Statement for the Record

_____

# Privatizing the Internet Assigned Number Authority

## Statement for the Record for the
## Subcommittee on Communications and Technology

## Energy and Commerce Committee
## United States House of Representatives

## March 17, 2016

### Brett D. Schaefer and Paul Rosenzweig

### The Heritage Foundation

Our names are Brett D. Schaefer and Paul Rosenzweig. We are, respectively, the Jay Kingham Fellow in International Regulatory Affairs and a Visiting Fellow at The Heritage Foundation. The views we express in this statement for the record are our own and should not be construed as representing any official position of The Heritage Foundation.

A critical change in Internet governance is imminent. It has been two years since the U.S. National Telecommunications and Information Administration (NTIA), an arm of the Commerce Department, announced that it intended to end its current contract with the Internet Corporation for Assigned Names and Numbers (ICANN) and "transition key Internet domain name functions to the global multi-stakeholder community."[1] The U.S. government is now on the verge of giving up its historical role in overseeing changes to the Domain Name System (DNS)—the policy apparatus and technological method that assigns names and numbers on the Internet. It is the system that ensures that "Heritage.org" refers to The Heritage Foundation and not some hypothetical ancestry and heritage group. If things proceed as proposed, the DNS system will be run independently under ICANN with oversight performed by a new international multi-stakeholder entity. As the Administration and Congress consider the transition, projected to be completed before the end of the fiscal year, they should proceed with great caution.

In its 2014 announcement, before the transition could occur, NTIA required ICANN to develop a formal proposal that would assure the U.S. that the termination of its historical contractual relationship would not threaten the security and openness of the Internet, undermine the bottom-up multi-stakeholder process, or replace the current role of the NTIA with a government-led or intergovernmental organization solution. That proposal has now been drafted and approved by the relevant groups in ICANN (known as supporting organizations and advisory committees or SO/ACs) and the ICANN board.[2] There are a number of positive aspects to the proposal that, if implemented as outlined, would create mechanisms for the ICANN community to hold the board and staff accountable and reverse imprudent decisions. To the extent it does so, the proposal is to be welcomed as a step in the right direction.

Important details, however, remain to be resolved in the implementation stage. Although the proposal outlines greatly improved accountability measures, it is important that these mechanisms be implemented in a robust, easily useable manner in order to help protect the newly reconfigured ICANN from capture by those seeking to advance a narrow business or political agenda and allow the community to block policies that could threaten the stability, security, or openness of the Internet. Another concern is that the proposal, while not replacing the NTIA with a governmental or intergovernmental solution, would greatly enhance the power of governments within ICANN relative to the status quo.

Fundamentally, however, the uncertainties of how this new ICANN structure would operate should lead the U.S. to retain some oversight until there is confidence that it will work smoothly as envisioned. To that end, we recommend a "soft extension" of the existing contractual relationship—one that allows ICANN two years to demonstrate that the new procedures it is

---

[1]News release, "NTIA Announces Intent to Transition Key Internet Domain Name Functions," National Telecommunications and Information Administration, March 14, 2014, http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions (accessed March 15, 2016).
[2]ICANN, "Plan to Transition Stewardship of Key Internet Functions Sent to the U.S. Government," March 10, 2016, https://www.icann.org/news/announcement-2016-03-10-en (accessed March 15, 2016).

putting in place actually work to hold the corporation accountable. The transition to a multi-stakeholder, global system is too important to get wrong and too important to rush.

**A Long, Difficult Process**

In March 2014, the NTIA announced that it intended "to transition key Internet domain name functions to the global multistakeholder community" and asked ICANN to convene a group of global stakeholders to develop a proposal on a new process to replace the NTIA's "procedural role of administering changes to the authoritative root zone file—the database containing the lists of names and addresses of all top-level domains."[3] In that announcement, however, NTIA stated:

> NTIA has communicated to ICANN that the transition proposal must have broad community support and address the following four principles:
>
> ▪ Support and enhance the multistakeholder model;
>
> ▪ Maintain the security, stability, and resiliency of the Internet DNS;
>
> ▪ Meet the needs and expectation of the global customers and partners of the IANA services; and,
>
> ▪ Maintain the openness of the Internet.
>
> Consistent with the clear policy expressed in bipartisan resolutions of the U.S. Senate and House of Representatives (S.Con.Res.50 and H.Con.Res.127), which affirmed the United States support for the multistakeholder model of Internet governance, NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution.[4]

After NTIA made its announcement, ICANN quickly convened the IANA Stewardship Transition Coordination Group (ICG), comprised of three sub-groups on Domain Names: the Cross Community Working Group on Stewardship (CWG-Stewardship), Numbering Resources (CRISP Team), and Protocol Parameters (IANAPLAN Working Group).[5] This effort focused on the technical questions raised by the transition and how the gaps in process resulting from the withdrawal of the NTIA would be filled. The narrow focus of this effort, combined with the earlier start, led to the ICG being largely complete by January 2015.

