

Questions for the Record from The Honorable Renee Ellmers

March 17, 2016 hearing before the U.S. House of Representatives, Committee on Energy and Commerce, Subcommittee on Communications and Technology.

“Privatizing the Internet Assigned Number Authority”

Questions for Mr. DelBianco:

Question 1: ICANN is a global organization to provide policy and protection for all citizens throughout the world. As threats to our nation’s cybersecurity increasingly grow more frequent and more complex, without accountability to the United States, how can we ensure that the leadership inside ICANN would not be unduly influenced or implement policy that could negatively impact every company and individual in the United States who rely upon fair and open access of the internet each and every day? For example, the staff of ICANN make decisions every day impacting companies and their very business models, such as how to implement policy relating to the new gTLD program or enforcing requirements that protect people from bad actors using domain names or web sites to cause harm to others.

Answer to Q1:

First, it’s important to remember that ICANN coordinates only the *Internet addressing system* that we use to reach websites and route emails. Some cyber attacks might attempt to corrupt internet addressing systems, in which case ICANN would have a role in assessing, correcting, and preventing that kind of attack.

While cyber attacks could use domain names and address numbers, please understand that ICANN has no role in monitoring or stopping internet traffic or conduct that uses the addressing system.

Nor does ICANN have any role or power to prevent governments or others from impairing open access to internet websites or content when internet traffic crosses their own borders.

Nor does ICANN leadership make policy *decisions*, since that is the work that we do within the ICANN community of Advisory Committees and Supporting Organizations (ACs and SOs). But you’re right to be asking about ICANN board and management, since they have significant influence in *implementing* and *interpreting* the policies the community develops.

The cross-community working group for this transition (CCWG) published a final proposal in Feb-2016 giving the community new powers to ensure ICANN was answerable to more than just itself.¹ New powers for the community include the ability to challenge ICANN board and management on how the implement and enforce consensus policies:

- Challenge board actions via Independent Review Process (IRP), where decisions are binding
- Veto strategic plans and budgets proposed by the ICANN board
- Control the periodic reviews required by the *Affirmation of Commitments*

¹ Final Accountability Proposal, at <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>

With these new powers, the community of business, technologists, and civil society can challenge the way ICANN implements policies and contracts. Any aggrieved party can bring their own IRP against ICANN. And if there is sufficient consensus among the newly-created Empowered Community to bring an IRP challenge, ICANN must bear the legal costs of the IRP.

IRP decisions can be enforced in California courts, or in any court that recognizes international arbitration proceedings. If the ICANN board were to ignore IRP decisions, the Empowered Community could recall one or all of the board of directors – and this power would be enforceable in California courts.

Your question also touches on how to hold ICANN staff accountable for their decisions and actions. The CCWG is now turning to several tasks as part of Work Stream 2 – accountability measures that can be developed after the new ICANN bylaws are adopted. One of the Work Stream 2 projects is to explore this very question.

Staff Accountability is described in the CCWG’s final proposal (Annex 12):

In general, management and staff work for the benefit of the community and in line with ICANN’s purpose and Mission. While it is obvious that they report to and are held accountable by the ICANN Board and the President and CEO, the purpose of their accountability is the same as that of the organization:

- Complying with ICANN’s rules and processes.
- Complying with applicable Bylaws.
- Achieving certain levels of performance, as well as security.
- Making their decisions for the benefit of the community and not in the interest of a particular stakeholder or set of stakeholders or ICANN the organization alone.

Having reviewed and inventoried the existing mechanisms related to staff accountability, areas for improvement include clarifying expectations from staff, as well as establishing appropriate redress mechanisms. The CCWG-Accountability recommends as part of its Work Stream 2:

- The CCWG-Accountability work with ICANN to develop a document that clearly describes the role of ICANN staff vis-à-vis the ICANN Board and the ICANN community. This document should include a general description of the powers vested in ICANN staff by the ICANN Board of Directors that need, and do not need, approval of the ICANN Board of Directors.
- The CCWG-Accountability work with ICANN to consider a Code of Conduct, transparency criteria, training, and key performance indicators to be followed by staff in relation to their interactions with all stakeholders, establish regular independent (internal and community) surveys and audits to track progress and identify areas that need improvement, and establish appropriate processes to escalate issues that enable both community and staff members to raise issues. This work should be linked closely with the Ombudsman enhancement item of Work Stream 2.

It is through these community powers and increased staff accountability that US companies and individuals can take actions to prevent or reverse policies that negatively impact Americans who rely upon ICANN’s address coordination to reach websites and deliver communications.

