AMERICANS FOR
LIMITED GOVERNMENT

10332 MAIN STREET, BOX 326 · FAIRFAX, VA 22030 · PHONE: 703.383.0880 · FAX: 703.383.5288 · WWW.GETLIBERTY.ORG

Testimony of
Richard Manning
President
Americans for Limited Government
Before the
Committee On Commerce, Science, & Transportation
United States Senate
Hearing entitled
Examining the Multistakeholder Plan for Transitioning the Internet Assigned Numbers Authority

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Chairman Thune, Ranking Member Nelson, and members of this distinguished committee, thank you for the opportunity to offer Americans for Limited Government's views regarding the National Telecommunications and Information Administration's (NTIA) plan to transition oversight of the Internet's domain name system (DNS), including the Internet Assigned Numbers Authority (IANA) functions, to the Internet Corporation for Assigned Names and Numbers (ICANN).

The actions of Congress over the months ahead will determine if the primary value of maintaining a free and open Internet prevails or not.

Advocates for the transition have long held the concern that failure to move forward would in some way fracture the Internet, and that has been the rationale given for the U.S. to proceed with turning over the IANA functions to a new governance body led by the current vendor, ICANN, which handles these and other functions on behalf of the U.S. government. Last year, then-outgoing ICANN CEO Fadi Chehade stated that failure to transition the IANA functions would result in fracturing. Chehade stated, "ICANN's community may fracture or fray slowly, becoming divided…The technical operating communities using IANA may go separate ways…"[1]

But that is not the real danger. Let me be clear, no multistakeholder system that can be devised will ever be as effective at protecting a free and open Internet as the current United States government oversight system.

It is probably safe to assume that everyone in this room agrees that protecting a free and open Internet is a primary value. It is also probably safe to assume that everyone agrees that the Internet structure as currently administered by the United States government has provided that platform since its inception. In short, the Internet works, so the burden of proof on changing management over some of its core functions is on the proponents.

[1] http://domainincite.com/19390-chehade-outlines-five-ways-icann-could-die

What is also undeniably true, based upon a State Department hosted May 16, 2016 blog post [2] by Daniel Sepulveda, [3] the Deputy Assistant Secretary of State and U.S. Coordinator for International Communications and Information Policy in the State Department's Bureau of Economic and Business Affairs (EB) [4] and Lawrence E. Strickling, the Assistant Secretary of Commerce for Communications and Information and Administrator, National Telecommunications and Information Administration, is that the Internet is already being fractured by China which has developed an alternate root zone system as well as a separate naming convention.

Sepulveda and Strickling write, "The digital economy has become one of the most powerful engines for global economic growth. If left unchanged, China's regulations would undermine some of the most fundamental aspects of the Internet –- openness, reliability, and interoperability –- within China. By creating its own rules for domain name management, China is threatening to fragment the Internet, which would limit the Internet's ability to operate as a global platform for human communication, commerce, and creativity."

Only the most naïve would believe that the government of China is going to be assuaged to not implement their own Internet censorship regime if only the United States turned a large portion of Internet governance over to a multi-national stakeholder community.

And those who believe that the IANA functions transition would temporarily stem China's threat to fracture the Internet, need only look at China's attempted censorship demands on the .XYZ top level domain name where the government of China demanded last year that the owner not allow 12,000 different words be accepted as domain names including "liberty" and "democracy" as revealing the terrible potential cost of maintaining the Internet's "interoperability."

Stunningly, the issue of possible content censorship in a post-transition world is left wide open by a proposal to insert into ICANN's bylaws a commitment to respect "internationally recognized human rights." A May 20, 2016 letter by Senators Cruz, Lee and Lankford to Commerce Secretary Pritzker states this provision "would open the door to the regulation of content. Inclusion of such a commitment would unquestionably be outside the historical mission of an organization whose functions are supposedly 'very limited to the names and numbers and protocol parameters which are way down in the plumbing of the Internet.'" [5]

Cruz, Lee and Lankford continue writing, "However any provision, such as human rights, that is included in ICANN's bylaws automatically becomes an integral part of ICANN's core mission and, in this case, could provide a gateway to content regulation."

