

Questions for the Record from Chairman John Thune
To
Mr. Rick Manning

Question 1. *Mr. Manning, if the U.S. government were to extend the IANA contract for two more years, what would you need to see during that time to become comfortable enough to support the transition plan?*

Answer: The transition proposal should be postponed indefinitely.

One of the challenges with the proposed transition is that in ending ICANN's status as a vendor of the U.S. government, it also ends First Amendment¹ protections against capricious actions by ICANN or its successor in Internet governance.

The pending proposal in front of ICANN's Board in Stream 2 that would put protecting "internationally recognized human rights"² in the group's bylaws should be viewed with deep alarm. This change would create an undefined, shifting standard that would put content control as a core value of ICANN. While some dismiss the concerns about delinking the First Amendment from ICANN activities through the transition, there can be no reasonable argument that ICANN's consideration of content control bylaws legislation so close to the proposed transfer, demonstrates that the organization has a dangerous blind spot toward the underlying freedoms upon which the free and open Internet has thrived.

Another challenge is that proponents of the transition argue that the multi-stakeholder community can better protect the Internet from a United Nations' takeover than the U.S. government. This is absurd on its face. The private sector stakeholders are each subject to market based coercion, and have a fiduciary responsibility to their shareholders, not to the American public. The consequences of the private, publicly held stakeholders' fiduciary responsibilities are likely to be interpreted to mean that if making concessions on Internet governance opens up potentially profitable markets it becomes these companies' legal responsibility to trade concerns about Internet governance for increased fiscal opportunities and profitability.

There are many other unanswered areas, such as, the ending of pricing oversight for new and existing domain names at the ICANN and registrar levels effectively allowing ICANN to impose increased Internet fees/taxes with no oversight or control, and the overall ramifications of ICANN losing its anti-trust exemption³ which the NTIA has completely ignored according to recent Freedom of Information Act releases⁴, which make moving forward with the transition in the near term both unwise and extremely risky.

Question 2. *Is there any scenario where you would support the U.S. relinquishing its role with respect to the IANA functions?*

Answer: It is difficult to foresee any such scenario.

¹ https://w2.eff.org/infrastructure/DNS_control/ICANN_IANA_IAHC/19980924_eff_new_iana_pressrel.html

² http://www.cruz.senate.gov/?p=press_release&id=2646

³ <http://www.wsj.com/articles/an-internet-giveaway-to-the-u-n-1472421165>

⁴ <https://getliberty.org/wp-content/uploads/2016/08/NTIA-No-Records-Response-Antitrust-Analysis-08.16.16.pdf>

The names and numbers that constitute the Internet domain name system are no different than spectrum. We allot spectrum via the FCC, and whatever that system's flaws, it prevents any one power from consolidating control over the airwaves.

This government function, protecting the airwaves, protects the First Amendment, and creates a zone where democracy can thrive. Government oversight of the Internet domain name system is no different.

Any alternative to the First Amendment protections afforded by federal government oversight will inevitably fail leaving the Internet less open and free than it is today.

The Internet is a technology that the whole world utilizes. Via government oversight of the naming conventions, we have created spaces for speech to occur that did not exist previously.

NTIA has done a good job with the IANA functions contract, reflecting the federal government's duty as a light-handed steward of Internet governance while resisting calls for content based restrictions.

That remains true today. Americans for Limited Government urges you to not forget your vital role as protectors of constitutional safeguards, and creating an environment where freedom can thrive. Speech without protection will be assaulted and lost.

Surrendering Internet governance to foreign powers or even a corporate governance structure that is subject to foreign government coercion is akin to surrendering a vital piece of the spectrum to international regulators. It need not be housed in the United Nations to be a dangerous power to be wielded against U.S. interests. By allowing the transition to go through, Congress will be endorsing the creation of an unregulated global monopoly over the domain name system which is doomed to fail. This would be dangerous and foolish.

As stated earlier, ceding the IANA functions and the domain name system to the international community sacrifices the First Amendment's primacy over the government contracts. Nothing unconstitutional is allowed to happen under a government contract, but you will lose that guarantee when you lose the IANA functions. In fact, your Committee will no longer be relevant on this matter should the transition occur and will be impotent when inevitable questions and complaints arise.

No guarantee you receive from ICANN or anyone else will ever be as good as the First Amendment and its regime of federal court intervention to ensure the NTIA contract with ICANN complies with the safeguards afforded by the First Amendment.

Questions for the Record from Senator Marco Rubio
To
Mr. Rick Manning

Question 1. *During the course of the CCWG's consideration of its accountability reform proposal, the U.S. Chamber and other business interests requested that ICANN's bylaws be amended to allow for greater insight into how and to what extent ICANN interacts with governments and government officials (outside the formal interaction with the GAC). This request seems especially important in the wake of the revelations concerning ICANN's most recent CEO, Fadi Chehade, and his interactions with the Chinese government before his departure in March. The CCWG delayed consideration of this important work during Work Stream 2.*

Answer: Transparency is important, however the notion that the U.S. government should let the transition take place in order to get bylaws changes that bring more transparency to the domain name system is exactly backward. The U.S. government contracting process is the only means to bring the transparency you seek. Once you let the contract go, you lose leverage to keep it away from other governments, and to enforce any transparency laws that have been put in place.

If Congress wants ICANN bylaws changes to bring more transparency, the most efficient means is for NTIA to never let the contract go and threaten the contract every time something needs to be reined in. ICANN is the contractor, and can be replaced. The domain name system and the free and open Internet as we currently know it, cannot be replaced. To maintain transparency and accountability, the U.S. government should continue the current contract.