To their credit, however, many in the ICANN community made clear that they would not be satisfied with a narrow technical proposal that would only address the gaps arising from the end of the U.S. contractual relationship with ICANN. They insisted that long-standing concerns

---

[3]News release, "NTIA Announces Intent to Transition Key Internet Domain Name Functions."
[4]News release, "NTIA Announces Intent to Transition Key Internet Domain Name Functions."
[5]A descriptive chronology and the ICG proposal are available at: IANA Stewardship Transition Coordination Group (ICG), "Proposal to Transition the Stewardship of the Internet Assigned Numbers Authority (IANA) Functions from the U.S. Commerce Department's National Telecommunications and Information Administration (NTIA) to the Global Multistakeholder Community," March 2016, https://www.icann.org/en/system/files/files/iana-stewardship-transition-proposal-10mar16-en.pdf (accessed March 15, 2016).

about insufficient transparency and accountability within ICANN and its decision-making process needed to be addressed before the transition occurred.

An initial attempt by the ICANN board to lead this process raised strong objections from the ICANN community which was concerned that the board would not develop or support robust accountability measures that would allow the community to block objectionable board decisions or recall the board. An unprecedented unanimous statement from all the stakeholder groups and constituencies that make up ICANN's Generic Names Supporting Organization (gNSO)[6] rebuked the board for trying to control this process and called for "creation of an independent accountability mechanism that provides meaningful review and adequate redress for those harmed by ICANN action or inaction in contravention of an agreed upon compact with the community."[7]

After several months of negotiation, the Board and the community agreed to establish the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) which held its first meeting in December 2014. Over the past 14 months, the 28 members and 203 participants of the CCWG-Accountability—including the authors of this paper—dedicated enormous effort to developing a robust accountability proposal. As of March 2016, the group had held 209 meetings and calls consuming 404 total hours and had exchanged 12,430 e-mails on the proposal.[8]

The final draft of their proposal was approved by the chartering organizations and the ICANN board at a meeting in early March and the board has now transmitted both the ICG and the CCWG-Accountability proposals to the NTIA. The NTIA, in turn, has announced that it will review the combined proposal to determine if it meets the criteria set forth and consult with Congress as the transition moves forward.[9]

**Board Interference and Procedural Irregularities.** A number of challenges arose in this process beyond the normal differences of opinion and approach inherent in negotiating an important document between groups with different equities. High among these challenges was the tendency of the ICANN board to act as a participant in the process rather than as a recipient of the proposal as devised by the multi-stakeholder community. When queried, ICANN Chief Executive Officer Fadi Chehade assured Congress that the board would allow the multi-stakeholder community to independently develop the accountability plan and would transfer it

[6]The gNSO is one of three "supporting organizations" in ICANN. It is by far the largest and provides ICANN with policy advice relating to generic names—most domain names on the Internet in the .org, .edu, .com, and other top-level domains (TLDs), including all of the relatively new gTLDs, like .biz and .net. The country code name supporting organization (ccNSO) provides advice relating to country code domains (for example, the .uk that signifies the United Kingdom). The address supporting organization (ASO) provides advice regarding IP addresses—the unique number given to every computer connected to the Internet.

[7]Brett Schaefer and Paul Rosenzweig, "Fireworks Erupt at ICANN's London Meeting," Daily Signal, June 29, 2014, http://dailysignal.com/2014/06/29/fireworks-erupt-icanns-london-meeting/ (accessed March 15, 2016).

[8]ICANN, "IANA Stewardship Transition and Enhancing ICANN Accountability Engagement and Participation Statistics," March 2014 through March 2016, https://www.icann.org/resources/pages/iana-accountability-participation-statistics-2015-11-04-en (accessed March 15, 2016).

[9]Assistant Secretary for Communications and Information and NTIA Administrator Lawrence E. Strickling, "Reviewing the IANA Transition Proposal," National Telecommunications and Information Administration, March 11, 2016, https://www.ntia.doc.gov/blog/2016/reviewing-iana-transition-proposal (accessed March 15, 2016).

forward to the NTIA even if it contained provisions that the board opposed.[10] Yet, the board did not adhere to this promise and, instead, intervened to shape the proposal in fundamental ways and to block provisions that it opposed.

Most notable was the board's opposition to the Cross Community Working Group on Enhancing ICANN Accountability Second Draft Report (Work Stream 1) because it recommended making ICANN into a member-based nonprofit corporation with the SO/ACs jointly comprising a single member called the "Sole Member Model."[11] Under California law, which is the relevant law because ICANN is incorporated in California, this model would have given the community significant authority over the Board in much the same way that shareholders have control over for-profit corporations.

The board objected to membership for several reasons that the board thought could be potentially destabilizing, but prominent among them was the board's concern that the "Sole Member Model would bring with it statutory rights that could impact ICANN and its operations, without any fiduciary duty to ICANN."[12] In other words, the board objected to membership even though it was a standard California method of governance in nonprofit organizations because, in its view, the model gave the membership too much power over ICANN operations.

In the face of the board's opposition, the CCWG-Accountability backed down and did not insist that the board transfer the proposal to the NTIA as promised to Congress. Instead, the CCWG-Accountability dramatically altered the proposal, wasting weeks, perhaps months, of work. A new proposal titled "CCWG-Accountability - Draft Proposal on Work Stream 1 Recommendations" was submitted to public comment on November 30.[13] This proposal abandoned the membership model and suggested a "Sole Designator Model" that would consolidate the SO/ACs as a group into a "designator" (later called the Empowered Community or EC). Under California law, a designator has far more limited powers than a member. To try and address these gaps, the proposal would grant specified powers to the EC through new or amended bylaws. However, this shift is notable because it weakened the legal standing and independence of the ICANN community as compared to a member organization. Specifically,

---

[10]ICANN CEO Fadi Chehade promised the Senate that "if the stakeholders present [ICANN] with [such] a proposal [w]e will give it to NTIA, and we committed already that we will not change the proposal." Hearing, *Preserving the Multistakeholder Model of Internet Governance*, Committee on Commerce, Science and Transportation, U.S. Senate, February 25, 2015, http://www.commerce.senate.gov/public/index.cfm/2015/2/preserving-the-multistakeholder-model-of-internet-governance (accessed March 15, 2016).