Given the audacity of ICANN's proposal before the transition has even occurred, Congress can be assured that if content is not regulated, then China or somebody else could aggressively

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[2] https://blogs.state.gov/stories/2016/05/16/china-s-internet-domain-name-measures-and-digital-economy#sthash.m76i03qf.dpuf
[3] http://www.state.gov/r/pa/ei/biog/bureau/209063.htm
[4] http://www.state.gov/e/eb/
[5] http://www.cruz.senate.gov/?p=press_release&id=2646

fracture the Internet as the free exchange of ideas is antithetical to their national interest. And if content is regulated, the Internet will cease to exist as a free and open system removing its DNA and unalterably changing it. What's more, as this committee is well aware from the recent Facebook censorship allegations, a private entity has no legal responsibility to uphold First Amendment freedoms, so post-transition, there would be no constitutional protection afforded holders of domains using terms like liberty, should China or any other entity prevail in a censorship gambit.

What's more it is increasingly clear that any attempt to transition the Internet will face significant legal hurdles disrupting any orderly transfer.

The first legal issue surrounds whether President Obama has the authority to conduct the transfer without going through the Congressionally established legal channels for the disposal of property. The Administration has argued that they would not be transferring property so the law doesn't apply, yet, the contracts that govern the relationship between the U.S. government and ICANN repeatedly refer to property negating that argument.

Incredibly, the same Obama Administration that seeks to deny that ICANN manages U.S. government property, put out a Request for Proposals in 2012 for the contract that ICANN manages due to the vendor's failure to respond to various accountability changes that were being demanded. Yet, today, they ask you to give some iteration of that same unresponsive vendor permanent power with little if any accountability to either the U.S. government or you as representatives of the people of the United States.

What's more, ICANN has been exempt from any antitrust questions of their highly lucrative monopoly in creating and selling top level domain names due to their being protected by the very contract they seek to get out from under. Congress has not acted to provide ICANN any antitrust exemptions should the transfer occur. Not that it should, but as a result, it is reasonable to assume that legal challenges would be forthcoming should the transfer occur attempting to break ICANN's single source power to price current and future top level domain names, manage existing top level domain leases and create new top level domain names.

The United States government stands as the protector of freedom on the Internet. Vendors like ICANN help bring specific expertise to manage the day to day operations of the Internet, and the system functions well when the United States government plays its oversight role to prevent abuse.

Absent the U.S. government's light handed oversight, the idea of a free and open Internet will certainly become a thing of the past.

I urge you to use every legislative power at your disposal to stop the planned transition of these critical Internet functions to ICANN. The rationale for the transition is moot and allowing the Obama Administration to proceed would create an open door to future censorship. I submit the remainder of my testimony for the record. Yet I must remind you to consider if you choose to proceed not only how the NTIA transition plan might work, but what could happen to the free and open Internet if it does not.

Does the NTIA have legal authority to transfer IANA functions to ICANN?

On March 25, 2014, Rep. Blake Farenthold and Rep. Darrell Issa issued a letter[6] to Assistant Secretary for Communications of the National Telecommunications and Information Administration (NTIA) Lawrence Strickling regarding the NTIA's March 14, 2014 announcement[7] of its intention to transition key Internet domain name functions to the Internet Corporation for Assigned Names and Numbers (ICANN) and the global multistakeholder community. The letter specifically asked Strickling, "Does the executive branch have unilateral authority to transfer control over the Internet addresses and root zone management of domains?"

On Jan. 14, 2015, Issa and Farenthold actually received a reply from Strickling on April 28, 2014.[8] In it, Strickling stated: "NTIA's announcement marks the final phase of privatization of the Internet domain name system (DNS) first outlined by the U.S. Government in 1998 after broad consultation with stakeholders in the development of Statement of Policy," referring to Federal Register Volume 63, Number 111 published on Wednesday, June 10, 1998, Pages 31741-31751.[9]

Strickling added, "Our action is fully consistent with the 2012 resolution, H.Con.Res.127, that called on the United States to continue to support a global Internet free from government control and to preserve and advance the successful multistakeholder model that governs the Internet."