Besides, the idea the domain name system as currently constituted is non-governmental is a fiction. The U.S. government has controlled these functions since their inception, and the rest of the world opted in. It's been under government contract the whole time, and as recent as 2012, the Obama Administration was so frustrated with the vendor that they threatened to open up competitive bidding for the contract.⁵ If we want more transparency, then NTIA needs to get in there and do its job, not collaborate with foreign interests who wish to capture the IANA functions. You don't create transparency by ceding power, you lose it.

If ICANN personnel working for the Chinese government is an unacceptable state of affairs, then ICANN should be fired and a new contractor found which is committed to maintaining a free and open Internet and not appeasing those who wish to destroy this fundamental principle.

Question 2. *Should this important work have been punted to Work Stream 2?*

Answer: The answer is no, as it denies Congress and the next Administration the ability to judge any transition based upon a full set of facts. But to be clear, Americans for Limited Government remains opposed to the transition regardless of promises, due to the permanent loss of First Amendment protections that are only afforded if the current relationship is maintained. The only thing that should be punted is the transition proposal itself. The work in Stream 2 is irrelevant to maintaining U.S. government control of the IANA functions, which is the true task at hand. The only transparency that matters to the domain name system is U.S. government oversight. You either keep it, or we'll lose it forever.

⁵ https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=337abfa3fa508d260738052baf46bdf9&_cview=1

Question 3. *What assurances are there that greater transparency such as this will be effectuated if the transition was to occur before the work is done?*

Answer: There are no assurances you should accept. Delaying is a perfectly viable alternative to transitioning. You are contemplating sacrificing oversight of the IANA functions to an unaccountable global monopoly over the domain name industry. That is a bad idea. Instead, you should be maintaining oversight, not giving it up.

Right now the Internet domain name system has transparency via the NTIA contracting process, and our elected officials and federal courts enforcing constitutional protections.

Right now, you have at least a regulated monopoly that can be reined in if need be. Once you let that go, you'll never get it back—and Congress will have no power to address the inevitable concerns that will occur in the future, and will rue the day the free and open Internet was unwittingly handed to foreign powers. The transition is not in the U.S. interests, nor is it in the interests of maintaining a free and open Internet. Given that, Congress should do everything in its power to stop the transition, if even for an additional two-year period so the next Administration can undertake a thorough review of this critical decision and if it decides to proceed, request ak

Question 4. *What other issue have been punted to Work Stream 2 that you see potential problem with?*

Answer: The concern about whether ICANN will be locked in as a U.S. based non-profit corporation is one. The Committee is well aware of this concern so I won't address it further in this document.

Another obvious concern is the decision on whether to change ICANN's by-laws to include, "internationally recognized human rights." The fact that the value-neutral ICANN would even consider imposing some kind of human rights component to its by-laws demonstrates a willingness to create a future censorship regime based upon international standards. The Senator is reminded that the UN Human Rights Council is composed of abusers like Cuba, Venezuela and China and have recently condemned [Israel](http://www.foxnews.com/opinion/2016/03/29/can-t-make-it-up-un-names-democratic-israel-as-world-s-top-human-rights-violator.html)⁶ as the leading human rights abuser in the world, and in a recent report urged the [federalization of all of US law enforcement agencies](http://freeassembly.net/news/usa-statement/)⁷ and the sublimation of U.S. law to international law.

The very fact that ICANN would consider making something as constantly changing and politically motivated as "internationally recognized human rights" part of their underlying mission even as Congress faces the decision on whether they can be trusted with full stewardship over the Internet's IANA is stunning. This consideration demonstrates that ICANN could in the near future, impose Internet content controls under the guise of 'human rights' rejecting the First Amendment protections that currently exist through their existing contract with the U.S. government. This Stream Two consideration raises significant enough doubts about ICANN's judgment, ability and willingness to perform its functions as a vendor to the U.S. government, that serious consideration should be given as to whether they should continue to manage the contract on behalf of the U.S. government after a two-year interim extension is put into place by Congress.

⁶ <http://www.foxnews.com/opinion/2016/03/29/can-t-make-it-up-un-names-democratic-israel-as-world-s-top-human-rights-violator.html>

⁷ <http://freeassembly.net/news/usa-statement/>

Congress can be assured that given the lucrative⁸ functions ICANN currently performs there would be no shortage of competitors to replace them as the vendor should the next Administration find it advisable in 2018.

But let's be clear, as it pertains specifically to Stream 2 outcomes, even if Congress were to be satisfied, any decision made related to Work Stream 2 can be rescinded or revised at a later date by the current or a future ICANN Board. This impermanence in the governing structure and the instability it represents to future governance issues, makes any transition a risky gamble, because once the proposed transition has occurred, Congress will have no power to stop changes antithetical to a free and open Internet. And as is intended through the transition, the U.S. government's oversight role will have been reduced to one of 160+ governments, effectively rendering the U.S. powerless to project a free and open Internet from an onslaught from a vast majority of the world's governments which fear that very concept.

Americans for Limited Government strongly urges that Congress act to compel the Obama Administration to renew the existing vendor contract with ICANN, allowing the next Administration to recommend to Congress whether the IANA functions should be turned over to ICANN's control, or whether a different course of action is needed to protect a free and open Internet into the future.

⁸ <https://www.icann.org/en/system/files/files/annual-report-2015-en.pdf>