



214 Massachusetts Avenue, NE • Washington DC 20002 • (202) 546-4400 • heritage.org

Testimony

Examining the Multistakeholder Plan for Transitioning the Internet Assigned Number Authority

**U.S. Senate Committee on Commerce, Science, and
Transportation**

May 24, 2016

**Brett D. Schaefer
The Heritage Foundation**

My name is Brett Schaefer and I am the Jay Kingham Fellow in International Regulatory Affairs at The Heritage Foundation. The views I express in this statement for the record are my 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 National Telecommunications and Information Administration (NTIA), an arm of the U.S. Department of Commerce, 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

Now the U.S. government is on the verge of giving up its historical role in overseeing changes in the Domain Name System (DNS), the policy apparatus and technological method that assigns names and numbers on the Internet. It is the system, for example, 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 by the end of September 2016, they should proceed with caution.

In its 2014 announcement, before the transition could occur, the NTIA required ICANN to develop a formal proposal that would assure the U.S. that the termination of its 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 was finalized and approved by the relevant groups in ICANN, known as supporting organizations and advisory committees (SO/ACs), and the ICANN board.² Draft bylaws intended to reflect the changes recommended in the Cross Community Working Group (CCWG-Accountability) and the IANA Stewardship Transition Coordination Group (ICG) proposals have been drafted and posted for public comment by ICANN.

I and my colleague Paul Rosenzweig participated extensively in this process through our research and publications, submissions to ICANN’s public comment process, involvement in and attendance at ICANN meetings, participation in the CCWG-Accountability meetings and remote discussions, and membership in the Non-Commercial Users Constituency and the Non-Commercial Stakeholder Group within ICANN. We have commented on and debated various proposed changes in those forums and our suggestions have in some cases been incorporated into the final CCWG-Accountability proposal and the revised bylaws.

I have great respect for the work and time that the members and participants of these groups have invested. The proposal includes a number of positive elements that, if they operate as envisioned, would create mechanisms for the ICANN community to hold the board and staff accountable and reverse imprudent decisions.

There are concerns, however. For instance, while not replacing the NTIA with a governmental or intergovernmental solution, the proposed changes would greatly enhance the power of governments within ICANN relative to the status quo. There are important issues that have yet to be fleshed out, like human rights and ICANN’s jurisdiction of incorporation and headquarters, which will be implemented in Work Stream 2 and are unlikely to be completed prior to September 2016. Although improved accountability measures would be established, it is unknown how they will work in practice. The new bylaws are twice as long as the current bylaws and establish new, untested mechanisms and procedures. Unforeseen errors, flaws, or oversights could lie unnoticed.

¹News 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).

²News release, “Plan to Transition Stewardship of Key Internet Functions Sent to the U.S. Government,” ICANN, March 10, 2016, <https://www.icann.org/news/announcement-2016-03-10-en> (accessed March 15, 2016).

Uncertainty with regard to 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, I recommend a “soft extension” of the existing contractual relationship—one that allows ICANN two years to demonstrate that the new procedures it is 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 [Internet Assigned Number Authority] 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 the NTIA made its announcement, ICANN quickly convened the IANA Stewardship Transition Coordination Group (ICG), comprised of three sub-groups: 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 relatively narrow focus of this effort, combined with the earlier start, led to the ICG proposal 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 only addressed the gaps arising from the end of the U.S. contractual relationship with ICANN. They insisted that long-standing concerns 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

³News release, “NTIA Announces Intent to Transition Key Internet Domain Name Functions.”

⁴Ibid.

⁵For a descriptive chronology and the ICG proposal, see 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).

the board. An unprecedented unanimous statement from all of 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. Since then, the CCWG-Accountability's 28 members and 203 participants—including myself and Paul Rosenzweig—dedicated enormous effort to developing a robust accountability proposal. As of March 2016, the group had held 209 meetings and calls consuming a total of 404 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 the ICG and CCWG-Accountability proposals to the NTIA. Both proposals were analyzed and revisions were made to ICANN's bylaws to reflect their recommendations and posted for public comment by ICANN. The NTIA has announced that it will review the combined proposal to determine whether it meets the criteria set forth and will 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, former ICANN Chief Executive Officer Fadi Chehade assured Congress that the board would allow the multi-stakeholder community to develop the accountability plan independently and would transfer it forward to the NTIA even if it contained provisions that the board opposed.¹⁰ The board, however, did not adhere to this promise and instead intervened to shape the proposal in fundamental ways and 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

⁶The 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 of the 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 numbers given to all computers connected to the Internet.