On the specific question of legal authority, Strickling wrote: "In 2000, NTIA did not contract with ICANN to procure the IANA functions services as an assertion of 'control' over the Internet DNS. Rather NTIA contracted with ICANN as a temporary measure to carry out the government's policy to allow the private sector to take leadership for management of the Internet DNS. By performing the IANA functions in a competent manner for almost a decade and half, ICANN has established itself in this role and there is no longer a need to maintain a government contract designating it to perform these functions. Just as federal agencies can enter into contracts they need to fulfill their missions without specific legislative authority, federal agencies can discontinue obtaining services when they no longer need them. As NTIA made clear at the time of its Statement of Policy, it intended only to procure the IANA functions services until such time as the transition to private sector management of the Internet DNS was complete."

Finally, in a footnote Strickling stated referencing a 2000 then-General Accounting Office (GAO) report on the potential need for legislative action in this area: "GAO's discussion about the need for legislative authority to transfer government property does not concern the provision of the IANA functions under contract since no government property or assets are involved in the contract."[10]

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[6] http://farenthold.house.gov/uploadedfiles/icann.pdf
[7] http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions
[8] http://getliberty.org/wp-content/uploads/2015/01/NTIA_Letter_to_Rep-_Issa_4-28-14.pdf
[9] http://www.gpo.gov/fdsys/pkg/FR-1998-06-10/html/98-15392.htm
[10] http://www.gao.gov/new.items/og00033r.pdf

The IANA functions contract, government property and Article IV, Section 3 of the Constitution

Although Strickling claimed in the letter that "no government property or assets are involved in the contract," here, Strickling clearly mischaracterized the contract. To wit, the current October 1, 2012 NTIA contract with ICANN explicitly states that "All deliverables under this contract become the property of the U.S. Government."[11]

Deliverables under the contract include "technical requirements for each corresponding IANA function," "performance standards in collaboration with all interested and affected parties … for each of the IANA functions," and "a fully automated root zone management system … [that] must, at a minimum, include a secure (encrypted) system for customer communications; an automated provisioning protocol allowing customers to manage their interactions with the root zone management system; an online database of change requests and subsequent actions whereby each customer can see a record of their historic requests and maintain visibility into the progress of their current requests; and a test system, which customers can use to meet the technical requirements for a change request; an internal interface for secure communications between the IANA Functions Operator; the Administrator, and the Root Zone Maintainer," among other items.

Further, ICANN collects annual revenues of more than $100 million a year, making it property of real value.

Article 4, Section 3 of the U.S. Constitution states that only "The Congress shall have power to dispose of … property belonging to the United States."

It therefore follows that NTIA cannot perform the transfer of the IANA functions to ICANN without a vote in Congress, or some other authorizing statute, for example, 40. U.S.C., Chapter 5, Subchapter III, "Disposing of property" (see below).

In addition, the IANA itself reverts to the Commerce Department upon termination of the contract: "the Government may terminate the contract for default." The contract even provides for the possibility of IANA being performed by another entity: "In the event the Government selects a successor contractor, the Contractor shall have a plan in place for transitioning each of the IANA functions to ensure an orderly transition while maintaining continuity and security of operations." These provisions further indicate that upon conclusion of the contract on Sept. 30, 2015, the Commerce Department remains in possession of the IANA functions.

Disposal of property provided under 40 U.S. Code, Chapter 5, Subchapter III

In Strickling's letter to Rep. Issa, he explicitly denied that there was any property or assets involved in the transfer of the IANA functions to ICANN: "the need for legislative authority to transfer government property does not concern the provision of the IANA functions under contract since no government property or assets are involved in the contract." This despite the

[11] http://www.ntia.doc.gov/files/ntia/publications/sf_26_pg_1-2-final_award_and_sacs.pdf

fact the contract, explicitly states, "All deliverables under this contract become the property of the U.S. Government."