[11]ICANN, "Cross Community Working Group on Enhancing ICANN Accountability 2nd Draft Report (Work Stream 1)," Public Comment, August 3, 2015, https://www.icann.org/public-comments/ccwg-accountability-2015-08-03-en (accessed March 15, 2015).

[12]Quoted from ICANN Board, "Frequently Asked Questions Regarding Approach for Community Enforceability," September 11, 2015, http://forum.icann.org/lists/comments-ccwg-accountability-03aug15/msg00045.html (accessed March 15, 2016). For the entire comment see ICANN Board, "ICANN Board submission of supplementary and final comments to the CCWG-Accountability 2nd Draft Proposal Public Comment forum," September 11, 2015, http://forum.icann.org/lists/comments-ccwg-accountability-03aug15/msg00045.html (accessed March 15, 2016).

[13]ICANN Public Comment, "CCWG-Accountability - Draft Proposal on Work Stream 1 Recommendations," November 30, 2015, https://www.icann.org/public-comments/draft-ccwg-accountability-proposal-2015-11-30-en (accessed March 15, 2016).

many powers would be subject to change via bylaw amendment and would lack the guarantees of statute in California law, i.e., an authority external to ICANN.[14]

Other significant board interventions occurred during the process and even after the report was supposed to be final. As noted by ICANN's Intellectual Property Constituency (IPC) in its comment to the gNSO:

> [A] last minute, Board-initiated change was made less than two weeks before the commencement of ICANN 55 and the deadline for CCWG Chartering Organization decisions whether to approve or reject the Final Proposal. The Board-initiated change did not involve a fringe issue; rather it went to the heart of the proposal, and in particular the balance of government interests and private sector interests.[15]

The Board's comment led to changes in the proposal even though that stage of the process had officially closed and only copyedits and corrections were being accepted. This procedural irregularity was not unique. Again as noted by the IPC:

> While the effort of the CCWG has spanned 14 months, many of the details ultimately provided in the Proposal were not completely articulated until the Third Draft Proposal circulated in late Fall 2015…. Review of the final proposal between publication and the Marrakech meeting, as well as the earlier truncated comment period for the Third Draft Proposal, which fell during the Winter holidays, required herculean efforts to review, digest and (when called for) draft responsive comments. Given their importance, it is unfortunate that the proposed changes to ICANN governance and accountability mechanisms were fast tracked.[16]

Despite the fact that the NTIA and ICANN repeatedly assured Congress that it was more important to get this right than to get it done on time, these procedural compromises were deemed necessary because of a perceived need to meet political deadlines. The NTIA has the ability to extend the U.S. oversight role through September 2019, but there is a keen desire in ICANN, the NTIA, and among many in the community to get the transition done prior to the 2016 U.S. presidential election out of concern that a new Administration might not support the timeline. It is uncertain if the report contains unknown or unnoticed problems or oversights that could impair ICANN operations or governance, but if they do surface after the transition occurs this politically driven haste would be partially to blame for the failure to diligently vet this proposal.

---

[14]This is by no means the only such board intervention. In fact, the very start of this process began poorly with the ICANN Board authorizing the CEO to "explore ways to accelerate [an] end of U.S. stewardship" without consulting the ICANN community or making the decision public. For a detailed chronology, see Jordan Carter, "Chronology of Recent ICANN Accountability milestones," https://internetnz.nz/sites/default/files/2015-10-09-ICANN-accty-chrono.pdf (accessed March 15, 2016).

[15]GNSO, "Transmittal of results of GNSO Council consideration of CCWG-Accountability Supplemental Final Proposal," March 9, 2016, p. 5, http://mm.icann.org/pipermail/accountability-cross-community/attachments/20160309/f1b5ce45/CCWG-Accountabilitytransmittalofresults-9March2016-0001.pdf (accessed March 15, 2016).

[16]Ibid., pp. 5–6.

**Final Report: Good and Bad**

The CCWG-Accountability proposal, titled the "Supplemental Final Proposal on Work Stream 1 Recommendations," was finalized on February 23 and was supported by all seven SO/ACs[17] and the ICANN Board at the ICANN 55 public meeting in Marrakech March 4–10. The document is incredibly detailed and totals 346 pages, including 15 annexes and another 11 appendices.[18] The length of the report and the need to be familiar with ICANN's structure and processes makes it very difficult to comprehend for those who have not been intimately involved in the CCWG-Accountability process.

This will prove to be a barrier to efforts in Congress to practice due diligence in their scrutiny of the report. In an attempt to assist congressional scrutiny, this paper will highlight significant positive and negative elements of the proposal.

**Positive Elements.** Overall, the proposal has a number of positive accountability measures and establishes necessary limits to ICANN's area of responsibility.