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

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

⁹Lawrence E. Strickling, Assistant Secretary of Commerce for Communications and Information and NTIA Administrator, "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).

¹⁰ICANN 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).

the “Sole Member Model.”¹¹ Under California law, which is the relevant law because ICANN is currently incorporated in California, this model would have given the community significant authority over the board in much the same way that shareholders have control of for-profit corporations.

The board objected to membership for several reasons that it thought could be potentially destabilizing. 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’s 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 and 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 (EC). Under California law, a designator has far more limited powers than a member. To address these gaps, the proposal would grant specified powers to the EC through new or amended bylaws. Notwithstanding the gap-filling effort, this shift in the model of governance undoubtedly weakened the legal standing and independence of the ICANN community as compared to a member organization. Specifically, many powers would be subject to change through bylaw amendment and would lack the guarantees of statute in California law—that is, 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

¹¹ICANN, “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).

¹²Quoted 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).

¹³ICANN 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).

¹⁴This 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,” October 9, 2015, <https://internetnz.nz/sites/default/files/2015-10-09-ICANN-accty-chrono.pdf> (accessed March 15, 2016).

¹⁵ICANN | 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).

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. 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 transition 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 before the 2016 U.S. presidential election out of concern that a new Administration might not support the timeline. It is uncertain whether the report contains 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 vet this proposal diligently.

Final CCWG Report: Good and Bad

The CCWG-Accountability proposal, titled the *Supplemental Final Proposal on Work Stream 1 Recommendations*, was finalized on February 23 and supported by all seven SO/ACs¹⁷ and the ICANN board at the ICANN 55 public meeting in Marrakech on March 4–10. The document is incredibly detailed and totals 346 pages, including 15 annexes and another 11 appendices.¹⁸ The impact on the bylaws is similarly large – the ICANN bylaws as revised (in draft form, at this point) to reflect the ICG and the CCWG-Accountability proposals are more than twice the size, both in terms of pages and number of words, as the current bylaws. The changes substantially revise ICANN's accountability mechanisms, establish two new entities within ICANN, and outline a number of important issues that will be developed in the coming months or years to be incorporated into the bylaws and ICANN's operations.

The extent of the changes and the need to be familiar with ICANN's structure and processes make it very difficult to comprehend the proposal for those who have not been intimately involved in the transition process. This will prove to be a barrier to efforts in Congress to exercise due diligence in scrutinizing the report. In an effort to assist congressional scrutiny, I will highlight significant positive and negative elements of the proposal.

Positive Elements. Overall, a number of positive accountability measures have been proposed and incorporated into the revised draft bylaws.

- **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

¹⁶Ibid., pp. 5–6.

¹⁷In addition to the supporting organizations, ICANN has four advisory committees (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); Governmental Advisory Committee (GAC); Root Server System Advisory Committee (RSSAC); and Security and Stability Advisory Committee (SSAC).

¹⁸CCWG-Accountability, *Supplemental Final Proposal on Work Stream 1 Recommendations*, February 23, 2016, <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf> (accessed March 23, 2016).

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 is to 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."¹⁹ The proposal also clarifies that anything not specifically articulated in the bylaws would be outside the scope and mission of ICANN.

Adoption of and adherence to this mission statement would go a long way toward assuring that ICANN did not seek to become a "global guardian of the Internet" or take on responsibilities beyond its narrow remit. The draft revised bylaws reflect the limited mission as recommended by the CCWG.

- **Creating fundamental bylaws.** Certain bylaws, including those establishing new accountability mechanisms and clarifying ICANN's mission, were deemed too important to be changed by board action alone. Under the proposal and in the revised draft bylaws, they will also require approval by the ICANN community as represented in the Empowered Community. This useful change both prevents the board from acting unilaterally on these fundamental bylaws without broader support and entrenches limits on ICANN in the form of quasi-constitutional restrictions.
- **Establishing the Empowered Community.** A new nonprofit association is to be established within ICANN called the Empowered Community, populated by five of ICANN's SO/ACs: the Address Supporting Organization (ASO); At Large Advisory Committee (ALAC); Country Code Names Supporting Organization (ccNSO); Generic Names Supporting Organization (gNSO); and 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, and authority under the bylaws to reject an operating plan, strategic plan, and budget proposed by the board; approve changes in fundamental bylaws; reject changes in standard bylaws; initiate a binding Independent Review Process; and reject board decisions related to reviews of the IANA functions, including triggering of any Post Transition IANA (PTI) separation.²¹