One reason to deny this might be because, if it were government property, then it would fall under an onerous process for disposing of property under the 40 U.S.C., Chapter 5, Subchapter III, "Disposing of property." The disadvantage to NTIA and ICANN would be that the IANA functions would have to come up for competitive bid as provided in 40 U.S.C. 545 (a).

Or if a negotiated sale as provided in 40 U.S.C. 545 (d)(1), it would have to done at "fair market value": "the sale must be publicized to an extent consistent with the value and nature of the property involved and the price established must reflect the estimated fair market value of the property." Since this is an entity that does more than $100 million a year of revenue, the fair market value of the IANA functions — we're talking about a global monopoly for allocation of an unlimited number of IP addresses, domain names, and top-level domain names — *it should be worth billions*!

Or, if disposal through a contract broker as provided in 40 U.S.C. 545 (c), "wide public notice of the availability of the property for disposal" would be required: "Disposals and contracts for disposal of surplus real and related personal property through contract realty brokers employed by the Administrator shall be made in the manner followed in similar commercial transactions under regulations the Administrator prescribes. The regulations must require that brokers give wide public notice of the availability of the property for disposal." Yet, no such notice has been given.

The Antitrust Implications under 40 U.S.C. 559 (b)(1)

But perhaps most critically, if Strickling were to acknowledge there is property at stake, the disposal of such property to a private interest would invoke antitrust.

40 U.S.C. 559 (b)(1) states: "An executive agency shall not dispose of property to a private interest until the agency has received the advice of the Attorney General on whether the disposal to a private interest would tend to create or maintain a situation inconsistent with antitrust law." Since Strickling's position is that there is no property involved, NTIA would not have sought the Attorney General's advice the disposal of property to a private interest prior to the March 2014 announcement.

That is a huge liability for ICANN, and potentially for anyone involved at the agency if the provision of the contract stating "All deliverables under this contract become the property of the U.S. Government" was deliberately ignored. No more so than because 15 U.S.C. Section 2 prohibits and makes a felony any attempt "to monopolize any part of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. Sections 13 and 14 forbid any business practice where the effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Antitrust law challenges to IANA functions administrator were anticipated in the 1998 statement of policy: "Several commenters suggested that the U.S. Government should provide full antitrust

immunity or indemnification for the new corporation. Others noted that potential antitrust liability would provide an important safeguard against institutional inflexibility and abuses of power."

To which, NTIA responded, saying it would seek no such immunity for the corporation and that antitrust would actually help keep the corporation in line: "Applicable antitrust law will provide accountability to and protection for the international Internet community. Legal challenges and lawsuits can be expected within the normal course of business for any enterprise and the new corporation should anticipate this reality."[12] Is that not still a danger today?

Did NTIA even conduct any legal analysis about whether it had the authority to proceed with the transfer?

In an April 2, 2014 letter to Assistant Secretary of Commerce Lawrence Strickling, head of the National Telecommunications and Information Administration (NTIA), 35 Senate Republicans including Sen. John Thune (R-S.D.) and Sen. Marco Rubio (R-Fla.) sought "clarification regarding the recent announcement that NTIA intends to relinquish responsibility of the Internet Assigned Numbers Authority (IANA) functions to the global multistakeholder community." [13]

In part, the letter questions the legal basis for the Commerce Department to perform the transition of vital Internet names and numbers functions, citing a 2000 report by the then-U.S. General Accounting Office, which stated, "it is unclear if the Department has the requisite authority" to transfer control of the IANA functions to a private entity. The Senate letter requests "the Administration's legal views and analysis on whether the United States Government can transition the IANA functions to another entity without an Act of Congress." [14]

Yet, to date, the White House has failed to produce the legal basis for transferring the IANA functions without Congress, despite numerous requests. As revealed on March 23, 2014 by the Wall Street Journal's L. Gordon Crovitz: "a spokesman for the Commerce Department's