- **Limiting ICANN's mission.** One major concern is that ICANN will see its role as broader than the technical management of the DNS system and the Internet Assigned Number Authority (IANA) function, which has the responsibility for assigning names and numbers to websites. Without the backstop provided by the NTIA contract, some in the ICANN community were concerned that ICANN could fall victim to mission creep that could distract the organization from its primary purpose or drain resources through support of tangential activities. Under the CCWG-Accountability proposal, ICANN's mission would be "limited to coordinating the development and implementation of policies that are designed to ensure the stable and secure operation of the Domain Name System and are reasonably necessary to facilitate its openness, interoperability, resilience, and/or stability." The proposal also clarifies that anything not specifically articulated in the bylaws would be outside the scope and mission of ICANN.[19] If this mission statement is both adopted and adhered to, that would go a long way to assuring that ICANN did not seek to become a "global guardian of the Internet" or take on responsibilities beyond its narrow remit.

- **Creating fundamental bylaws.** Certain bylaws, including those establishing new accountability mechanisms and clarifying the mission of ICANN, were deemed too important to be changed by board action alone. Under the proposal they will also require approval by the ICANN community as represented in the Empowered Community. This useful change prevents the Board from unilaterally acting on critical matters without broader support and entrenches limits on ICANN in the form of quasi-constitutional restrictions.

---

[17]In addition to the supporting organizations, ICANN also has four advisory committees, or ACs, that are intended to advise the ICANN community and the ICANN board on specific policy issues or to represent the views and opinions of parts of the ICANN community that are not integrated into the Supporting Organizations. The four ACs are: the At-Large Advisory Committee (ALAC); the Root Server System Advisory Committee (RSSAC); the Governmental Advisory Committee (GAC); and the Security and Stability Advisory Committee (SSAC).

[18] CCWG-Accountability, "Supplemental Final Proposal on Work Stream 1 Recommendations," February 23, 2016, https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal (accessed March 15, 2016).

[19]Ibid., p. 26.

- **Establishing the Empowered Community.** The CCWG-Accountability proposal would establish a new unincorporated association within ICANN called the Empowered Community (EC) populated by five of ICANN's SO/ACs: the Address Supporting Organization (ASO); the At Large Advisory Committee (ALAC); the Country Code Names Supporting Organization (ccNSO); the Generic Names Supporting Organization (gNSO); and the Government Advisory Committee (GAC).[20] The EC would have the statutory power to appoint and remove ICANN board directors, either individually or as a group. In addition to the power to appoint and remove directors, new bylaws will be drafted or existing bylaws amended to also grant the EC the power to: (1) reject an operating plan, strategic plan, and budget proposed by the board; (2) approve changes to fundamental bylaws; (3) reject changes to standard bylaws; (4) initiate a binding Independent Review Process; and (5) reject board decisions related to reviews of the IANA functions, including triggering of any Post Transition IANA (PTI) separation. In addition, the bylaws are to be amended to grant the EC the right to inspect ICANN accounting books and records, the right to investigate ICANN via a third-party audit, and mandate board engagement and consultation with the EC before approving an annual or five-year strategic plan, an annual or five-year operating plan, the ICANN annual budget, the IANA functions budget, any bylaw changes, and any decisions regarding the PTI separation process. Taken together, these changes provide significant power to the EC to involve itself in ICANN decisions, scrutinize ICANN activities, block undesired actions, and hold the board to account.

- **Improving the Independent Review Process (IRP) and Request for Reconsideration (RFR) mechanisms.** The IRP is an independent external arbitration review mechanism to ensure that ICANN does not go beyond its limited scope and mission through its actions or decisions or violate its bylaws. Under the CCWG-Accountability proposal, the IRP process would be slightly broadened in scope, be made accessible to any materially affected person or party (including the EC) and less costly, and more systematic through the establishment of a standing panel of independent experts in ICANN-related fields. The RFR, which is means for any individual to appeal for a review of any ICANN action or inaction, would be improved by expanding the range of permissible requests, lengthening the time for filing a request, establishing firm deadlines for RFR procedures and responses, adding transparency requirements, narrowing the grounds for dismissal, and requiring the board to handle all requests directly.

These accountability changes are a significant improvement over the status quo and are unambiguously good outcomes. Happily, their implementation is not dependent on NTIA and/or congressional approval of the CCWG-Accountability proposal. When asked, the board confirmed at ICANN 55 in Marrakech that the accountability improvements in the proposal would be adopted and implemented regardless of the whether the transition proceeds or not.[21]

---

[20]The other to advisory committees, the Security and Stability Advisory Committee (SSAC) and Root Server System Advisory Committee (RSSAC), informed the CCWG-Accountability at the ICANN Public Meeting in October 2015 (ICANN 54) that they did not want to participate as decisional participants in the Empowered Community. It is unclear under the current proposal whether this decision is permanent or can be reversed.

