seek bureaucratic permission to innovate and invest. In sum, the dramatic encroachments on Internet freedom secured in Dubai will serve as a stepping stone to more international regulation of the Internet in the very near future. The result will be devastating even if the United States does not ratify these toxic new treaties.

III. We must waste no time fighting to prevent further governmental expansion into the Internet's affairs at the upcoming ITU Plenipotentiary in 2014.

Time is of the essence. While we debate what to do next, Internet freedom's foes around the globe are working hard to exploit a treaty negotiation that dwarfs the importance of the WCIT by orders of magnitude. In 2014, the ITU will conduct what is literally a constitutional convention, called a "plenipotentiary" meeting, which will define the ITU's mission for years to come. Its constitution will be rewritten and a new Secretary General will be elected. This scenario poses both a threat and an opportunity for Internet freedom. The outcome of this massive treaty negotiation is uncertain, but the momentum favors those pushing for more Internet regulation. More immediately, the World Telecommunications Policy/ICT Forum ("WTPF"), which convenes in Geneva this May, will focus squarely on Internet governance and will shape the 2014 Plenipotentiary. Accordingly, the highest levels of the U.S. Government must make this cause a top priority and recruit allies in civil society, the private sector and diplomatic circles around the world.

The effort should start with the President immediately making appointments to fill crucial vacancies in our diplomatic ranks. The recent departures of my distinguished friend, Ambassador Phil Verveer, his legendary deputy Dick Beaird, as well as WCIT Ambassador Terry Kramer, have left a hole in the United States' ability to advocate for a constructive – rather than destructive – Plenipot. America and Internet freedom's allies simply cannot dither again. If we do, we will fail, and global freedom and prosperity will suffer.

IV. We should work to offer constructive *alternative* proposals, such as improving the highly successful multi-stakeholder model of Internet governance to include those who feel disenfranchised.

As I warned a year ago, merely saying “no” to any changes to the multi-stakeholder Internet governance model has recently proven to be a losing proposition.¹⁹ Ambassador Gross can speak to this approach far better than can I, but using the creation of the IGF as a model, we should immediately engage with all countries to encourage a dialogue among all interested parties, including governments, civil society, the private sector, non-profits and the ITU, to broaden the multi-stakeholder umbrella to provide those who feel disenfranchised from the current structure with a meaningful role in shaping the evolution of the Internet. Primarily due to economic and logistical reasons, many developing world countries are not able to play a role in the multi-stakeholder process. This is unacceptable and should change immediately. Developing nations stand to gain the most from unfettered Internet connectivity, and they will be injured the most by centralized multilateral control of its operations and content.

V. Last year’s bipartisan and unanimous Congressional resolutions clearly opposing expansions of international powers over the Internet reverberated around the world and had a positive and constructive effect, *but Congress must do more.*

In my nearly seven years of service on the FCC, I have been amazed by how closely every government and communications provider on the globe studies the latest developments in American communications policy. In fact, we can be confident that this hearing is streaming live in some countries, and is being blocked by government censors in others. Every detail of our actions is scrutinized. It is truly humbling to learn that even my statements have been read in Thailand and Taiwan, as well as translated into Polish and Italian.

¹⁹ Robert M. McDowell, *The U.N. Threat to Internet Freedom*, WALL ST. J. Feb. 21, 2012, at A19, available at <http://online.wsj.com/article/SB10001424052970204792404577229074023195322.html>.

And when Congress speaks, especially when it speaks with *one* loud and clear voice, as it did last year with the unanimous and bipartisan resolutions concerning the WCIT, an uncountable number of global policymakers pause to think. Time and again, I have been told by international legislators, ministers, regulators and business leaders that last year's resolutions had a positive effect on the outcome of the WCIT. Although Internet freedom suffered as a result of the WCIT, many even more corrosive proposals did not become international law in part due to your actions.²⁰

IV. Conclusion.

And so, I ask you in the strongest terms possible, to take action and take action *now*. Two years hence, let us not look back at this moment and lament how we did not do enough. We have but one chance. Let us tell the world that we will be resolute and stand strong for Internet freedom. All nations should join us.

Thank you for having me appear before you today. I look forward to your questions.