Question 2: The transition plan asks for the US government to place trust in an organization governed by volunteers who self-select leaders rather than elect or appoint leaders. In some cases leaders may or may not be qualified, and in some cases may clearly have financial or other interests influencing their decision-making and approach to developing policy for everyone. When the internet is so central to how our people and companies live and thrive, can we really simply trust that this will be done fairly and appropriately, particularly given the political volatility in today's climate? What safeguards can we instill to ensure fair decisions for all?

Answer to Q2:

The organizations that comprise ICANN's volunteer community of stakeholders -- known as Advisory Committees and Supporting Organizations (ACs and SOs) -- have been part of ICANN since the US government helped establish the organization. So the US government has placed its trust in these ACs and SOs since 1998, while holding leverage in its ability to withhold the IANA functions contract if ICANN failed to meet its responsibilities.

After this transition, the US government will no longer hold contractual leverage over the IANA functions. Instead, the existing community of ACs and SOs will gain new powers to hold ICANN accountable if it failed to serve IANA customers and the global internet community. (I described some of those powers in my response to the first question above.)

As your question indicates, it is therefore essential that these community organizations are *themselves* transparent and accountable to the stakeholders they were designed to represent.

The CCWG is now turning to several tasks as part of Work Stream 2 – accountability measures that can be developed after the new ICANN bylaws are adopted. One of the Work Stream 2 projects is to explore this very question of “Who watches the watchers?”

Supporting Organizations and Advisory Committee Accountability is described in the CCWG's final proposal (Annex 12):

As the community's power is enhanced, legitimate concerns have arisen regarding the accountability of the community (organized as SOs and ACs) in using new Community Powers, i.e., “who watches the watcher.”

The CCWG-Accountability reviewed existing accountability mechanisms for SOs and ACs as well as governance documents (see above). Analysis revealed that mechanisms are limited in quantity and scope. Having reviewed and inventoried the existing mechanisms related to SO and AC accountability, it is clear that current mechanisms need to be enhanced in light of the new responsibilities associated with the Empowered Community.

The CCWG-Accountability recommends the following.

As part of Work Stream 1:

- Include the review of SO and AC accountability mechanisms in the independent structural reviews performed on a regular basis. These reviews should include consideration of the

mechanisms that each SO and AC has in place to be accountable to their respective Constituencies, Stakeholder Groups, and Regional At-Large Organizations, etc.

- This recommendation can be implemented through an amendment of Section 4 of Article IV of the ICANN Bylaws, which currently states: “The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine (1) whether that organization has a continuing purpose in the ICANN structure, and (2) if so, whether any change in structure or operations is desirable to improve its effectiveness.”

As part of Work Stream 2:

- Include the subject of SO and AC accountability as part of the work on the Accountability and Transparency Review process.
- Evaluate the proposed “Mutual Accountability Roundtable” to assess viability and, if viable, undertake the necessary actions to implement it.
- Propose a detailed working plan on enhancing SO and AC accountability
- Assess whether the IRP would also be applicable to SO and AC activities.

Another response to your question is to examine whether ICANN’s new accountability structure will adequately contain the power that governments might seek to exercise as part of the Empowered Community.

Governments have influence on ICANN policy development and contract compliance via their collective participation in the Governmental Advisory Committee (GAC). The GAC was established when the US Commerce Department and American private sector interests first created ICANN in 1998:²

The Governmental Advisory Committee should consider and provide advice on the activities of the Corporation as they relate to concerns of governments, particularly matters where there may be an interaction between the Corporation’s policies and various laws, and international agreements.

The GAC has gradually grown in its effectiveness to and its advice to ICANN has grown in importance, as seen with policies adopted for the latest expansion of new top-level domains.

In our previous Congressional testimony, I described a stress test where governments could significantly raise their influence via GAC formal advice:³

Stress Test #18 is related to a scenario where ICANN’s GAC would amend its operating procedures to change from consensus decisions to majority voting for advice to the ICANN Board. Since the ICANN Board must seek a mutually acceptable solution if it rejects GAC advice, concerns were raised that the Board could be forced to arbitrate among sovereign governments if they were divided in their support for the GAC advice. In addition, if the GAC lowered its decision threshold while also participating in the

² 6-Nov-1998, Bylaws for ICANN, at <https://www.icann.org/resources/unthemed-pages/bylaws-1998-11-06-en>