In addition, the revised bylaws would grant the EC the right to inspect ICANN accounting books and records, the right to investigate ICANN by means of 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 potential 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 and does not violate its bylaws. Under the CCWG-Accountability proposal, the IRP process would be

¹⁹Ibid., p. 26.

²⁰The other two advisory committees, the Security and Stability Advisory Committee and Root Server System Advisory Committee, 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. The revised bylaws make clear that amending the fundamental bylaw listing the decisional participants of the Empowered Community would be required to reverse this decision and include SSAC and RSSAC among the decisional participants.

²¹The PTI is the organizational structure envisioned for technical operation of the IANA function after the NTIA contract is terminated. It is to be a sub-organization within ICANN, but the draft proposal contemplates the possibility of complete separation at some point in the future, should the need arise.

slightly broadened in scope and made accessible to any materially affected person or party (including the EC), less costly, and more systematic through the establishment of a standing panel of independent experts in ICANN-related fields. It would also provide for interim relief if the decision could result in irreparable harm. The RFR, which any individual can use 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. Both of these changes are helpful. Unfortunately, however, the RFR process does not provide for interim relief during the reconsideration process even though irreparable harm could result.

Collectively, these accountability changes are a significant improvement over the status quo. It is important to note that their implementation is not dependent on NTIA and/or congressional approval of the transition. When asked, the board confirmed that the accountability improvements in the proposal would be adopted and implemented whether the transition proceeds or not.²²

Remaining Issues of Concern. While the changes to ICANN include many good provisions, there remain a number of concerns:

- **Lack of resolution on .mil and .gov.** Today, the United States has exclusive use of the .mil and .gov domains. Allowing other governments or the private sector to use these gTLDs poses security risks. In a July 8th 2015 hearing held by the House Energy and Commerce Committee's Subcommittee on Communications and Technology, when pressed about formalizing the informal agreement about .mil and .gov, Assistant Secretary for Communications and Information and NTIA Administrator Lawrence Strickling stated,

There is nothing in the transition of our stewardship which actually implicates .mil or .gov, and also .us, which we administer at the Department of Commerce. But we understand this is an issue of concern and so we will do whatever is appropriate, in consultation with the Department of Defense and GSA and the other agencies that have equities in this, to make sure that these names are protected going forward. We understand the importance of it.

Today, they are not under any particular contract. These are legacy names that go back to the very beginning of the Internet. I think .mil was delegated back in 1984. That shows you how old it is. So there is no contract today, but there is a whole structure of these informal regulations within the Internet model that govern how...

[Question from Rep. Long] So you think informal regulations would hold up through this process?

²²A member of the Commercial Stakeholder Group asked the board to confirm that “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 impediment to the transition will not prevent the implementation of those bylaws reforms.” ICANN board member 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).

[Sec. Strickling] There is no reason why they should change, but we are not going to rest there. We are going to take a look at them and make sure that if there is a way we can strengthen the U.S. Government's rights to those names, we will do so.²³

Even though the transition may occur within a few months, NTIA has not publicly provided any detailed information on what, if anything, it intends to do to address this matter. Congress should not allow the transition to occur without securing sole U.S. ownership, control and use of these domains in perpetuity.

- **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.

“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. More than three dozen rights are recognized in the Universal Declaration of Human Rights (UDHR); International Covenant on Civil and Political Rights (ICCPR); and International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Office of the High Commissioner for Human Rights identifies over 50 human rights issues.²⁴ New rights—the so-called third-generation human rights, which some argue should include the right to Internet access, also known as the right to broadband—are being promulgated and seriously considered even if they currently lack the acceptance of more established human rights.²⁵

Moreover, how these rights are understood often varies from one country to another. 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.