²⁰ Many other proposals that would threaten the Internet were defeated at the WCIT, such as “sender party pays,” which would have required Web content providers to pay Internet service providers (ISPs) in other countries for the traffic sent over those networks. *See also* David Gross, *Walking the Talk: The Role of U.S. Leadership in the Wake of WCIT*, BLOOMBERG, Jan. 17, 2013, <http://www.wileyrein.com/resources/documents/Gross--BNA--1.17.13.pdf> (last visited Feb. 1, 2013) (explaining that Congress's clear message was heard at WCIT, “This action was important not only because of the substance of Congress's statements, but also because the world understood just how extraordinary it is for our Congress to act with unanimity, especially in an era when Congress has immense difficulty reaching consensus on almost anything. At the end of WCIT, I heard from many foreign officials that they knew that the United States would not sign the revised treaty with its Internet-related provisions because Congress had sent a clear and unequivocal message that such an agreement was unacceptable to the American people.”).

EXHIBIT A

**STATEMENT
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**BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON
COMMUNICATIONS AND TECHNOLOGY**

INTERNATIONAL PROPOSALS TO REGULATE THE INTERNET

MAY 31, 2012

Thank you, Chairman Walden, Ranking Member Eshoo, and Members of the Subcommittee for inviting me to join you today. Tomorrow will mark my sixth anniversary as an FCC commissioner, and every day has been an honor and a privilege. I am pleased to be back before you. As always, I look forward to answering any questions you may have.

It is a pleasure and an honor to testify beside my friend, Ambassador Phil Verveer. First, please allow me to dispense quickly and emphatically any doubts about the *bipartisan* resolve of the United States' to resist efforts to expand the International Telecommunication Union's ("ITU") authority over Internet matters. Some ITU officials have dismissed our concern over this issue as mere "election year politics." Nothing could be further from the truth as evidenced by Ambassador Verveer's testimony today as well as recent statements from the White House, Executive Branch agencies, Democratic and Republican Members of Congress and my friend and colleague, FCC Chairman Julius Genachowski. We are unified on the substantive arguments and have always been so.

Second, it is important to define the challenge before us. The threats are real and not imagined, although they admittedly sound like works of fiction at times. For many years now, scores of countries led by China, Russia, Iran, Saudi Arabia, and many others, have pushed for, as then-Russian Prime Minister Vladimir Putin said almost a year ago, "international control of the Internet" through the ITU.¹ I have tried to find a more concise way to express this issue, but I can't seem to improve upon now-President Putin's crystallization of the effort that has been afoot for quite some time. More importantly, I think we should take President Putin very seriously.

¹ Vladimir Putin, Prime Minister of the Russian Federation, Working Day, GOV'T OF THE RUSSIAN FED'N, <http://premier.gov.ru/eng/events/news/15601/> (June 15, 2011) (last visited May 14, 2012).

Six months separate us from the renegotiation of the 1988 treaty that led to insulating the Internet from economic and technical regulation. What proponents of Internet freedom do or don't do between now and then will determine the fate of the Net, affect global economic growth and determine whether political liberty can proliferate. During the treaty negotiations, the most lethal threat to Internet freedom may not come from a full frontal assault, but through insidious and seemingly innocuous expansions of intergovernmental powers.

This subterranean effort is already under way. While influential ITU Member States have put forth proposals calling for overt legal expansions of United Nations' or ITU authority over the Net, ITU officials have publicly declared that the ITU does not intend to regulate Internet governance while also saying that any regulations should be of the "light-touch" variety.² But which is it? It is not possible to insulate the Internet from new rules while also establishing a new "light touch" regulatory regime. Either a new legal paradigm will emerge in December or it won't. The choice is binary.

Additionally, as a threshold matter, it is curious that ITU officials have been opining on the outcome of the treaty negotiation. The ITU's Member States determine the fate of any new rules, not ITU leadership and staff. I remain hopeful that the diplomatic process will not be subverted in this regard.

As a matter of process and substance, patient and persistent incrementalism is the Net's most dangerous enemy and it is the hallmark of many countries that are pushing the pro-regulation agenda. Specifically, some ITU officials and Member States have been discussing an alleged worldwide phone numbering "crisis." It seems that the world may be running out of phone numbers, over which the ITU *does* have some jurisdiction.