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[12] "Applicable antitrust law will provide accountability to and protection for the international Internet community. Legal challenges and lawsuits can be expected within the normal course of business for any enterprise and the new corporation should anticipate this reality. The Green Paper envisioned the new corporation as operating on principles similar to those of a standard-setting body. Under this model, due process requirements and other appropriate processes that ensure transparency, equity and fair play in the development of policies or practices would need to be included in the new corporation's originating documents. For example, the new corporation's activities would need to be open to all persons who are directly affected by the entity, with no undue financial barriers to participation or unreasonable restrictions on participation based on technical or other such requirements. Entities and individuals would need to be able to participate by expressing a position and its basis, having that position considered, and appealing if adversely affected. Further, the decision making process would need to reflect a balance of interests and should not be dominated by any single interest category. If the new corporation behaves this way, it should be less vulnerable to antitrust challenges." Federal Register Volume 63, Number 111 published on Wednesday, June 10, 1998, Pages 31741-31751, http://www.gpo.gov/fdsys/pkg/FR-1998-06-10/html/98-15392.htm

[13] http://www.thune.senate.gov/public/index.cfm/2014/4/thune-rubio-demand-answers-from-administration-on-internet-transition

[14] http://www.gao.gov/new.items/og00033r.pdf

National Telecommunications and Information Administration said the agency reviewed this legal issue and concluded the administration can act without Congress but refused to share a copy of the legal analysis." [15]

The Crovitz report prompted Americans for Limited Government to file a Freedom of Information Act (FOIA) request with the NTIA requesting the legal basis for its plans to transition control over Internet governance to some as of yet unnamed international body. The FOIA request includes "All records relating to legal and policy analysis developed by or provided to the National Telecommunications and Information Administration that support its decision to 'transition key internet domain name functions,' including any analysis showing whether the NTIA has the legal authority to perform the transition." [16]

The Department's interim response to the FOIA request, [17] which was referenced in the Wall Street Journal on June 29, 2014 by Crovitz, [18] still failed to produce the legal analysis. And the agency's many responses since [19] [20] [21] [22] have not produced any legal analysis supporting the transition, nor has the agency claimed any privileged exemptions under the FOIA Act. Meaning, such an analysis being conducted prior to the transition being announced might not even exist.

Is NTIA already violating the Congressional defund barring the transition of the IANA functions passed the past two years?

In Singapore on Feb. 15, 2015, Assistant Secretary for Communications and Information at the Department of Commerce Lawrence Strickling answered a question about why he believed the National Telecommunications and Information Administration (NTIA) was still allowed to plan transitioning the Internet Assigned Numbers Authority (IANA) functions to the Internet Corporation for Assigned Names and Numbers (ICANN) in spite of a thrice-enacted prohibition [23] [24] [25] by Congress barring the use of funds to engage in said transition, including attending such conferences at taxpayer expense.

Strickling replied:

> "So yes there was a rider attached into our budget in the budget bill last December that said that we can't spend appropriated dollars to complete transition before the end of next September. And so we have taken that seriously and I've reported out that there will not be a transition before next—the end of next September. At the same time though there

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[15] http://online.wsj.com/news/articles/SB10001424052702303802104579453263393882136
[16] http://getliberty.org/wp-content/uploads/2014/03/DOC-NTIA-FOIA-re-ICANN-03-27-14.pdf
[17] http://getliberty.org/wp-content/uploads/2014/06/DOC-NTIA_FOIA-Responsive-Docs-Set1.pdf
[18] http://online.wsj.com/articles/gordon-crovitz-au-revoir-to-the-open-internet-1404076280
[19] http://getliberty.org/wp-content/uploads/2015/06/DOC-NTIA_FOIA-Responsive-Docs-Set2.pdf
[20] https://getliberty.org/wp-content/uploads/2016/03/NTIAFOIA3rdSet-3-14-16.pdf
[21] https://getliberty.org/wp-content/uploads/2016/03/NTIAFOIAResponse4thSet3-18-16.pdf
[22] https://getliberty.org/wp-content/uploads/2016/01/NTIAFOIAResponse1-7-2016.pdf
[23] PL 114-113, H.R.2029, Section 539.
[24] PL 114-53, H.R.719, Section 101.
[25] PL 113-235, H.R.83, Section 540.