[21]A member of the Commercial Stakeholder Group asked the board to confirm, "Even in the event that there were some political problem with the transition, it is your intention that we will have implemented the bylaws changes. That the accountability reforms are done and that we will have implemented the other aspects and that political

**Remaining Issues of Concern.** While the CCWG-Accountability proposal has many good provisions, it is far from perfect. Among the concerns:

- **An undefined commitment to human rights.** The CCWG-Accountability proposal includes a recommendation to incorporate into the ICANN bylaws an undefined commitment to internationally recognized human rights. Implementation of this recommendation is deferred to the future under "Work Stream 2," but the inclusion of this commitment into the bylaws and strong support in some parts of the ICANN community means that implementation is very likely to happen. "Internationally recognized human rights" is a very broad, imprecisely defined term and there is no clear delineation of where internationally recognized human rights start or end. Indeed, it is a fundamental tenet in the United Nations and among the majority of human rights advocates that human rights are all interrelated, interdependent, and indivisible. There are over three dozen rights recognized in the Universal Declaration of Human Rights (UDHR); International Covenant on Civil and Political Rights (ICCPR); and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The OHCHR identifies over 50 human rights issues.[22] New rights—the so-called third-generation human rights like the right to development and the right to peace—are being promulgated and seriously considered even if they currently lack the acceptance of more established human rights.[23]

  Moreover, there are often differing understandings of these rights. For instance, under the U.S. constitution, freedom of speech is an extremely broad right, but in many other countries there are significant constraints on freedom of speech in the interests of preventing, for instance, hate speech. If ICANN adopts the more common and limited interpretation of free speech in its human rights commitment, it could create means for governments or businesses to use ICANN to moderate content.

  In short, there is a legitimate concern that a broad commitment to "internationally recognized fundamental human rights" would, even if circumscribed by the caveat that the commitment be within the mission and scope of ICANN as is the case in the CCWG-Accountability proposal, be an invitation for various civil society groups, ICANN constituencies, and governments to petition the organization to commit to and involve itself in human rights

---

impediment to the transition will not prevent the implementation of those bylaws reforms." Bruce Tonkin answered on behalf of the Board, "So the only caveat in that case,…is if the NTIA wished to continue its agreement, we would just need to make sure that any changes were not in conflict with that agreement, which really doesn't involve much in the way of any of the accountability work that you've been involved in." ICANN board member Cherine Chalaby added, "So I'd like to add to what Bruce is saying. Basically on the accountability reforms, I think the train has left the station and the reasons for that is the community has come to an agreement. I mean, if the community did not come to an agreement, it would be a different thing. So I think they are good accountability measures and we're committed to go forward with it, even if there are political positions and such. So subject to some of the caveats that Bruce has done, we're all in support of that." Video and initial transcript available at ICANN Public Meetings, "Joint Meeting of the ICANN Board & the Commercial Stakeholders | Adobe Connect: Full [EN]," March 8, 2016, https://meetings.icann.org/en/marrakech55/schedule/tue-board-csg/ac-board-csg-08mar16-en (accessed March 15, 2016).

[22]Office of the High Commissioner for Human Rights, "List of Human Rights Issues," http://www.ohchr.org/EN/Issues/Pages/ListofIssues.aspx (accessed March 15, 2016).

[23]The first generation is civil and political rights like freedom of expression and the right to due process. The second generation is economic, social, and cultural rights like the right to education and the right to housing.

activities or actions not directly related to its mission or observe human rights in a manner that could be in tension with a truly free and open Internet.[24]

- **Enhanced power for governments.** The CCWG-Accountability proposal would see governments significantly increase their power in ICANN versus the status quo. Currently, governments are represented in ICANN through the Government Advisory Committee (GAC), which is an advisory body unable to appoint board directors. The GAC has a power that other advisory bodies do not—an ability to convey advice to the board that the board must implement unless opposed by majority vote. But, even if GAC advice is rejected, the board is obligated to try and find a mutually acceptable solution with the GAC. This special advisory role has frustrated the community because it allows the GAC to intervene at late hours and upend community-led policy development processes.[25]

Under the CCWG-Accountability proposal, the GAC would retain this special advisory power, but with slightly different details. The threshold for board rejection actually increases from 50 percent to 60 percent, but in return only GAC advice that is truly adopted by consensus (without any formal objection) can trigger the board's obligation to find a mutually acceptable solution.

In addition to retaining its privileged advisory power, the GAC also will now be a decisional participant in the EC with a direct say in the exercise of all of the community powers including board dismissal, bylaw changes, etc.[26] This is somewhat moderated by the "GAC carve-out," which prohibits the GAC from being a decisional participant when the matter involves a board decision based on consensus GAC advice. This restriction is to prevent the GAC from getting two bites at the apple, i.e., being able to providing consensus advice to the board and using its new authority in the EC to impede efforts by the community to block implementation of that advice if the board approves it.

---

[24]Comment of Brett D. Schaefer and Paul Rosenzweig of The Heritage Foundation on the Human Rights Commitment in the Cross Community Working Group on Enhancing ICANN Accountability Second Draft Report (Work Stream 1), http://forum.icann.org/lists/comments-ccwg-accountability-03aug15/msg00037.html (accessed March 15, 2016).

[25]A good example of the pernicious potential that arises from GAC intervention is the controversy that continues to plague ICANN over the question of the delegation of the .africa domain name. Initially, the board accepted the GAC's advice to favor one applicant over another—a decision it adopted in apparent violation of its own internal procedures. The losing applicant, DotConnectAfrica, was compelled to seek redress through the Independent Review Process—an adjudication that led, in the end, to a declaration that the board had acted improperly. See *DotConnectAfrica Trust v. Internet Corporation for Assigned Names and Numbers* (July 9, 2015), https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf (accessed March 15, 2016). More recently, when the board sought to restart the .africa delegation (again awarding the domain to another applicant), DotConnectAfrica sought, and received, a temporary restraining order from a California court. See *DotConnectAfrica Trust v. Internet Corporation for Assigned Names and Numbers*, No. CV 16-00862 (C.D.Calif., Mar. 2, 2016), https://www.icann.org/en/system/files/files/litigation-dca-minute-order-plaintiff-ex-parte-application-04mar16-en.pdf (accessed March 15, 2016). The case remains pending and a final adjudication on the merits has yet to be made, but it should trouble all observers that the Board's apparent deference to the GAC has embroiled ICANN in such a long-running and contentious piece of litigation.