² Speech by ITU Secretary-General Touré, *The Challenges of Extending the Benefits of Mobile* (May 1, 2012), http://www.itu.int/net/pressoffice/press_releases/index.aspx?lang=en (last visited May 29, 2012).

Today, many phone numbers are used for voice over Internet protocol services such as Skype or Google Voice. To function properly, the software supporting these services translate traditional phone numbers into IP addresses. The Russian Federation has proposed that the ITU be given jurisdiction over IP addresses to remedy the phone number shortage.³ What is left unsaid, however, is that potential ITU jurisdiction over IP addresses would enable it to regulate Internet services and devices with abandon. IP addresses are a fundamental and essential component to the inner workings of the Net. Taking their administration away from the bottom-up, non-governmental, multi-stakeholder model and placing it into the hands of international bureaucrats would be a grave mistake.

Other efforts to expand the ITU's reach into the Internet are seemingly small but are tectonic in scope. Take for example the Arab States' submission from February that would change the rules' definition of "telecommunications" to include "processing" or computer functions.⁴ This change would essentially swallow the Internet's functions with only a tiny edit to existing rules.⁵

When ITU leadership claims that no Member States have proposed absorbing Internet governance into the ITU or other intergovernmental entities, the Arab States' submission demonstrates that nothing could be further from the truth. An infinite number of avenues exist to

³ *Further Directions for Revision of the ITRs*, Russian Federation, CWG-WCIT12 Contribution 40, at 3 (2011), <http://www.itu.int/md/T09-CWG.WCIT12-C-0040/en> (last visited May 29, 2012) ("To oblige ITU to allocate/distribute some part of IPv6 addresses (as same way/principle as for telephone numbering, simultaneously existing of many operators/numbers distributors inside unified numbers space for both fixed and mobile phone services) and determination of necessary requirements.").

⁴ *Proposed Revisions*, Arab States, CWG-WCIT12 Contribution 67, at 3 (2012), <http://www.itu.int/md/T09-CWG.WCIT12-C-0067/en> (last visited May 29, 2012).

⁵ And Iran argues that the current definition already includes the Internet. *Contribution from Iran*, The Islamic Republic of Iran, CWG-WCIT12 Contribution 48, Attachment 2 (2011), <http://www.itu.int/md/T09-CWG.WCIT12-C-0048/en> (last visited May 29, 2012).

accomplish the same goal and it is camouflaged subterfuge that proponents of Internet freedom should watch for most vigilantly.

Other examples come from China. China would like to see the creation of a system whereby Internet users are registered using their IP addresses. In fact, last year, China teamed up with Russia, Tajikistan and Uzbekistan to propose to the UN General Assembly that it create an “International Code of Conduct for Information Security” to mandate “international norms and rules standardizing the behavior of countries concerning information and cyberspace.”⁶ Does anyone here today believe that these countries’ proposals would encourage the continued proliferation of an open and freedom-enhancing Internet? Or would such constructs make it easier for authoritarian regimes to identify and silence political dissidents? These proposals may not technically be part of the WCIT negotiations, but they give a sense of where some of the ITU’s Member States would like to go.

Still other proposals that have been made personally to me by foreign government officials include the creation of an international universal service fund of sorts whereby foreign – usually state-owned – telecom companies would use international mandates to charge certain Web destinations on a “per-click” basis to fund the build-out of broadband infrastructure across the globe. Google, iTunes, Facebook and Netflix are mentioned most often as prime sources of funding.

In short, the U.S. and like-minded proponents of Internet freedom and prosperity across the globe should resist efforts to expand the powers of intergovernmental bodies over the Internet

⁶ Letter dated 12 September 2011 from the Permanent Representatives of China, the Russian Federation, Tajikistan, and Uzbekistan to the United Nations addressed to the Secretary-General, Item 93 of the provisional agenda - Developments in the field of information and telecommunications in the context of international security, 66th Session of the United Nations General Assembly, Annex (Sep. 14, 2011), http://www.cs.brown.edu/courses/csci1800/sources/2012_UN_Russia_and_China_Code_o_Conduct.pdf (last visited May 29, 2012).

even in the smallest of ways. As my supplemental statement and analysis explains in more detail below, such a scenario would be devastating to global economic activity, but it would hurt the developing world the most.