> was some commentators, not necessarily anybody with any expertise were saying ah this shuts down NTIA. They have to sit on the sidelines and not do anything. You know, like our hands are tied. And so that concerned us. We didn't read the bill that way or the law that way and we've consulted with — informally with both the House and the Senate, both Democrats and Republicans to get an understanding as to what exactly they intended. So one of the things was even in the rider it said you must provide us regular reports and updates on how the transition is going. So they clearly intended us to do things like come to the ICANN meetings and watch and report back what's going on. We clearly are participating in the GAC and none of that affects that. And the only real issue was to what extent do we provide feedback during the process to the community. And on that, you know, the assurances I got from most of the staff on the Hill was they didn't see any problem with that because… we want to protect the interests of the United States in all of this." [26]

Americans for Limited Government Foundation President Nathan Mehrens has filed a complaint with the Commerce Department Inspector General David Smith on Feb. 1, [27] stating, "Despite the explicit prohibition, the NTIA is clearly engaged in activities that are designed to lead to the relinquishment of its responsibilities regarding Internet domain name system functions, including responsibility with respect to the authoritative root zone fine and the Internet Assigned Numbers Authority functions. The NTIA personnel have traveled to numerous conferences on internet governance and speeches from NTIA personnel clearly indicate that they are moving ahead as if Congress had not acted to prohibit their very actions."

As for Strickling's citing of reporting requirements that were included in the spending bills, these do not authorize working on the relinquishment of the IANA functions specifically because they cannot supersede the statute.

In the 2015 omnibus spending bill, Congress required NTIA to submit a report due January 30 "regarding any recourse that would be available to the United States if the decision is made to transition to a new contract and any subsequent decisions made following such transfer of Internet governance are deleterious to the United States." [28] That does not authorize any work on relinquishing the Internet, except to produce NTIA's backup plan in case anything went wrong with such a transition.

Congress also directed "NTIA to inform appropriate Congressional committees not less than 45 days in advance of any such proposed successor contract or any other decision related to changing NTIA's role with respect to ICANN or IANA activities." [29]

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[26] http://singapore52.icann.org/en/schedule/tue-ncuc/transcript-ncuc-10feb15-en.pdf

[27] https://getliberty.org/wp-content/uploads/2016/03/NPM-Complaint-to-DOC-IG-Re-NTIA-Antideficiency-Act_02.01.16.pdf

[28] http://www.circleid.com/posts/20141210_breaking_us_government_funding_bill_delays_iana_transition/

[29] http://www.circleid.com/posts/20141210_breaking_us_government_funding_bill_delays_iana_transition/

This reporting requirement was not fully followed when NTIA most recently unilaterally modified its contract with ICANN on August 4 allowing for a short-term extension. [30] According to NTIA Administrator Strickling, Congress was not notified of the contract extension until Friday, August 14, after the modification to the contract had already gone into effect. [31]

Again, these reporting requirements were very specific and narrowly tailored to ensure Congress would be notified of any changes to the NTIA contract with ICANN and of the agency's contingency plan in case any IANA functions transition goes awry. None of them authorized continued work on the transition.

As for the claim by Strickling that he informally consulted with Congressional staff about the intent of the prohibition, that is no legal standard whatsoever. As Mehrens noted in the Inspector General complaint, "it is not Hill staff that decide whether there is a problem, but rather the actual language passed by Congress should be examined."

Americans for Limited Government Foundation has since been informed by the Inspector General that they have referred the matter for an investigation.

As Congress works to affirm its commitment to restoring the Constitution's Article I separation of powers, including the power of the purse, a great place to start would be with prohibitions on the use of funds that Congress has already enacted. With NTIA clearly violating the prohibition barring the use of funds to engage in the IANA functions transition, plus not even meeting with the reporting requirements set for by Congress in the 2015 omnibus spending bill, there should be legislative redress, and that should be requiring NTIA to extend the current contract with ICANN for another two years.