As noted above, the proposal clarifies that anything not specifically articulated in the bylaws would be outside the scope and mission of ICANN. In addition, the draft revised bylaws stipulate that the ICANN’s human right commitment to respect human rights must be “within the scope of its Mission and other Core Values” and “does not create and shall not be interpreted to create any additional obligations for ICANN and shall not obligate ICANN to respond to or consider any complaint, request or demand seeking the enforcement of human rights by ICANN, *except as provided herein.*” The final italicized clause provides a worrisome loophole that such an obligation could be created through the Work Stream 2 human rights process. The CCWG public comment on the revised bylaws recommends closing this potential loophole by strengthening the

²³ House of Representatives, Subcommittee on Communications and Technology, Committee on Energy and Commerce, “Internet Governance After ICANN 53,” July 8, 2015, pp. 52-53, <http://docs.house.gov/meetings/IF/IF16/20150708/103711/HHRG-114-IF16-20150708-SD006.pdf> (accessed May 20, 2016).

²⁴ 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).

²⁵ 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.

current bylaw text and eliminating the final clause: “except as provided herein.”²⁶ But it remains uncertain if the ICANN board will incorporate this deletion in the final approved bylaws.

Even so, an unknown commitment to respect human rights will almost certainly be included in the bylaws. Therefore, there is a legitimate concern that a broad commitment to “internationally recognized fundamental human rights,” even if circumscribed by the caveat that the commitment be within the mission and scope of ICANN, would be an invitation for various civil society groups, ICANN constituencies, and governments to petition the organization to push the envelope and involve itself in human rights activities like promoting the right to the Internet or the right to development through access to information and communications technology (ICT) that could be linked to ICANN’s core values and mission or observe human rights in a manner that could be in tension with a truly free and open Internet.²⁷

- **Enhanced power for governments.** Since the March 2014 NTIA announcement, I and my colleague Paul Rosenzweig have repeatedly cautioned against providing enhanced authority for governments in a post-transition ICANN in papers, articles, congressional testimony, and public comments submitted to ICANN on the various CCWG proposals.²⁸ In fact, less than a month after the NTIA announcement, Rosenzweig testified,

According to news reports, during the recent ICANN meeting in Singapore, the Department of Commerce appeared to accept the idea that governmental organizations would have some formal membership role in the new IANA management structure to be created by ICANN. That would be consistent with ICANN’s expressed view that “all” stakeholders should have a say in the management of the domain. I think that would be a mistake. If the premise of our decision to give up NTIA control of the IANA function is that governmental management is suspect, then that should be equally true of a governmental role (even a broader based one) in the new IANA management structure. *My recommendation would be that the governmental role in any new structure be limited to an advisory one – with no formal, or informal right of control over the process.*²⁹

²⁶The CCWG-Accountability public comment recommends the following revision: Replace current language with the following: “(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.” CCWG-Accountability, “CCWG-Accountability Comments on Draft New ICANN Bylaws,” May 13, 2016, <http://forum.icann.org/lists/comments-draft-new-bylaws-21apr16/msg00004.html> (accessed May 20, 2016).

²⁷Comment 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), September 11, 2015, <http://forum.icann.org/lists/comments-ccwg-accountability-03aug15/msg00037.html> (accessed March 15, 2016).

²⁸See, for instance, Paul Rosenzweig, Brett D. Schaefer, James L. Gattuso and David Inserra, “Protecting Internet Freedom and American Interests: Required Reforms and Standards for ICANN Transition,” Heritage Foundations Backgrounder #2922, June 16, 2014, <http://www.heritage.org/research/reports/2014/06/protecting-internet-freedom-and-american-interests-required-reforms-and-standards-for-icann-transition> (accessed May 20, 2016); Brett D. Schaefer, “Stakeholder Perspectives on the IANA Transition,” Testimony before Subcommittee on Communications and Technology Energy and Commerce Committee United States House of Representatives, May 13, 2015, <http://www.heritage.org/research/testimony/2015/stakeholder-perspectives-on-the-iana-transition> (accessed May 20, 2016); Brett D. Schaefer and Paul Rosenzweig, “Comment of the Heritage Foundation on the Cross Community Working Group on Enhancing ICANN Accountability 2nd Draft Report (Work Stream 1),” August 20, 2015, <http://forum.icann.org/lists/comments-ccwg-accountability-03aug15/msg00005.html> (accessed May 20, 2016); and Brett D. Schaefer and Paul Rosenzweig, “Comment on the CCWG-Accountability Draft Proposal on Work Stream 1 Recommendations,” December 16, 2015, <http://forum.icann.org/lists/comments-draft-ccwg-accountability-proposal-30nov15/msg00020.html> (accessed May 20, 2016).