Thank you for the opportunity to appear before you today and I look forward to your questions.

* * *

FCC Commissioner Robert M. McDowell
Supplemental Statement and Analysis
May 31, 2012

Thank you, Chairman Walden and Ranking Member Eshoo, for holding this hearing. Its topic is among the most important public policy issues affecting global commerce and political freedom: namely, whether the International Telecommunication Union (ITU), or any other intergovernmental body, should be allowed to expand its jurisdiction into the operational and economic affairs of the Internet.

As we head toward the treaty negotiations at the World Conference on International Telecommunications (WCIT) in Dubai in December, I urge governments around the world to avoid the temptation to tamper with the Internet. Since its privatization in the early 1990s, the Internet has flourished across the world under the current deregulatory framework. In fact, the long-standing international consensus has been to keep governments from regulating core functions of the Internet's ecosystem.

Yet, some nations, such as China, Russia, India, Iran and Saudi Arabia, have been pushing to reverse this course by giving the ITU or the United Nations itself, regulatory jurisdiction over Internet governance. The ITU is a treaty-based organization under the auspices of the United Nations.¹ Don't take my word for it, however. As Russian Prime Minister Vladimir Putin said almost one year ago, the goal of this well-organized and energetic effort is to establish "international control over the Internet using the monitoring and supervisory capabilities of the [ITU]."²

Motivations of some ITU Member states vary. Some of the arguments in support of such actions may stem from frustrations with the operations of Internet Corporation for Assigned Names and Numbers (ICANN). Any concerns regarding ICANN, however, should not be used as a pretext to end the multi-stakeholder model that has served all nations – especially the developing world – so well. Any reforms to ICANN should take place through the bottom-up multi-stakeholder process and should not arise through the WCIT's examination of the International Telecommunication Regulations (ITR)s.

Constructive reform of the ITRs may be needed. If so, the scope of any review should be limited to traditional telecommunications services and not expanded to include information services or any form of Internet services. Modification of the current multi-stakeholder Internet governance model may be necessary as well, but we should all work together to ensure no intergovernmental regulatory overlays are placed into this sphere. Not only would nations surrender some of their national sovereignty in such a pursuit, but they would suffocate their own economies as well, while politically paralyzing engineering and business decisions within a global regulatory body.

¹ History, ITU, <http://www.itu.int/en/about/Pages/history.aspx> (last visited May 14, 2012).

² Vladimir Putin, Prime Minister of the Russian Federation, Working Day, GOV'T OF THE RUSSIAN FED'N, <http://premier.gov.ru/eng/events/news/15601/> (June 15, 2011) (last visited May 14, 2012).

Every day headlines tell us about industrialized and developing nations alike that are awash in debt, facing flat growth curves, or worse, shrinking GDPs. Not only must governments, including our own, tighten their fiscal belts, but they must also spur economic expansion. An unfettered Internet offers the brightest ray of hope for growth during this dark time of economic uncertainty, not more regulation.

Indeed, we are at a crossroads for the Internet's future. One path holds great promise, while the other path is fraught with peril. The promise, of course, lies with keeping what works, namely maintaining a freedom-enhancing and open Internet while insulating it from legacy regulations. The peril lies with changes that would ultimately sweep up Internet services into decades-old ITU paradigms. If successful, these efforts would merely imprison the future in the regulatory dungeon of the past.

The future of global growth and political freedom lies with an unfettered Internet. Shortly after the Internet was privatized in 1995, a mere 16 million people were online worldwide.³ As of early 2012, approximately 2.3 billion people were using the Net.⁴ Internet connectivity quickly evolved from being a novelty in industrialized countries to becoming an essential tool for commerce – and sometimes even basic survival – in all nations, but especially in the developing world. Such explosive growth was helped, not hindered, by a deregulatory construct. Developing nations stand to gain the most from the rapid pace of deployment and adoption of Internet technologies brought forth by an Internet free from intergovernmental regulation.