Conclusion

While many of my esteemed fellow panelists today will be examining in great depth the multistakeholder plan for NTIA's transition of the IANA functions, and rightly so, the testimony I intend to deliver today is much more of a gut check. Mr. Chairman, the real questions you must consider today and the days that follow are whether NTIA — and indeed the members of this committee and Congress as a whole — have done their own due diligence. That is, in ensuring whether this proposed transition is even lawful, serves U.S. interests and preserves the free and open Internet that we all today take for granted. And finally, whether surrendering oversight of the Internet's names and numbers is even a good idea.

Failing in these key pillars, we risk creating an unaccountable Internet that is beyond any law or authority, acts openly against U.S. interests and is anything but free and open. One that taxes users of the Internet at will, tramples upon property rights and threatens the religious and civic liberties of peoples around the world. Or, one that is no longer authoritative, splinters into multiple root zones and cannot maintain control over its framework as it splits into irreconcilable chaos, hindering global communications and commerce.

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[30] https://www.ntia.doc.gov/files/ntia/publications/mod_0003_for_sa1301-12-cn-0035_signed.pdf
[31] https://www.ntia.doc.gov/blog/2015/update-iana-transition

Today, the Internet works.

It is free and open. Users of the Internet, high and low, have a ready, robust recourse in federal courts to adjudicate any and all First Amendment claims should censorship ever occur in the fulfillment of the current U.S. government contracts and cooperative agreements. That it hasn't occurred is a testament to the virtue of the current U.S. oversight. But members of this committee should not take false comfort or become complacent. Much like the U.S. nuclear deterrent, we do not consider the absence of a nuclear exchange as reason to suddenly begin disarming our vast arsenal of warheads. U.S. oversight of the Internet has enabled the Internet to take on our uniquely American character for openness and entrepreneurship. Somebody has to be standing on the wall, and it is undoubtedly better to have the current, underappreciated constitutional system that says the root zone operator, ICANN, a U.S. government contractor, cannot violate the First Amendment rights of anyone who uses the Internet or else they go to court — than to leave it to the forces of globalization and profit, or foreign powers who might capture the function, to determine what shall be free and what shall be open.

In 1998, groups like the Electronic Frontier Foundation (EFF) criticized the transfer of DNS to a private foundation like ICANN. "Internet administration has always guaranteed free speech and due process, since it has been done by U.S. Government contractors who are required to follow the U.S. Constitution. If the New IANA moves Internet administration out from under the U.S. Government, as there is general agreement to do, the public will lose these guarantees," Shari Steele, Staff Counsel at EFF warned at the time.[32] These concerns have not been raised since, and certainly not during this process.

The Internet as we know it depends on there being a single, authoritative source for the names and numbers in order to work. For, while the government-overseen contracts and agreements are in place to establish the rules of the road, ICANN, Verisign, the regional registries, etc. are all shielded from antitrust scrutiny. Such pitfalls of collusion, monopoly power and price gouging might have arisen otherwise if the Internet had been brought up singularly in the private sector. Instead today's single, usable and affordable Internet, again, is a virtue of U.S. oversight. It is a monopoly, yes, but a regulated one that can be pulled back if needs be, where claims of U.S. government property over the IANA functions act simply as a failsafe — just in case anything goes wrong. We must consider whether trading the current system for a single, unaccountable monopoly beyond law or competition, or one that could be subject to antitrust suits the moment it engages in anticompetitive activities, splintering the Internet, could actually be a far worse outcome. Antitrust law challenges to the IANA functions were fully anticipated in the 1998 statement of policy: "Applicable antitrust law will provide accountability to and protection for the international Internet community. Legal challenges and lawsuits can be expected within the normal course of business for any enterprise and the new corporation should anticipate this

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32 https://w2.eff.org/Infrastructure/DNS_control/ICANN_IANA_IAHC/19980924_eff_new_iana_pressrel.html

reality."[33] But throughout this entire process, nobody has really considered the antitrust fallout of the transition.