²⁹Italics added. Paul Rosenzweig, “The Proposed Transfer of the IANA Function to ICANN,” Testimony before the Subcommittee on Courts, Intellectual Property and the Internet, Committee on the Judiciary, United States House of

Under the current proposal, governments would significantly increase their power in ICANN versus the status quo. As it now stands, governments are represented in ICANN through the Government Advisory Committee (GAC), an advisory body that is 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—and even if this advice is rejected, the board is obligated to try to 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.³⁰

Under the current proposal, the GAC would retain this special advisory power, but with slightly different details. The threshold for board rejection of GAC advice actually increases from 50 percent to 60 percent. But the proposal also clarifies that 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. While the definition of consensus is welcome, the higher threshold for board rejection of GAC consensus advice is a real increase in GAC authority. In addition, the higher threshold may place ICANN in legal jeopardy because California law requires that the ICANN board be in charge of decision making. This new threshold creates the possibility that a decision could be implemented over the opposition of a majority of the board.³¹

In addition to retaining its privileged advisory power, the GAC also would be a decisional participant in the EC with a direct say in the exercise of all community powers including, for example, board dismissal and bylaw changes.³² This is somewhat moderated by the “GAC carve-

Representatives, April 10, 2014, <https://judiciary.house.gov/wp-content/uploads/2016/02/041014-ICANN-Rosenzweig.pdf> (accessed May 20, 2016).

³⁰A 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 that 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 International Centre for Dispute Resolution, Independent Review Panel, Case #50 2013 001083, *DotConnectAfrica Trust v. Internet Corporation for Assigned Names and Numbers*, Final Declaration, version redacted July 31, 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.

³¹In January, CCWG-Accountability legal advisor Rosemary Fei pointed out, “The Board under California Corporate Law has to be in charge or running the organizations of how it can exercise its fiduciary duties. And that’s a basic requisite of corporate structure. And if the way it works is that if the GAC is able to come up with consensus advice, that the Board can only reject with a two-thirds vote, that means that you could have more than half the Board believe that something is not a good idea and not good for the corporation and all of those things, and still have to do it.” ICANN, “Transcript _CCWG ACCT_CoChairs-Lawyer Meeting_8 Jan.doc” January 8, 2016,

https://community.icann.org/download/attachments/56989655/Transcript%20_CCWG%20ACCT_CoChairs-Lawyer%20Meeting_8%20Jan.doc?version=1&modificationDate=1453041576000&api=v2 (accessed May 20, 2016). Perforce, this concern would also apply to the 60 percent rejection threshold.

³²It is uncertain how often or under what circumstances or procedures the GAC will be able to agree to exercise this decisional authority. The GAC failed to clarify this matter in its Marrakech statement supporting the CCWG-Accountability transition proposal, which stated, “The GAC expresses its support for the multistakeholder, bottom-up approach within ICANN and reiterates its interest in participating in the post - transition phase with a view to fulfilling its roles and responsibilities. The GAC wishes to express its sincere appreciation of the diligent and productive work performed by the CCWG-Accountability, its Co-Chairs, its members and all its contributors. The GAC reaffirms its role as an advisory committee to the ICANN Board and within the ICANN multistakeholder environment and will continue to advise on relevant matters of concern with regard to government and public interests. The GAC has considered the CCWG’s proposal and supports Recommendations 1 to 10 and 12. However, there is no consensus on Recommendation 11 and the “carve-out” provision contained in Recommendations 1 and 2.

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 of the apple by being able to provide consensus advice to the board and use its new authority in the EC to impede efforts by the community to block implementation of that advice if the board approves it.

Indisputably, the CCWG-Accountability proposal would 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 Senators John Thune (R–SD) and 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, 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.*³³

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.³⁴ Yet this is precisely what will occur if the proposal is enacted as recommended.