By way of illustration, a McKinsey report released in January examined the Net's effect on the developing world, or "aspiring countries."⁵ In 30 specific aspiring countries studied, including Malaysia, Mexico, Morocco, Nigeria, Turkey and Vietnam,⁶ Internet penetration has grown 25 percent per year for the past five years, compared to only five percent per year in developed nations.⁷ Obviously, broadband penetration is lower in aspiring countries than in the developed world, but that is quickly changing thanks to mobile Internet access technologies. Mobile subscriptions in developing countries have risen from 53 percent of the global market in 2005 to 73 percent in 2010.⁸

³ Internet Growth Statistics, INTERNET WORLD STATS, <http://www.internetworldstats.com/emarketing.htm> (last visited Feb. 21, 2012).

⁴ *Id.*

⁵ See McKinsey High Tech Practice, *Online and upcoming: The Internet's impact on aspiring countries*, MCKINSEY & CO. (Jan. 2012) ("*McKinsey Aspiring Countries Report*"), http://www.mckinsey.com/Client_Service/High_Tech/Latest_thinking/Impact_of_the_internet_on_aspiring_countries (last visited May 24, 2012).

⁶ *Id.* at 22 (categorizing the following as aspiring countries: Algeria, Argentina, Brazil, Chile, China, Colombia, Czech Republic, Egypt, Hungary, India, Indonesia, Iran, Kazakhstan, Malaysia, Mexico, Morocco, Nigeria, Pakistan, the Philippines, Poland, Romania, the Russian Federation, Saudi Arabia, South Africa, Taiwan, Thailand, Turkey, Ukraine, Venezuela, and Vietnam).

⁷ *Id.* at 1, 3-4, 23.

⁸ *Id.* at 1.

In fact, Cisco estimates that the number of mobile-connected devices will exceed the world's population sometime this year.⁹ Increasingly, Internet users in these countries use *only* mobile devices for their Internet access.¹⁰ This trend has resulted in developing countries growing their global share of Internet users from 33 percent in 2005, to 52 percent in 2010, with a projected 61 percent share by 2015.¹¹ The 30 aspiring countries discussed earlier are home to one billion Internet users, half of all global Internet users.¹²

The effect that rapidly growing Internet connectivity is having on aspiring countries' economies is tremendous. The Net is an economic growth accelerator. It contributed an average 1.9 percent of GDP growth in aspiring countries for an estimated total of \$366 billion in 2010.¹³ In some developing economies, Internet connectivity has contributed up to 13 percent of GDP growth over the past five years.¹⁴ In six aspiring countries alone, 1.9 million jobs were associated with the Internet.¹⁵ And in other countries, the Internet creates 2.6 new jobs for each job it disrupts.¹⁶ I expect that we would all agree that these positive trends must continue. The best path forward is the one that has served the global economy so well, that of a multi-stakeholder governed Internet.

One potential outcome that could develop if pro-regulation nations are successful in granting the ITU authority over Internet governance would be a partitioned Internet. In particular, fault lines could be drawn between countries that will choose to continue to live under the current successful model and those Member States who decide to opt out to place themselves under an intergovernmental regulatory regime. A balkanized Internet would not promote global free trade or increase living standards. At a minimum, it would create extreme uncertainty and raise costs for *all* users across the globe by rendering an engineering, operational and financial morass.

For instance, Harvard and the Massachusetts Institute of Technology (MIT) recently announced placing many of their courses online for free – for anyone to use. The uncertainty and economic and engineering chaos associated with a newly politicized

⁹ *Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2011-2016*, CISCO, at 3 (Feb. 14, 2012), http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-520862.pdf (last visited May 24, 2012).

¹⁰ *McKinsey Aspiring Countries Report* at 1.

¹¹ *Id.* at 3-4, 23.

¹² *Id.* at iv, 4, 23. And 73 percent of Internet users do not speak English as a first language. *Id.* at iv.

¹³ *Id.* at 2, 8-9, 26-27.

¹⁴ *Id.* at 2.

¹⁵ *Id.* at v.

