

April 9, 2013

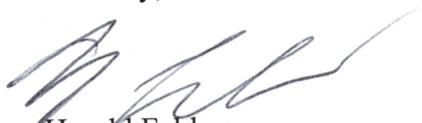
The Honorable Greg Walden
House of Representatives
Subcommittee on Communications and Technology
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Walden:

Thank you again for the opportunity to appear at the February 5, 2013 joint hearing entitled "fighting for Internet Freedom: Dubai and Beyond". At your request, I have submitted (below) responses to the additional questions for the record submitted by members of participating subcommittees.

Please do not hesitate to contact me if there are further questions we can answer or assistance we can provide on this topic.

Sincerely,



Harold Feld
Senior Vice President
Public Knowledge

cc: The Honorable Anna Eshoo, Ranking Member
Subcommittee on Communications and Technology

The Honorable Ted Poe

So my question to you is, Should there be, first, on one end and I am just asking for your opinion any consequences for countries that seem to want government control of the Internet, or not? And, second, a little more specific: how we can be prepared to communicate better to the vast majority of countries, as Ambassador Gross has mentioned, that still haven't made up their mind.

So three questions: ITU procedure; any consequences; and what can we specifically do?

ANSWER

With regard to ITU procedure, we have concerns that only member states may participate as full voting members. The importance of this distinction between full participation and even participation as a sector member was illustrated when the representative from Iran called for a formal vote on inclusion of human rights language which sought to transform the fundamental individual right to communicate into a “collective” right held not by individuals, but the very states which seek to restrict their freedom. Even if every NGO present had been independent Sector Members, they would not have been able to vote on this critical human rights question.

As Frank La Rue, U.N. Special Rapporteur on the right of freedom of expression, explained in the aftermath of the Dubai meeting, “meaningful participation” by NGOs and all stakeholders is critical to the success of any dialog on Internet governance.¹ While respecting the genuine efforts of the ITU to enhance participation by civil society and to urge member states to consult with their domestic civil society representatives, as long as the ITU remains a traditional multi-national treaty organization in which only accredited representatives of member states may vote and enjoy full privileges of membership, the concerns of members states will continue to drive the agenda.

In response to the second and third questions, it is important that our diplomatic efforts be continuous and inclusive. Perhaps more importantly, we must be wary of falling into the trap set by countries working against the interest of freedom of appearing to be bullies and supporting the narrative that this is not about Internet freedom but about U.S. efforts to “dominate” or “control” the Internet. The challenge for us is to simultaneously demonstrate the firmness of our resolve, while avoiding any appearance that we are attempting to bully, bribe or coerce countries through intimidation tactics.

Developing countries that have not made up their mind need to continue to see our resolve on this issue through normal diplomatic efforts. It is not enough simply to show up at the next international convening without having mentioned the importance of Internet governance in our

¹ Statement of the Special Rapporteur on December 19, 2012. Available at: <http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=12903&LangID=E>



regular discussions with these countries. The United States can also show its inclusiveness through the continued involvement of civil society groups.

In Dubai, the United States built up significant political capital with countries through our willingness to listen and engage. We must recognize that these issues will continue to be raised in the ITU and elsewhere, and that we must not squander our political capital by appearing to give up on negotiation after the first reversal. Countries that voted against us, or decided to sign the new ITRs, are not irredeemably lost. By the same token, the 55 countries that agreed with our position and declined to sign the ITRs could be driven into the arms of our opponents if we appear to abandon diplomacy for intimidation.

The Honorable Anna Eshoo

For what lies ahead, what do you think the United States should do in working with developing nations to help turn them around? What are the ingredients?

ANSWER

There are several actions that the United States can make to work at turning around key nations in the developing world. First, the U.S. should proactively reach out to these nations through both diplomatic and other government channels. While the State Department remains in regular communication, visits from officials such as the Chairman of the FCC and Congressional leaders on communications policy would bring an added perspective on the state of the Internet economy and the potential for it in these countries.

Second, it is important that we continue to demonstrate our interest in all voices being heard through consistent policies for trade discussions. This includes supporting the Internet Governance Forum (IGF) as well as standing up for transparency and civil society voices in trade negotiations. The IGF is the example of how the multi-stakeholder process should work and was created explicitly for working around Internet governance issues, as opposed to the ITU. U.S. trade negotiations practices generally have come under scrutiny for their lack of transparency and unequal access to civil society groups. These practices send the wrong message to our allies in developing countries and have even been criticized by members of Congress.

Third, I will reiterate my recommendation that the United States support financially the participation of both smaller developing countries and international civil society groups at international convenings such as the IGF and WCIT. Do not underestimate the inroads that China and others opposing the multi-stakeholder process have made with many developing countries through their long-standing economic development efforts in these countries. The United States can make the same inroads while broadening the attendance at these convenings to more developing countries that embrace the open, multi-stakeholder process but cannot afford to travel often.