- **An uncertain commitment to U.S. jurisdiction.** In the draft revised bylaws, the Post Transition IANA and the Empowered Community, respectively, would be “a California nonprofit public benefit corporation” and “a nonprofit association formed under the laws of the State of California.” There would also be several references to the California Corporations Code and a clause specifying that mediation for the IRP shall occur in Los Angeles. However, the bylaws never specify that ICANN itself must remain a California non-profit corporation. Article 24 states, “The principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California, United States of America. ICANN may also have an additional office or offices within or outside the United States of America as it may from time to time establish.” There is an obvious difference between the location of a principal office and the

As regards Recommendations 1 and 2, the GAC expresses its willingness to take part in the envisioned empowered community mechanism as a decisional participant, under conditions to be determined internally. While there are delegations that have expressed support for the proposal, there are other delegations that were not in a position to endorse the proposal as a whole. In spite of this difference of opinions, the GAC has no objection to the transmission of the proposal to the ICANN Board.” Governmental Advisory Committee, “GAC Communiqué–Marrakech, Kingdom of Morocco,” Marrakech, March 9, 2016, p. 4-5, <https://gacweb.icann.org/display/GACADV/GAC+Communiques?preview=/28278854/41943976/GAC%20Morocco%2055%20Communique%20FINAL.pdf> (accessed May 20, 2016).

³³Italics added. 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).

³⁴See comments of Non-Commercial Stakeholders Group (NCSG) and Intellectual Property Constituency (IPC) councilors in ICANN | GNSO, “Transmittal of results of GNSO Council consideration of CCWG-Accountability Supplemental Final Proposal,” pp. 5–10.

jurisdiction of incorporations. In short, there is no bylaw restriction preventing ICANN from shifting its legal jurisdiction of incorporation to Australia, Belgium, China, Iran, Russia, Singapore, Switzerland, or anywhere else.

Notably, even if the ICANN board thought that it needed to amend Article 24 to shift legal jurisdiction, that bylaw is a normal bylaw – not a fundamental bylaw – and could be changed by a two-thirds vote of the board. The EC could reject this amendment, but that would require significant opposition among decisional participants that is not evident from CCWG discussions. In fact, Annex 12 of the CCWG-Accountability report specifically includes among the topics of discussion for Work Stream 2: “Place and jurisdiction of incorporation and operations, including governance of internal affairs, tax system, human resources, etc.” and “Jurisdiction of places of physical presence.” These Work Stream 2 topics were included at the insistence of a number of members and participants who object to ICANN remaining a U.S. non-profit corporation. Worth noting is the fact that the resolution of the jurisdiction discussion in Work Stream 2 would almost certainly occur after the transition.³⁵

- **An immature organization.** One of the hallmarks of an institution ready for additional responsibility is the facility with which it handles its existing obligations. Recent events raise questions about ICANN’s willingness to deal with controversial matters. An instance of note was the decision to open a new gTLD: the .sucks domain. For obvious reasons, many intellectual property rights holders objected to creation of the domain—nobody at The Heritage Foundation, for example, is overjoyed at the prospect of a “heritagefoundation.sucks” domain.³⁶ When intellectual property rights holders complained to ICANN, however, 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 opinions on the matter.³⁷

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.

- **A community rarely able or willing to unite.** The CCWG-Accountability proposal and the revised bylaws are at the moment a theoretical product. There is a real prospect that the Empowered Community—which is at the core of fundamental accountability for ICANN—may be hamstrung by unanticipated and unintended consequences of the current structural proposals.

While there are serious concerns about the proposed accountability revisions themselves, there is an even more fundamental concern about whether the community can be decisive and united enough to utilize the accountability measures provided to the EC. The entire premise of the transition is that the multi-stakeholder ICANN community has sufficient maturity and cohesiveness to serve as a counterweight to the board and the enhanced influence of the GAC. The CCWG-Accountability development process engenders real doubts about the foundational suitability of the community as bedrock for accountability.

³⁵For a more detailed discussion, see Philip S. Corwin, “The Irritating Irresolution of ICANN Jurisdiction,” May 23, 2015, http://www.circleid.com/posts/20160523_the_irritating_irresolution_of_icann_jurisdiction/ (accessed May 23, 2015).

³⁶To be clear, though not overjoyed at the prospect, this discomfort is a small price to pay to preserve the right of free speech.

³⁷Chris 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).