¹⁶ McKinsey Global Institute, *Internet Matters: The Nets Sweeping Impact on Growth, Jobs, and Prosperity*, MCKINSEY & CO., at 3, 21 (May 2011), http://www.mckinsey.com/Insights/MGI/Research/Technology_and_Innovation/Internet_matters (last visited May 24, 2012).

intergovernmental legal regime would inevitably drive up costs as cross border traffic and cloud computing become more complicated and vulnerable to regulatory arbitrage. Such costs are always passed on to the end user consumers and may very well negate the ability of content and application providers such as Harvard and MIT to offer first-rate educational content for free.

Nations that value freedom and prosperity should draw a line in the sand against new regulations while welcoming reform that could include a non-regulatory role for the ITU. Venturing into the uncertainty of a new regulatory quagmire will only undermine developing nations the most.

As evidenced by today's panels, attempts to regulate the Internet sphere have rallied opposition here in the U.S. and internationally on a bipartisan basis. I am grateful that my friend, Ambassador Phil Verweir, is here with me today. I am encouraged by his recent indication that the Administration will name a head of the U.S. delegation to the WCIT in June. Furthermore, my friend and colleague, FCC Chairman Genachowski, also has been working to raise awareness of this important issue as have other key members of the Obama Administration.

I am further buoyed by the leading role played by the private sector, both for-profit and non-profit, not only domestically, but abroad as well. I am pleased to report that there are many entities of all stripes, including public interest groups, telecommunications companies, content providers, think tanks, Internet access service providers, non-profit Internet governance entities and network manufacturers standing together to help spread the message and educate policymakers across the globe. A solid diverse "coalition of coalitions" is starting to grow, which will help the soon-to-be named leader of our delegation begin on a positive note.

Finally, it is worth noting that even if this effort is unsuccessful in December, we must continue to be vigilant. Given the high profile, not to mention the dedicated efforts by some countries, I cannot imagine that this matter will disappear. Similarly, I urge skepticism for the "minor tweak" or "light touch." As we all know, *every* regulatory action has consequences. Put another way, when tended with care and patience, even a mustard seed can grow into Jack's Beanstalk. We must remain vigilant for years to come.

For your convenience, I have attached a copy of a recent *Wall Street Journal* op-ed that I wrote which provides more detail on the issue. See Exhibit A.

Thank you again for the opportunity to appear before you today. I look forward to your questions.

Exhibit A

Robert M. McDowell, *The UN Threat to Internet Freedom*, WALL ST. J., Feb. 21, 2012, at A19, available at <http://online.wsj.com/article/SB10001424052970204792404577229074023195322.html>.

THE WALL STREET JOURNAL.

TUESDAY, FEBRUARY 21, 2012

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The U.N. Threat to Internet Freedom

By **ROBERT M. McDOWELL**

On Feb. 27, a diplomatic process will begin in Geneva that could result in a new treaty giving the United Nations unprecedented powers over the Internet. Dozens of countries, including Russia and China, are pushing hard to reach this goal by year's end. As Russian Prime Minister Vladimir Putin said last June, his goal and that of his allies is to establish "international control over the Internet" through the International Telecommunication Union (ITU), a treaty-based organization under U.N. auspices.

If successful, these new regulatory proposals would upend the Internet's flourishing regime, which has been in place since 1988. That year, delegates from 114 countries gathered in Australia to agree to a treaty that set the stage for dramatic liberalization of international telecommunications. This insulated the Internet from economic and technical regulation and quickly became the greatest deregulatory success story of all time.

Since the Net's inception, engineers, academics, user groups and others have convened in bottom-up nongovernmental organizations to keep it operating and thriving through what is known as a "multi-stakeholder" governance model. This consensus-driven private-sector approach has been the key to the Net's phenomenal success.

In 1995, shortly after it was privatized, only 16 million people used the Internet world-wide. By 2011, more than two billion were online—and that number is growing by as much as half a million every day. This explosive growth is the direct result of governments generally keeping their hands off the Internet sphere.

Net access, especially through mobile devices, is improving the human condition more quickly—and more fundamentally—than any other technology in history. Nowhere is this more true than in the developing world, where

unfettered Internet technologies are expanding economies and raising living standards.