³ See Stress Tests 6 & 7, on p. 9 at [NetChoice Testimony before the House Energy & Commerce Committee – Ensuring the Security, Stability, Resilience, and Freedom of the Global Internet](#), 2-Apr-2014

Empowered Community, some stakeholders believe this could inappropriately increase government influence over ICANN.⁴

Several governments had previously voiced dissatisfaction with the present consensus rule for GAC decisions, so it is plausible that the GAC could change its method of approving advice at some point, such that a majority could prevail over a significant minority of governments. Early on, NTIA said that addressing Stress Test 18 was required for the transition.⁵

As a threshold matter, the USG considers the stress test both appropriate and necessary to meet the requirement that the IANA transition should not yield a government-led or an intergovernmental replacement for NTIA's current stewardship role.

Finally, we interpret the proposed stress test as capturing this important distinction in GAC advice, with an appropriate remedy in the form of a Bylaws amendment to reinforce the ICANN community's expectation that anything less than consensus is not advice that triggers the Bylaw provisions.

In response, the new bylaws would enshrine the GAC's present full-consensus rule as the only way to trigger the board's obligation to "try and find a mutually acceptable solution." Several GAC members fiercely resisted this change, saying it interfered with government decision-making and reduced the role of governments. To overcome some of that resistance, we raised the threshold for ICANN's board to reject GAC's full-consensus advice, from today's simple majority (9 votes) to 60% (10 votes).

This brings to mind the Feb-2015 hearing I the US Senate, where ICANN CEO Fadi Chehade was asked about a proposal to raise the rejection threshold to 2/3 of board votes. Chehade replied, "The Board has looked at that matter and has pushed it back, so it is off the table." It's true that a standalone proposal to raise the GAC rejection threshold was broadly opposed and set aside in late 2014. However, the proposed bylaw to increase the rejection threshold to 60% (1 additional vote) is an entirely different arrangement, since it reserves the higher threshold only for GAC advice adopted "by general agreement in the absence of any formal objection". This requirement prevents the GAC from generating privileged advice based on anything less than consensus, and more than justifies the addition of 1 more vote to reject that advice.

If the board rejects GAC advice, it must still follow existing bylaws to "try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution." This is an obligation to "try" and does not oblige ICANN to find a solution that is acceptable to the GAC.

⁴ pp. 2-3, Annex 11 - Recommendation #11: Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test #18), at <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>

⁵ Email from Suzanne Radell, Senior Policy Advisor, NTIA, 19-Mar-2015, at <http://mm.icann.org/pipermail/accountability-cross-community/2015-March/001711.html>

Another imposition on GAC advice is a requirement that advice “is communicated in a clear and unambiguous written statement, including the rationale for such advice.”⁶ And if ICANN’s board accepted GAC advice that is inconsistent with ICANN Bylaws, the community can invoke the independent review process (IRP) to “ensure that ICANN does not exceed the scope of its limited technical Mission and otherwise complies with its Articles of Incorporation and Bylaws.”⁷

As one of the 7 Advisory Committees and Supporting Organizations that comprise the ICANN community, GAC was also invited to participate as a decisional participant of the Empowered Community. A few critics say that we should have excluded GAC from the community, but I cannot imagine that Congress or the Administration would accept an accountability structure where governments – including the US – have no seat at the table. National, state, and local governments maintain websites and services as domain name registrants, and many government employees are Internet users. Moreover, governments have a role among all stakeholders in developing public policy and enforcing laws that are relevant to the Internet.

While GAC is rightfully an equal among ICANN stakeholders, the new bylaws ensure that governments could not block a community challenge of ICANN Board’s implementation of GAC advice. In what is known as the “GAC Carve-out”, the bylaws exclude the GAC from the community decision whether to challenge a board action based on GAC consensus advice.

Several governments vigorously oppose these bylaws provisions to limit GAC influence and lock-in their consensus method of decision-making. In a statement issued Mar-2016, France’s minister for digital economy complained about ICANN’s new bylaws:⁸

"Despite the continued efforts of civil society and many governments to reach a balanced compromise, elements of this reform project will marginalize States in the decision-making processes of ICANN, especially compared to the role of the private sector."

Unnamed French foreign ministry officials also told *Le Monde* they were unhappy with the end result, saying: "This is an unsatisfactory condition. The consensus requirement only produces warm water. And that does not put the GAC on the same footing as the other committees of ICANN."