[26]Because the GAC often is unable to arrive at clear consensus positions, it is uncertain how often or under what circumstance or procedures the GAC will be able to agree to exercise this decisional authority.

Objectively, the CCWG-Accountability proposal would unquestionably grant the GAC powers that it did not previously have and increase government authority in ICANN versus the status quo. These changes were recommended even though some Members of Congress have explicitly opposed this outcome. Specifically, a 2014 letter from Senator John Thune (R–SD) and Senator Marco Rubio (R–FL) made clear that, from their perspective, government influence should not be expanded in the transition:

> First, ICANN must prevent governments from exercising undue influence over Internet governance. In April we led 33 Senators in a letter to NTIA regarding the IANA transition. We wrote that "[r]eplacing NTIA's role with another governmental organization would be disastrous and we would vigorously oppose such a plan. ICANN should reduce the chances of governments inappropriately inserting themselves into apolitical governance matters. Some ideas to accomplish this include: not permitting representatives of governments to sit on ICANN's Board, limiting government participation to advisory roles, such as through the Government Advisory Committee (GAC), and amending ICANN's bylaws to only allow receipt of GAC advice if that advice is proffered by consensus. The IANA transition should not provide an opportunity for governments to increase their influence.[27]

A number of CCWG members and participants shared this concern about government increasing its power in ICANN post-transition as did some representatives from ICANN stakeholder and constituency groups. [28] Yet, this is precisely what would occur if the proposal is enacted as recommended.

- **An immature organization.** One of the hallmarks of an institution ready for additional responsibility is the facility with which it handles its existing obligations. Over the past year it has become somewhat concerning that ICANN is not apparently ready to deal with controversial matters. An instance of note was the decision to open up a new gTLD—the .sucks domain. For obvious reasons many intellectual property rights holders objected to the creation of the domain—nobody at The Heritage Foundation, for example, is overjoyed at the prospect of a "heritagefoundation.sucks" domain.[29]

When, however, intellectual property rights holders complained to ICANN, rather than address the issue directly, ICANN ducked. It referred the question of whether .sucks was lawful to regulatory authorities in the United States (where ICANN is incorporated) and Canada (where the domain name owner of .sucks is incorporated) and asked them to adjudicate the matter. Both countries, quite reasonably, declined to offer their opinion on the

---

[27]Senator John Thune and Senator Marco Rubio, letter to Dr. Stephen Crocker, Chairman ICANN Board of Directors, July 31, 2014, https://www.icann.org/en/system/files/correspondence/thune-rubio-to-crocker-31jul14-en.pdf (accessed March 15, 2016).

[28]See comments of individual Non-Commercial Stakeholders Group (NCSG) counselors and the Intellectual Property Constituency (IPC). GNSO, "Transmittal of results of GNSO Council consideration of CCWG-Accountability Supplemental Final Proposal," March 9, 2016, http://mm.icann.org/pipermail/accountability-cross-community/2016-March/011694.html (accessed March 15, 2016).

[29]To be clear, though we are not overjoyed at the prospect, our support for the freedom of expression means that we, generically, do not oppose the creation of the domain. The discomfort we feel is the price of free speech.

matter.[30] It does not engender great confidence in ICANN that, at the same time it is seeking greater independence from governmental authorities, it turns to those same authorities for assistance in resolving controversial matters within its remit. As the transition moves forward, ICANN will need to develop the institutional maturity to deal with controversies of this sort independently.

- **Many details yet to be finalized.** The CCWG-Accountability proposal is, in essence, a very detailed blueprint, not a finished product. Some basic issues remain unclear. For instance, are the decisions of the Security and Stability Advisory Committee (SSAC) and the Root Server System Advisory Committee (RSSAC) to be non-decisional participants permanent or could they change their minds? Questions were also raised by several NCSG counselors on the gNSO Council who, in their support for the CCWG-Accountability proposal submitted statements on how they thought the text should be implemented.[31] One particularly important problem that has yet to be resolved is precisely how the EC will operate—especially in the future when new SOs and ACs join (or drop out) of the community. There is a real prospect that the Empowered Community—which is at the core of fundamental accountability for ICANN—may be hamstrung by unanticipated an unintended consequences of the current structural proposals. Rather than address this problem, however, in a politically motivated rush to judgment, the CCWG-Accountability and the board left the resolution of this difficult question ambiguous in the proposal, which if it is to be clarified will be done in the bylaws drafting or implementing language.[32]

  The actual bylaws and implementing rules and procedures to execute the proposal have yet to be completed. As noted by the IPC:

  > These recommendations [in the CCWG-Accountability proposal] will affect overarching ICANN governance concerns. However, it is not entirely clear how they will affect ICANN's day-to-day operations or whether unintended consequences may arise, particularly given the timeframes for review that were provided to the community…. As the revised bylaws themselves have yet to be produced, and the new paradigm for ICANN accountability remains practically

---

[30]Chris Burt, "Canada Responds to ICANN on Controversial .SUCKS New gTLD," The Whir, June 17, 2015, http://www.thewhir.com/web-hosting-news/canada-responds-to-icann-on-controversial-sucks-new-gtld (accessed March 15, 2016).