Farmers who live far from markets are now able to find buyers for their crops through their Internet-connected mobile devices without assuming the risks and expenses of traveling with their goods. Worried parents are able to go online to locate medicine for their sick children. And proponents of political freedom are better able to share information and organize support to break down the walls of tyranny.

The Internet has also been a net job creator. A recent McKinsey study found that for every job disrupted by Internet connectivity, 2.6 new jobs are created. It is no coincidence that these wonderful developments blossomed as the Internet migrated further away from government control.

Today, however, Russia, China and their allies within the 193 member states of the ITU want to renegotiate the 1988 treaty to expand its reach into previously unregulated areas. Reading even a partial list of proposals that could be codified into international law next December at a conference in Dubai is chilling:

- Subject cyber security and data privacy to international control;

- Allow foreign phone companies to charge fees for "international" Internet traffic, perhaps even on a "per-click" basis for certain Web destinations, with the goal of generating revenue for state-owned phone companies and government treasuries;

- Impose unprecedented economic regulations such as mandates for rates, terms and conditions for currently unregulated traffic-swapping agreements known as "peering."

- Establish for the first time ITU dominion over important functions of multi-stakeholder Internet governance entities such as the Internet Corporation for Assigned Names and Numbers, the nonprofit entity that coordinates the .com and .org Web addresses of the world;

- Subsume under intergovernmental control many functions of the Internet Engineering Task Force, the Internet Society and other multi-stakeholder groups that establish the engineering and technical standards that allow the Internet to work;

- Regulate international mobile roaming rates and practices.

Many countries in the developing world, including India and Brazil, are particularly intrigued by these ideas. Even though Internet-based technologies are improving billions of lives everywhere, some governments feel excluded and want more control.

And let's face it, strong-arm regimes are threatened by popular outcries for political freedom that are empowered by unfettered Internet connectivity. They have formed impressive coalitions, and their efforts have progressed significantly.

Merely saying "no" to any changes to the current structure of Internet governance is likely to be a losing proposition. A more successful strategy would be for proponents of Internet freedom and prosperity within every nation to encourage a dialogue among all interested parties, including governments and the ITU, to broaden the multi-stakeholder umbrella with the goal of reaching consensus to address reasonable concerns. As part of this conversation, we should underscore the tremendous benefits that the Internet has yielded for the developing world through the multi-stakeholder model.

Upending this model with a new regulatory treaty is likely to partition the Internet as some countries would inevitably choose to opt out. A balkanized Internet would be devastating to global free trade and national sovereignty. It would impair Internet growth most severely in the developing world but also globally as technologists are forced to seek bureaucratic permission to innovate and invest. This would also undermine the proliferation of new cross-border technologies, such as cloud computing.

A top-down, centralized, international regulatory overlay is antithetical to the architecture of the Net, which is a global network of networks without borders. No government, let alone an intergovernmental body, can make engineering and economic decisions in lightning-fast Internet time. Productivity, rising living standards and the spread of freedom everywhere, but especially in the developing world, would grind to a halt as engineering and business decisions become politically paralyzed within a global regulatory body.

Any attempts to expand intergovernmental powers over the Internet—no matter how incremental or seemingly innocuous—should be turned back. Modernization and reform can be constructive, but not if the end result is a new global bureaucracy that departs from the multi-stakeholder model. Enlightened nations should draw a line in the sand against new regulations while welcoming reform that could include a nonregulatory role for the ITU.

Pro-regulation forces are, thus far, much more energized and organized than those who favor the multi-stakeholder approach. Regulation proponents only need to secure a simple majority of the 193 member states to codify their radical and counterproductive agenda. Unlike the U.N. Security Council, no country can wield a veto in ITU proceedings. With this in mind, some estimate that approximately 90 countries could be supporting intergovernmental Net regulation—a mere seven short of a majority.

While precious time ticks away, the U.S. has not named a leader for the treaty negotiation. We must awake from our slumber and engage before it is too late. Not only do these developments have the potential to affect the daily lives of all Americans, they also threaten freedom and prosperity across the globe.

Mr. McDowell is a commissioner of the Federal Communications Commission.