The French official is right – the GAC is not on the same footing as other ICANN stakeholders. That, however, is by design. Notwithstanding criticism from certain governments, the full package of transition accountability measures sufficiently cabins governmental influence and fully meets NTIA’s conditions for the transition.

⁶ 20-Apr-2016, Section 12.3 of Draft New ICANN Bylaws, at <https://www.icann.org/en/system/files/files/proposed-new-bylaws-20apr16-en.pdf>

⁷ *Ibid*, Section 4.3 a

⁸ 24-Mar-2016, “French scream sacré bleu! as US govt gives up the internet to ICANN”, at http://www.theregister.co.uk/2016/03/24/france_slams_us_govt_internet_transition/

Question 3: Why the need to transition from the United States before the Accountability work stream 2 is completed? With so much at stake and so many potential threats to the US economy, safety and security driven by potential bad actors on the internet ranging from the North Koreans, Chinese, Russians, and ISIS/ISIL, why risk this to a group of volunteers without accountability back to the United States?

Answer to Q3:

As noted in my response to your first question, it's important to understand that ICANN coordinates only the Internet addressing system that we use to reach websites and route emails. Some cyber attacks might attempt to corrupt internet addressing systems, in which case ICANN would have a role in assessing, correcting, and preventing that kind of attack. While cyber attacks could use the addressing system, ICANN has no role in monitoring or intercepting internet traffic.

In my response to your second question, I describe how the CCWG has cabined the power of governments to bring censorship or content control into the ICANN sphere of coordination.

Over 18 years and three administrations, the US government has used light-touch oversight over ICANN. However, it is neither sustainable nor necessary for the US to retain its unique role forever. In fact, retaining this unique role increases the risk of Internet fragmentation and government overreach. At NTIA's request, the Internet community created proposals to let ICANN loosen ties to the US government and strengthen its accountability to the global Internet user community and keeping core Internet functions free from governmental control.

At this point, a significant delay in this transition could create far more risks than rewards for the interests of US government, businesses, and citizens.

Your third question suggests delaying the transition beyond the IANA contract expiration on 30-Sep-2016, until Work Stream 2 tasks are all completed. We acknowledge that a modest delay could give more time to complete remaining implementation tasks and verify promised implementation by the ICANN Board. But an extended delay would create more risks and no significant benefits from the perspective of the US government, businesses, and citizens.

One Work Stream 2 task has generated questions about whether ICANN might be pulled into potentially troubling enforcement obligations for human rights. NetChoice shared this concern with the first draft of Bylaws regarding the *Work Stream 2* framework on human rights, so we support this amended Bylaw text:

(viii) Subject to the limitations set forth in Section 27.3, within the scope of its Mission and other Core Values, respecting internationally recognized human rights as required by applicable law. This Core Value does not create, and shall not be interpreted to create, any obligation on ICANN outside its Mission, or beyond obligations found in applicable law. **This Core Value does not obligate ICANN to enforce its human rights obligations, or the human rights obligations of other parties, against such other parties.**

This proposed bylaws text would make it clear that ICANN will not become embroiled in enforcement of claims related to human rights, and should address this concern.

Actually, there are several additional tasks in Work Stream 2, which will take the CCWG well into mid-2017 to complete.

However, the whole point of separating Work Stream 1 and 2 tasks was to identify what had to be implemented *before* the IANA contract expired, after which there would be very little leverage to force accountability measures that would be resisted by ICANN's board. Work Stream 1 includes new powers to block the board's budget, overturn a board decision, and to recall board directors. Those powers are deemed sufficient to force a future ICANN board to accept Work Stream 2 changes that are developed through community consensus.

In other words, ICANN's new bylaws give the Empowered Community new powers to implement further reforms *at any time*. So the only way to evaluate all changes the community might pursue in the future is to delay the transition *indefinitely*.

A long-term delay of transition would re-ignite the fire at the United Nations, where many governments have cited the US government role as the sole supervisor of ICANN and the IANA functions as an excuse to gain more control over the Internet *for themselves*.

With this transition we are eliminating the role where one government holds ICANN accountable, by moving to a structure where ICANN is accountable to a broad community of Internet stakeholders. After transition, the UN and ITU can no longer point to the US government role and say they should step into those shoes.

An extended delay of transition would signal that the US government does not actually trust the multi-stakeholder model that we are encouraging China and other governments to trust. China's government would surely note our hypocrisy for criticizing them for failing to embrace domain registration policies developed by ICANN's multi-stakeholder community.

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Thank you for these questions. I am at your service to elaborate on these responses and address other questions and concerns you might have.