The Internet in its current form is in fact held accountable by the U.S. contracts. In 2012, NTIA put up the IANA functions for a request for proposals,[34] to see if anybody else besides ICANN might perform the functions but, mostly, to ensure that ICANN realized its authorities could be revoked as a fallback if the U.S. deemed it necessary.

A fallback plan, mind you, that without the current contract, the U.S. will lack. In the 2015 omnibus spending bill, Congress required NTIA to submit a report due January 30 "regarding any recourse that would be available to the United States if the decision is made to transition to a new contract and any subsequent decisions made following such transfer of Internet governance are deleterious to the United States." [35]

In response in its first quarterly report, NTIA told Congress that "Our preliminary answer is that the criteria for the plan that NTIA established in its March 2014 announcement will ensure an outcome that is not 'deleterious' to the United States." [36]

Besides this vague assurance, NTIA never produced its contingency plan should the IANA functions transition harm U.S. interests in its subsequent quarterly reports to Congress. [37] [38] [39] [40]

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[33] "Applicable antitrust law will provide accountability to and protection for the international Internet community. Legal challenges and lawsuits can be expected within the normal course of business for any enterprise and the new corporation should anticipate this reality. The Green Paper envisioned the new corporation as operating on principles similar to those of a standard-setting body. Under this model, due process requirements and other appropriate processes that ensure transparency, equity and fair play in the development of policies or practices would need to be included in the new corporation's originating documents. For example, the new corporation's activities would need to be open to all persons who are directly affected by the entity, with no undue financial barriers to participation or unreasonable restrictions on participation based on technical or other such requirements. Entities and individuals would need to be able to participate by expressing a position and its basis, having that position considered, and appealing if adversely affected. Further, the decision making process would need to reflect a balance of interests and should not be dominated by any single interest category. If the new corporation behaves this way, it should be less vulnerable to antitrust challenges." Federal Register Volume 63, Number 111 published on Wednesday, June 10, 1998, Pages 31741-31751, http://www.gpo.gov/fdsys/pkg/FR-1998-06-10/html/98-15392.htm

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

[35] http://www.circleid.com/posts/20141210_breaking_us_government_funding_bill_delays_iana_transition/

[36] http://www.ntia.doc.gov/files/ntia/publications/iana_report_013015.pdf

[37] https://www.ntia.doc.gov/files/ntia/publications/ntia_second_quarterly_iana_report_05.07.15.pdf

[38] https://www.ntia.doc.gov/files/ntia/publications/ntia_iana_third_quarterly_report.pdf

[39] https://www.ntia.doc.gov/files/ntia/publications/iana_transition_report_to_congress_-_fourth_quarterly_11.02.15.pdf

[40] https://www.ntia.doc.gov/files/ntia/publications/ntia_iana_fifth_quarterly_report_to_congress.pdf

[41]That is to say, Mr. Chairman, there is no backup plan should the Internet become an unaccountable monopoly, subjected to foreign capture or broken into hundreds of pieces — even though Congress required there to be such a plan. You've got the plan for transition, but no fallback position.

In short, the dangers of the IANA functions transition and leaving U.S. oversight behind include:

1) The plan necessarily lacks First Amendment protections for the Internet naming conventions because the government contract is the only way for anybody to invoke the First Amendment;

2) The plan lacks antitrust protections for ICANN without the government contract, and Congress does not appear to anticipate any need to offer an antitrust exemption to ICANN. Not that it should, as it might lead to other unintended consequences;

3) The plan lacks Congressional authority;

4) The plan could lead to an Internet that is either an unaccountable monopoly or one that is fractured, either way it could end up being less free and open;

5) Neither Congress nor NTIA has any backup plan if anything goes wrong.

Thank you for allowing me to present Americans for Limited Government's rationale for ardently opposing the proposed transition.

[41] https://www.ntia.doc.gov/files/ntia/publications/iana-transition-quarterly-report-05162016.pdf