[31]GNSO, "Transmittal of results of GNSO Council consideration of CCWG-Accountability Supplemental Final Proposal," March 9, 2016, pp. 8-10, http://mm.icann.org/pipermail/accountability-cross-community/attachments/20160309/f1b5ce45/CCWG-Accountabilitytransmittalofresults-9March2016-0001.pdf (accessed March 15, 2016).

[32]For instance, a group of NCSG councilors on the gNSO Council felt the need to address this ambiguity in their acceptance of the CCWG-Accountability proposal, "The aforementioned NCSG representatives in the GNSO council support Recommendation 2 with the understanding that bylaws will reflect the CCWG's requirement that the exercise of community powers should not require unanimity of participating AC/SOs, and that no single AC/SO could block exercise of any power." GNSO, "Transmittal of results of GNSO Council consideration of CCWG-Accountability Supplemental Final Proposal," p. 9.

untested, the IPC is deeply concerned that the voices of the businesses and individuals who own intellectual property may be unfairly marginalized. [33]

This concern involves questions that will apply across the ICANN community and they should share the IPC's concerns about implementation. There was and will be ample opportunity during this compressed implementation period for errors or deviation, deliberate or otherwise, from the intent of the CCWG-Accountability participants. Indeed, the ICANN lawyers will be side by side with the independent CCWG-Accountability lawyers drafting new bylaw text. Considering the sometimes opposing views between the board and the CCWG-Accountability, it would hardly be surprising if the board again tried to influence details of the implementation to its preference.

**A Community Rarely Able or Willing to Unite**

While there are serious concerns with the report, there is an even more fundamental concern about whether the community can actually be decisive and united enough to utilize the accountability measures provided to the EC in the CCWG-Accountability proposal. Indeed, the entire premise of the transition is that the multi-stakeholder ICANN community has sufficient maturity and cohesiveness to serve as a counter-weight to the board and the enhanced influence of the GAC. Unfortunately, the CCWG-Accountability development process leaves doubts about the foundational suitability of the community as bedrock for accountability.

To exercise most powers requires the support of three or four of the five decisional participants. This will be very difficult to achieve even in the face of substantial cause. The SO/ACs each have differing equities and perspectives that could lead them to be indifferent even when the ICANN board and staff are acting in a very objectionable manner. This is compounded by the GAC being a decisional participant because the GAC is unlikely to be able to arrive at a common position in a timely manner if at all.

Issues like this contributed to the calls for mandating accountability improvements in tandem with the transition and, if the accountability measures are implemented properly, there will be avenues for righting ICANN missteps and forcing compliance with agreed procedures and rules. However, the most powerful accountability measures are restricted to the Empowered Community and are premised on it being able to act in a decisive and dependable manner. Unfortunately, the practical challenges of exercising the powers and experience casts doubt on the community's ability or willingness to fulfill such a role.

**Recommendations**

The NTIA and Congress will be considering the CCWG-Accountability proposal in the coming months. The Internet is too important to act in haste or imprudence. There are numerous questions and uncertainties that should lead the U.S. to:

- **Vet the proposal thoroughly.** The IANA Transition Coordination Working Group (ICG) has had its proposal complete since early 2015 and work has been ongoing in assessing the

---

[33]GNSO, "Transmittal of results of GNSO Council consideration of CCWG-Accountability Supplemental Final Proposal," p. 6.

changes necessary to complete the technical aspects of the transition proposal and drafting bylaws and language to implement those recommendations. The CCWG-Accountability proposal has only recently been adopted and is much less developed. New and amended bylaws will be drafted in the coming weeks that will be reviewed by the CCWG-Accountability, the ICANN board, and the broader ICANN community through a public comment period. If warranted, the draft bylaws will be tweaked before being approved by the ICANN board in May and the entire package will then be considered by the NTIA and Congress. During this consideration, ICANN will need to flesh out details for implementation of the proposal, which will not be complete until later in the summer. The NTIA has insisted that it requires a "comprehensive and complete"[34] product for consideration that includes both the ICG and the CCWG-Accountability proposals and implementation details, particularly bylaw changes.[35] This is the correct approach—the proposal cannot be properly assessed unless all the details are fleshed out and finalized. Neither the NTIA nor Congress should feel compelled to hasten their consideration if they feel more time is necessary to vet the proposal. It is better to do this right than to get it done according to an artificial deadline.

- **Draft a new two-year contract allowing for a resumption of the NTIA's historical relationship with ICANN.** Even if the NTIA and Congress are satisfied with the proposal, it would be wise to provide a transition to the transition. The proposed changes to ICANN's structure and governance model are significant and untested. It would be prudent to allow ICANN to operate under the new structure for a period of time to verify that unforeseen complications and problems do not arise while retaining the ability to reassert the historical NTIA relationship if unforeseen complications arise. In fact, the ICANN Board suggested such an approach in its public comment to the first CCWG report:

  We believe the Sole Membership Model as proposed has the potential for changes in the balance of powers between stakeholder groups in ICANN's multistakeholder model. At any time, the balance of power and influence among any of the "groups" within ICANN can change based upon the willingness or ability to participate in the Sole Member, changing for example the balance between governments and the private sector and civil society. We believe that if the Sole Membership Model is the only proposed path forward, it may be prudent to delay the transition until the Sole Membership Model is in place and ICANN has demonstrated its experience operating the model and ensuring that the model works in a stable manner.