Industry financial support can help supplement this effort, but Congress should authorize the State Department to set up a mechanism through which this support could be delivered. Critically, funding from any source must be seen as disbursed in a neutral manner. For this participation to remain credible, it must be clear that funding for participation is not contingent on adopting specific positions or a willingness to vote in accordance with the wishes of the United States or any financial donor.



The Honorable Brad Sherman

Should we have done more to tell countries that, to use the language here in Congress, we are scoring the vote? That is to say, that those making other important U.S. foreign policy decisions are taking note of how countries vote at the ITU? Is that undue pressure or a demonstration of how important Internet freedom is?

ANSWER

I believe that the U.S. delegation, led by Ambassador Terry Kramer, found the correct balance in demonstrating our willingness to negotiate and the firmness of our resolve to avoid any new regulation of the Internet through the ITU. That 53 other countries joined us in not signing the final acts of the ITR demonstrates that our arguments carried weight and earned us support.

Threats to countries that support the ITR will backfire and harm the opportunity win over support from the majority of countries that still have not signed onto the ITR. The United States focus should now be focused on continuing to reach out to these countries using the tools of diplomacy, demonstrated commitment to open forums, and economic support for the participation of developing countries [see above answer to Rep. Eshoo].

The Honorable Henry Waxman

Please share with the Committee your view on the draft legislation circulated prior to the hearing, which states that “it is the policy of the United States to promote a global Internet free from government control and to preserve and advance the successful multistakeholder model that governs the Internet.”

ANSWER

As I stated in my testimony, Public Knowledge and I support the effort of Congress to demonstrate unity around Internet freedom through language similar to the 112th Congress’ unanimous bipartisan resolution, S. Con. Res. 50. Unanimous, bipartisan statements targeted at these global convenings show to the world the resolve of our country to remain dedicated to the multi-stakeholder process.

That being said, I want to make a further distinction between the unifying message of the Resolution of 2012 and the potential risk of applying such language to domestic policies around communications networks. I understand that since the draft legislation was introduced, concerns have been expressed by the U.S. State Department, the FCC, and others that a bill promoting an Internet “free from government control” could point towards invalidating many longstanding protections in domestic communications law that protect consumers, promote competition, and enable law enforcement and cybersecurity initiatives. These concerns are legitimate and were not discussed during our hearing.

My concern is further heightened by the fact that prior to the WCIT, efforts were made by some parties to hijack concerns about the WCIT to advance purely domestic policy purposes.² As I warned in my written testimony, “it is critical that this international process is not hijacked for a debate over domestic rules preserving an open Internet.” Nothing could be more damaging to our international standing than to transform this show of unity into a partisan brawl by refusing to clarify that the proposed legislation is designed to address only “international regulatory bodies,” as suggested by Rep. Eshoo.³

Further, as I noted in my written testimony, “the United States equally opposed consideration of cybersecurity and privacy at the ITU, arguing that these were matters for sovereign governments in the first instance, and multi-stakeholder cooperation internationally.” Those who would seek to leverage the proposed legislation to undermine the policies of the Federal Communications Commission will likewise undermine the privacy and consumer protection authority of the Federal Trade Commission, access to VOIP calls under the Communications to Law Enforcement Act (CALEA), the recent Executive Order on Cybersecurity and any future actions by the Department of Homeland Security (DHS) or other agency on cybersecurity. Such an

² See Gigi Sohn, “Not So Hidden Agendas Threaten ITU Kumbaya Moment,” Public Knowledge Blog (August 17, 2012) available at: <http://www.publicknowledge.org/blog/not-so-hidden-agendas-threaten-itu-kumbaya-mo>

³ Letter of Ranking Member Anna Eshoo to Chairman Walden (Feb. 25, 2013).

interpretation would require an implied repeal of the provisions of the Digital Millennium Copyright Act (DMCA) requiring Internet Service Providers or providers of Interactive Services to respond to takedown requests and repeat infringers. At a minimum, such an interpretation would affect an implied repeal of the CAN-SPAM Act, given that we cited the inclusion of anti-spam provisions in the ITRs as a reason we could not sign the Treaty in Dubai.

As these examples indicate, the simplistic and self-serving argument that “what is unfit for the ITU is unfit for domestic policy” is absurd. Our opposition to ceding authority to the ITU to decide how to balance consumer protection and free expression is not because we see no role for government in protecting consumers or promoting competition. Rather, we believe those matters are best decided here at home, by a Congress accountable to the people and enforced by a government constrained by the Constitution.

I therefore ask that you refrain from passing the bill as written, despite my initial expression of support at the hearing. Only after incorporating the changes requested by Rep. Eshoo, and otherwise clarifying that the bill addresses only regulation by International multi-governmental entities and does not purport to create a new policy of total deregulation for anything using Internet protocol (IP). Without such a change, I would oppose the proposed bill as potentially undermining critical and long-standing consumer protections and pro-competitive policies.