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. Because of their differing perspectives, if the matter at hand does not directly affect them, individual SO/ACs could be indifferent even when the ICANN board and staff are acting in a very objectionable manner. This is compounded by the GAC's status as a decisional participant because the GAC is unlikely to be able to arrive at a common position in a timely manner if at all unless it changes its procedures to allow EC positions to be determined by less than a full consensus – a change that requires only a majority vote under the GAC's operating procedures. Thus, GAC participation in the EC poses two potential challenges. First, if the GAC habitually finds itself unable to arrive at a decision, it would effectively increase the threshold for EC action by reducing the pool of potential decisional participants that could support or reject EC action from five to four. Alternatively, if the GAC changes its procedures to permit GAC decisions in the EC at less than full consensus, the U.S. could find itself frequently outvoted with the GAC supporting or opposing EC actions at odds with U.S. interests.

If the accountability measures are implemented properly, there will be avenues, such as the IRP and RFR processes, for righting ICANN missteps and forcing compliance with agreed procedures and rules without a decision from the Empowered Community. However, the most powerful accountability measures are exercised only by the Empowered Community and are premised on it's being able to act in a decisive and dependable manner. Regrettably, the practical challenges of exercising its powers raise questions about the community's ability or willingness to fulfill such a role.

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 it remain accountable and transparent.

It is important to note that the proposed transition was not driven by problems or failings in the current IANA process or the U.S. role in that process. It was driven by political considerations. In my opinion, those political concerns are substantial and eventually will require the U.S. to end its historical relationship with ICANN. But that transition need not happen this September nor with this particular transition proposal. Indeed, NTIA and ICANN have repeatedly stated that it is better to get this transition done right than to get it done within a specific timeframe.

The proposed changes to ICANN provide numerous improvements and tools for enhanced accountability, but there are also uncertainties. The proposal is a blueprint for an accountable institution, but it is unclear whether the result will be sound or whether the ICANN community can or will act responsibly and in a timely manner to hold ICANN accountable.

In short, the adjustments in ICANN's structure and governance model are significant and untested. ICANN and Verisign are engaged in a 90 day "parallel testing" period of the new technical IANA process to make sure that, if the transition occurs, the new process will be reliable. Reportedly, Senator Rubio has requested that NTIA consider extending U.S. oversight role to provide for similar parallel testing of the new ICANN governance model.³⁸

I agree that the U.S. should take steps 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

³⁸Kieren McCarthy, "Republicans threaten to derail internet transition: IANA contract getting unwelcome attention," The Register, May 19, 2016, http://www.theregister.co.uk/2016/05/19/republicans_threaten_to_derail_internet_transition/ (accessed May 20, 2016).

ability to reassert the historical NTIA relationship if unforeseen complications do arise. The ICANN board suggested such an approach in its public comment on 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.³⁹

The new ICANN similarly would implement changes in ICANN governance and shifts in the balance of power and influence among groups within ICANN. A soft extension of the current contract for a reasonable period of time would allow the community and ICANN to take the new mechanisms for a sustained test drive to verify to the Internet community that relies on ICANN that they are working as envisioned. This would not derail the progress made by the ICG or the CCWG because the ICANN board has confirmed that virtually all of the recommended changes, including the new accountability improvements and the EC, would be adopted and implemented whether the transition proceeds or not. It would therefore be prudent to maintain U.S. oversight, or at least a means for reasserting NTIA oversight, for the next two years until the new structure proves itself and the details of Work Stream 2 are fully developed and their implications understood.

—**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.

The Heritage Foundation is a public policy, research, and educational organization recognized as exempt under section 501(c)(3) of the Internal Revenue Code. It is privately supported and receives no funds from any government at any level, nor does it perform any government or other contract work.

The Heritage Foundation is the most broadly supported think tank in the United States. During 2014, it had hundreds of thousands of individual, foundation, and corporate supporters representing every state in the U.S. Its 2014 income came from the following sources:

Individuals 75%

Foundations 12%

Corporations 3%

Program revenue and other income 10%

The top five corporate givers provided The Heritage Foundation with 2% of its 2014 income. The Heritage Foundation’s books are audited annually by the national accounting firm of RSM US, LLP.

Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed are their own and do not reflect an institutional position for The Heritage Foundation or its board of trustees.

³⁹ ICANN board, “ICANN Board submission of supplementary and final comments to the CCWG-Accountability 2nd Draft Proposal Public Comment forum: Summary of Board Input,” September 11, 2015, <http://forum.icann.org/lists/comments-ccwg-accountability-03aug15/pdfjl8SFyc7XR.pdf> (accessed May 20, 2016).