---

[34]Remarks by Assistant Secretary of Commerce for Communications and Information Lawrence E. Strickling, "ICANN, IANA Transition, Larry Strickling, NTIA, State of the Net Conference," State of the Net Conference, Washington, DC, January 27, 2015, http://www.expvc.com/2015/01/icann-iana-transition-larry-strickling.html (accessed March 15, 2016).

[35]As stated by Assistant Secretary Lawrence E. Strickling, "The other critical path element that emerges from the legislative language is the need to work out the specific language of bylaw changes as quickly as possible. We want to avoid a lengthy delay after we get the plan while language is being written and reviewed by the community as that will delay when we can provide our certification to Congress." Remarks of Assistant Secretary of Commerce for Communications and Information Lawrence E. Strickling, ICANN Meeting, Buenos Aires, Argentina, June 21, 2015, https://www.ntia.doc.gov/speechtestimony/2015/remarks-lawrence-e-strickling-assistant-secretary-commerce-communications-and-i (accessed March 15, 2016).

While the current proposal is not based on membership, it does propose radical changes in ICANN governance and shifts in the balance of power and influence among groups within ICANN and thus it would be prudent to maintain the current arrangement, or at least a means for reasserting NTIA oversight, for the next two years until the new structure proves itself.

- **Urge those implementing the CCWG-Accountability proposal to apply the strictest interpretations on the CCWG-Accountability proposal for GAC participation.** Ideally, the NTIA and Congress would send the transition proposal back to ICANN with instructions to reverse the expansion in government authority in the CCWG-Accountability proposal. However, even if the NTIA or Congress do not mandate specific changes to the CCWG-Accountability proposal as a condition for approval, there is room for interpretation within the proposal to increase the bar for the GAC to utilize its authority under the proposal. For instance, the consensus requirement for GAC advice to the board should be clear and require the GAC to affirm that no government opposed the advice. The GAC must not be allowed to circumvent this requirement through creative alterations in its decision-making procedures. Also, prior to the vote to exercise the EC powers, each of the five decisional participants should be required to inform the EC whether they wish to participate or not in a timely manner. If the GAC or any other decisional SO/AC cannot make such a declaration, it should be excluded and the thresholds for exercising EC powers lowered to observe the understanding throughout the CCWG-Accountability process that "the exercise of community powers should not require unanimity of participating AC/SOs, and that no single AC/SO could block exercise of any power."[36]

- **Require enumeration of human rights to protect ICANN's narrow scope and mission.** The NTIA and the ICANN Community were correct to insist that strict limits on ICANN's mission and scope be incorporated into the bylaws. They should ensure that the human rights bylaw does not undermine this central priority by asking ICANN to specifically enumerate the human rights commitments in a manner that is consistent with the NTIA criteria and directly related to ICANN's core purpose and operations to avoid mission creep. Clear linkages to ICANN's mission and operation include the fundamental human rights of freedom of expression and opinion (as interpreted in the U.S. under the First Amendment to the Constitution), freedom of association, the right to due process, the right to privacy, the right to own property, including intellectual property, and the "right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."[37] If future circumstances dictate that an additional human right be added to ICANN's commitment, this can be done through a bylaw amendment. In the current unexplored situation, however, caution should prevail.

---

[36]GNSO, "Transmittal of results of GNSO Council consideration of CCWG-Accountability Supplemental Final Proposal," p. 9.
[37]Universal Declaration of Human Rights, Articles 9, 10, 11, 12, 17, 19, 20, and 27, http://www.un.org/en/universal-declaration-human-rights/index.html (accessed March 15, 2016).

**Conclusion**

Nearly half of the world's population, including almost everyone in the United States, uses the Internet for business or personal purposes and pursuits and it has become a critical vehicle for research, discourse, and commerce. ICANN plays an important role in maintaining the safety, security, reliability, and openness of the Internet and it is necessary that ICANN remain accountable and transparent. The CCWG-Accountability proposal provides numerous improvements and tools that can be used to achieve this after the U.S. contractual relationship expires, but there are many uncertainties.

The CCWG-Accountability proposal is a blueprint for an accountable institution, but it is unclear if the result will be sound or if the ICANN community can or will act responsibly and in a timely manner to hold ICANN accountable. Prudence dictates caution. The U.S. should take the time to make sure everything is working properly before executing to an irreversible decision.

—***Brett D. Schaefer*** *is Jay Kingham Fellow in International Regulatory Affairs in the Margaret Thatcher Center for Freedom, of the Kathryn and Shelby Cullom Davis Institute for National Security and Foreign Policy, at The Heritage Foundation.* ***Paul Rosenzweig*** *is a Visiting Fellow in the Douglas and Sarah Allison Center for Foreign and National Security Policy, of the Kathryn and Shelby Cullom Davis Institute for National Security and Foreign Policy, at The Heritage Foundation.*

\* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \*