



ICANN Transition is Premature

Unanswered Questions Require an Extension¹

by Berin Szóka,² Brett Schaefer³ & Paul Rosenzweig⁴

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¹ The views expressed in this white paper reflect those of TechFreedom and the individual authors, but not necessarily those of The Heritage Foundation.

² *Berin Szóka is President of TechFreedom.*

³ *Brett Schaefer is the is Jay Kingham Senior Research Fellow in International Regulatory Affairs at The Heritage Foundation.*

⁴ *Paul Rosenzweig is a Visiting Fellow at The Heritage Foundation and formerly served as Deputy Assistant Secretary for Policy in the Department of Homeland Security.*

I. Introduction

Is the Internet ready for the U.S. government to give up its historic role as the ultimate guarantor of Internet governance? Yes, insists the Obama Administration. Global stakeholders — users, businesses, technical experts and civil society groups — will remain firmly in control, they assure us.

We're skeptical. But before we tell you why, let's make a few things clear. We support the multi-stakeholder model. We do not believe *any* government should control or own the Internet. We do *not* oppose the "Transition" — wherein multi-stakeholders would assume the current U.S. oversight responsibilities over the Internet Corporation for Assigned Names and Numbers (ICANN). But we *do* oppose rushing the Transition before critical questions are resolved. We recommend extending the contract for a year or two to vet the proposal and complete all of the reforms sought by the community.

Administration officials have stated repeatedly that "it is more important to get this issue right than it is to simply get it done."⁵ However, as we near the end of President Obama's second term, it is hard not to conclude that the Administration has become more concerned with getting this done *right now* than in getting it right. We wonder because of the many serious concerns surrounding the Transition that remain unresolved even as the Administration appears dead-set on moving forward regardless of the potential consequences.

We worry that approving the Transition prematurely will set the multi-stakeholder model up to fail. We fear that governments will gain new influence over the Internet, that Internet freedom will suffer, and that the ICANN leadership (CEO and staff) will continue its troubling pattern of cavalierly ignoring its bylaws and procedures while the ICANN Community proves too fractious to hold the leadership accountable.

What's needed now is a "test drive" — a trial period of a year or two in which the U.S. withdraws and allows the new ICANN to operate autonomously, but with the possibility of reasserting its traditional role if unforeseen problems arise, if ICANN resists additional reforms, or if the multi-stakeholder community determines that the new bylaws or governance structure are insufficient to hold ICANN accountable.

* * *

The Transition started in March 2014. The Commerce Department's National Telecommunications and Information Administration (NTIA) announced that it intended to end the contractual relationship over the technical heart of the Internet between the U.S. government and ICANN.⁶ The contract required NTIA to sign off on changes to the authoritative root zone file and the Internet Assigned Numbers Authority (IANA) functions, which tie together the domain name system (DNS)

⁵ Jeff Elder, U.S. Delays Giving Up Oversight of Internet Administrator Iann, The Wall Street Journal, (Aug. 18, 2015 2:09 p.m), <http://www.wsj.com/articles/u-s-delays-giving-up-oversight-of-internet-administrator-icann-1439851721>.

⁶ Press Release, The National Telecommunications and Information Administration (NTIA), NTIA Announces Intent to Transition Key Internet Domain Name Functions (March 14, 2014), <https://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>.

— who’s who on the global network of networks. NTIA’s role meant the DNS could not be hijacked: the U.S. government was the ultimate guarantor of freedom on the network.

ICANN, a California nonprofit corporation, was created in 1998 as a technical coordinating body, but has acquired increasingly quasi-governmental powers to regulate, tax, and spend. The U.S. has largely kept a hands off approach to ICANN, but the mere possibility that NTIA might award the IANA contract to some other organization has helped check ICANN and make sure it did not stray beyond its narrow mission or abuse its position. Indeed, NTIA used that threat effectively back in 2012 when it rejected ICANN’s bid to renew the IANA contract and canceled its Request for Proposals, saying it had “received no proposals that met the requirements requested by the global community.”⁷

But that was before Edward Snowden dramatically changed the dynamic in June 2013. For years, the U.S. had worked with like-minded countries to resist efforts to have the International Telecommunication Union (ITU) assume a role in Internet governance, but feared that some of its allies might change their position after the extent of NSA surveillance was made public. Even though the U.S. relationship with ICANN had nothing to do with NSA surveillance, the U.S. saw an opportunity to change the discussion prior to the April 2014 NETMundial conference on Internet governance in Brazil. In March 2014, NTIA announced that that it would seek end the historical contractual relationship with ICANN and Transition that oversight role to the multi-stakeholder community.⁸

Over the past two years, a ton of work has gone into a proposal for ICANN to fulfill its responsibilities without NTIA oversight and empower the community to hold an autonomous ICANN accountable.⁹ But its leadership knew that, for all the lofty talk about reform, the Administration had already committed itself to completing the Transition. In addition, much of the multi-stakeholder community was eager to complete the process before the election, because a new administration might not support the Transition.

ICANN’s leadership held the real leverage. All it needed to do was to run down the clock — and put together reforms that looked just good enough to satisfy the White House and the community. And *that* is precisely — and very predictably — what happened. In June, NTIA released a lengthy report

⁷ Press Release, NTIA, Notice - Cancelled Internet Assigned Numbers Authority (IANA) Functions - Request for Proposal (RFP) SA1301-12-RP-IANA (March 10, 2012), <http://www.ntia.doc.gov/other-publication/2012/notice-internet-assigned-numbers-authority-iana-functions-request-proposal-rf>. See also Kevin Murphy, *NTIA says ICANN “does not meet the requirements” for IANA renewal*, (March 10, 2012), <http://domainincite.com/8091-ntia-says-icann-does-not-meet-the-requirements-for-iana-renewal>.

⁸ See *supra* note 2.

⁹ NTIA, IANA Functions’ Stewardship Transition: ICANN Board Transmits IANA Stewardship Transition Proposal and Enhancing ICANN Accountability Recommendations to NTIA, ICANN, (March 10, 2016), <https://www.icann.org/stewardship>.

concluding that the proposal met its criteria for the Transition laid out in March 2014.¹⁰ On August 16, NTIA informed ICANN that it intended to allow the contract to expire on September 30.¹¹

In doing so, the Administration has waved away concerns about the Transition. At the Internet Governance Forum USA this past July, Assistant Secretary Strickling of the NTIA responded to some concerns, but offered little substance about many. He breezily concluded: “Other claims keep popping up and I do not have time today to correct every misstatement being made about the Transition.”¹² In truth, the points are not “claims” or “misstatements”, they are unresolved concerns and unanswered questions.

Here are just the most prominent of our remaining concerns — and why they matter. We start with practical concerns and conclude with legal ones. Here’s a high-level list:

1. Whatever happens with the Transition, there’s no reason whatsoever to think authoritarian countries like Russia and China won’t try to exert greater control over the Internet and the long-term impact of the Transition on positions of other governments vis-à-vis U.N. governance of the Internet are unknown.
2. It is unclear at best whether the multi-stakeholder community has the cohesion and resolve necessary to serve as an effective check on the ICANN Board post-Transition.
3. Governments will have more power post-Transition than they do currently, and it is unclear how this will affect ICANN.
4. Recent events revealed that ICANN has serious transparency and governance problems, which could make it vulnerable to corruption and abuse.
5. The U.S. government’s role is a major reason why the ICANN Board has been willing to accept accountability measures, because the Transition is dependent on their adoption. But a number of important additional reforms will not be completed until after the Transition, and failing to extend the contract may jeopardize their implementation.
6. Substantial questions on ICANN’s jurisdiction, including where ICANN will be headquartered and incorporated and to which laws ICANN will be subject, remain unanswered.
7. The U.S. failed to secure legal ownership and control of the .MIL and .GOV domains, which could create national security concerns in the future.
8. The new ICANN bylaws may not be in line with California law, which could lead to legal and political challenges.
9. If the Transition involves a transfer of property, ending the contract without congressional authorization would violate the Constitution.

¹⁰ National Telecommunications and Information Administration U.S. Department of Commerce, IANA Stewardship Transition Proposal Assessment Report (June 9, 2016), <https://www.ntia.doc.gov/report/2016/iana-stewardship-transition-proposal-assessment-report>.

¹¹ Letter from Lawrence Strickling, Assistant Secretary for Communications and Information, U.S. Department of Commerce, to Goran Marby, President and CEO of ICANN (Aug. 16, 2016) (on file with the author), available at <https://www.ntia.doc.gov/files/ntia/publications/20160816marby.pdf>.

¹² Lawrence Strickling, Assistant Secretary for Communications and Information, National Telecommunications and Information Administration, U.S. Department of Commerce, Remarks at The Internet Governance Forum USA (July 14, 2016), <https://www.ntia.doc.gov/speechtestimony/2016/remarks-assistant-secretary-strickling-internet-governance-forum-usa>.

10. NTIA may have violated a funding prohibition if it fails to extend the contract.
11. It is unclear that U.S. antitrust law will actually be an effective remedy (or deterrent) against anti-competitive behavior by ICANN, even the Transition doesn't change its legal status. Yet foreign antitrust laws could be used strategically to portray ICANN as a cartel, and thus make the case for a shift to U.N. control.
12. NTIA may have violated administrative law by failing to adequately consider public comments on the Transition directly, and instead relying on ICANN to do so on its behalf.

II. Unresolved Concerns

A. The Transition Won't Stop an ITU Takeover

Most proponents and skeptics of the Transition agree that the worst possible outcome would be for authoritarian governments to exert more control over Internet content through control via the United Nations or a U.N. specialized agency like the International Telecommunication Union (ITU) where Internet governance would be decided on a one-country-one-vote basis. The multi-stakeholder process, for all its flaws, is a far better alternative.

Since it announced the Transition, the Administration has strongly implied that the Transition announcement has undermined attempts to increase governmental control of the Internet through the ITU or the United Nations. For instance, in July 2014, Assistant Secretary Strickling declared,

We firmly believe that our announcement will help prevent any government or group of governments to take over the domain name system. Our continued stewardship of the IANA functions has been a source of friction and used as an excuse by Russia and others to push for organizations like the International Telecommunication Union to take over the IANA functions. Our announcement takes that argument off the table, and affirms the role of the global Internet community, which is committed to a truly inclusive multistakeholder process for Internet governance.¹³

When pressed, Assistant Secretary Strickling has admitted that authoritarian countries will continue to try and assert control over the Internet regardless of the Transition. Still, he argued, the Transition might convince some countries not to support that goal. In July, he stated that “almost 30 of [the 89 countries supporting U.N. governance of the internet in 2012] have now demonstrated their support for multistakeholder governance of the domain name system by joining in the Governmental Advisory Committee’s [GAC’s] consensus position to move the transition proposal forward.”¹⁴ Of course, this means that roughly 60 countries have *not* endorsed the multi-stakeholder model.

But more fundamentally, support for the proposal in the GAC does not *ipso facto* mean that they would not prefer U.N. governance. In fact, some of these countries may see the Transition as the

¹³ Lawrence Strickling, Assistant Secretary for Communications and Information, National Telecommunications and Information Administration, U.S. Department of Commerce, Keynote Address at the American Enterprise Institute, (July 22, 2014), <https://www.ntia.doc.gov/speechtestimony/2014/keynote-address-assistant-secretary-strickling-american-enterprise-institute>.

¹⁴ See Strickling Remarks, *supra* note 11.

first step in a two-step process of asserting U.N. governance over the Internet. In other words, the Transition may offer only temporary reprieve and its long-term impact on government positions vis-à-vis U.N. governance of the Internet is unknown — and unknowable. Nor is there any reason whatsoever to think that the Transition will restrain the efforts of authoritarian countries like Russia and China to exert greater control of the network. The most that can be said is that the Transition makes us hope that our allies will be less angry about Snowden and will support the U.S. in rejecting an ITU takeover — and that is a predictive judgment without any factual support.

B. Can the Community Govern ICANN Post-Transition?

In his July comments, Assistant Secretary Strickling falsely conflated the goal of privatization, first announced in 1998, with the far more recent development of a brand new governance model for ICANN.¹⁵ Just because the Transition may be a good idea in principle does not mean that *this particular* Transition proposal is sound or that the timing is right.

The entire premise of the Transition is that a new Empowered Community, comprised of representatives from the multi-stakeholder community, will act as an effective check on Board abuse and corporate misconduct. But it is important to note that these powers are less than those originally sought by the multi-stakeholder community. When the ICANN Community first drafted a proposal for governing ICANN absent U.S. oversight, it proposed making ICANN into a membership organization — meaning that stakeholders would have clearly defined rights under California non-profit corporate law.

The Board rejected this request because it did not want to grant the Community too much authority. In the face of this opposition from the Board, the Community backed down and did not insist on membership. Instead, the ICANN Community settled for a weaker “designator” model that gives stakeholders fewer statutory rights under California law and provides other powers only through new bylaws, which can be changed.

To illustrate the importance of this difference, under a membership governance structure, the ICANN Community would have had to affirmatively approve key decisions like those regarding ICANN’s budget and all bylaw changes. But under the designator governance model, approval of the Empowered Community is necessary only to approve changes to fundamental bylaws (a defined subset of the overall bylaws). Exercise of the other powers, such as rejecting the budget or regular bylaw changes, is possible only if a petition by one part of the community passes several thresholds of support. This is a significant shift in the power relationship in favor of the Board and Staff versus the ICANN Community.

In theory, the new bylaws provide powers to enable the Community to hold ICANN accountable. But there is an enormous gap between providing this authority and the ability to use it. ICANN’s “multi-stakeholder” community is often fractious and irresolute. The various multi-stakeholder constituencies each have separate interests and priorities and tend not to take positions on matters that do not directly affect them. History indicates that the multi-stakeholder community will not be the strong oversight mechanism needed. Indeed, ICANN Community representatives backed down

¹⁵ *Id.*

when confronted by the Board at key moments during the Transition.¹⁶ This concern is exacerbated by the generally steep thresholds necessary for the community to actually exercise its powers. Reluctantly, we believe that multi-stakeholder oversight post-Transition will be too difficult to use to be an effective check on the ICANN Board.

However, even if we are wrong, the new ICANN governance model is untested and represents a major change in how ICANN will be governed. When the ICANN Community first proposed a membership model for governing ICANN absent U.S. oversight, the Board warned that given the “potential for changes in the balance of powers between stakeholder groups in ICANN’s multistakeholder model... 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.”¹⁷ Although the Board made this statement as a calculated move to get the ICANN Community to abandon its membership proposal — much of the ICANN Community is worried that a delay might endanger the possibility of the Transition — its warning was not incorrect. Although the current proposal establishes a designator rather than a membership governance model, the post-Transition ICANN similarly would implement changes in ICANN governance and shifts in the balance of power and influence among groups within ICANN. It would be similarly prudent to prove that it is a stable model before formally completing the Transition.

C. Increased Influence for Governments in ICANN Post-Transition

Assistant Secretary Strickling has stated that “the transition proposal does not expand the role of governments vis-à-vis other stakeholders.”¹⁸ This argument is both false and a calculated distraction. The undeniable reality is that governments will have more power in the post-Transition ICANN than they do currently.

Under the current bylaws, governments have a privileged advisory role in ICANN, wherein government advice can only be rejected through opposition of a majority of the ICANN Board. In the post-Transition ICANN, the threshold for rejecting GAC advice is increased to 60 percent. Governments will also participate as voting members in the new “Empowered Community” that is vested with the authority to dismiss the Board or individual directors, approve or reject bylaw changes, and other powers. Governments have not had a say in these matters before. While they will mostly be on par with other stakeholders, no fair observer can argue that government power is not increased by the Transition.

While this expanded authority is not to the level sought by authoritarian governments and would not establish government “control” over ICANN, it is unclear how the more powerful role of governments will affect ICANN.¹⁹ Indeed, governments are already asserting themselves. The draft

¹⁶ Brett D. Schaefer, Testimony before the U.S. Senate Committee on Commerce, Science, and Transportation, (May 24, 2016), <http://www.heritage.org/research/testimony/examining-the-multi-stakeholder-plan-for-transitioning-the-internet-assigned-number-authority>.

¹⁷ ICANN, supplementary and final comments to the CCWG-Accountability 2nd Draft Proposal Public Comment forum, available at <http://forum.icann.org/lists/comments-ccwg-accountability-03aug15/pdfjl8SFyc7XR.pdf>.

¹⁸ See Strickling Remarks, *supra* note 8.

¹⁹ See Schaefer Test., *supra* note 12.

IANA Naming Function Agreement would codify the the 2005 Governmental Advisory Committee Principles and Guidelines for the Delegation and Administration of Country Code Top Level Domains (GAC 2005 ccTLD Principles) and require the contractor to “respect” those principles even though they are not accepted as binding by the ccNSO and have not been formally adopted by ICANN.²⁰

D. ICANN’s Troubling Record of Ignoring its Corporate Legal Obligations

Recent events have revealed that ICANN has serious transparency and governance problems. Earlier this year, ICANN was challenged in U.S. court regarding its failure to follow proper procedures in awarding the .AFRICA domain name.²¹ The dilemma arose from the ICANN Board’s attempt to improperly appease governments who had objected to the original allocation of the TLD.²² More recently, an Independent Review Panel (an arbitral panel for dispute resolution) condemned ICANN in no uncertain terms for its actions involving applications for domains by a company called Dot Registry.²³ According to the panel, “ICANN failed to apply the proper standards in the reconsiderations at issues, and that the actions and inactions of the board were inconsistent with ICANN’s Articles of Incorporation and Bylaws.”

This cavalier attitude becomes all the more concerning given the potential power and resources of ICANN. ICANN has the *de facto* power to tax domain names. It is flush with cash from a flurry of top level domain name applications (e.g., .APP, .SHOP). Just recently, a company won the action for the .WEB TLD with a bid of \$135 million. Since June 2014, ICANN has earned over \$240 million in auction proceeds.²⁴ It is increasingly exercising essentially regulatory powers (e.g., who may use .WINE or .AMAZON). Resources, power and willful disregard of existing rules is not a comforting combination.

The fact that ICANN leadership acted in such a high-handed manner in conflict with its bylaws *while knowing that the Transition was still in question* says volumes about the presumptuousness of ICANN’s staff and leadership. This should be of great concern to the ICANN Community. Nobody can colorably argue that the prospect of ICANN Board or staff misconduct will be lessened once there is no longer any possibility of the U.S. government putting the IANA contract out for re-bid (to an entity other than ICANN), or using the IANA contract to exercise oversight. Absent strong

²⁰ ICANN, IANA Naming Function Agreement Proposal, (Aug. 10, 2016), *available at* <https://www.icann.org/en/system/files/files/proposed-iana-naming-function-agreement-10aug16-en.pdf>.

²¹ DotConnectAfrica Trust v. Internet Corporation for Assigned Names and Numbers (ICANN), Docket No. CV 16-00862-RGK(JCx), (United States District Court, C.D. California, Western Division).

²² DotConnectAfrica Trust v. Internet Corporation for Assigned Names and Numbers (ICANN), International Centre For Dispute Resolution Independent Review Panel Final Declaration, Case #50 2013 001083, *available at* <https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf>.

²³ DotConnectAfrica Trust v. Internet Corporation for Assigned Names and Numbers (ICANN), International Centre For Dispute Resolution Independent Review Panel Declaration, Case #50 2013 001083, at 59, <https://regmedia.co.uk/2016/08/03/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

²⁴ ICANN, New GTLD Auction Results, <https://gtldresult.icann.org/application-result/applicationstatus/auctionresults> (last visited Sept. 8, 2016).

oversight by an cohesive ICANN Community with the powers and tools necessary to adequately check the ICANN Board and staff, the corruption and misgovernance scandals witnessed in FIFA and WIPO could happen at ICANN.²⁵ Unfortunately, as described above, the dispersed and divided nature of the ICANN Community and the limited powers granted to it under the current proposal cast doubt on whether ICANN will have adequate governance post-Transition.²⁶

It's also worth noting that ICANN has failed to enforce intellectual property rights embedded in its contracts, even though ICANN has remedies available to it and a responsibility to respond to reports of abuse on sites within their domains.²⁷ Even IP skeptics should find this troubling because, if ICANN can choose not to enforce these rights, it can do the same for other contractual obligations.

E. Letting the Contract Lapse in 2016 Undermines Incentives to Implement Work Stream Two Reforms

Early on, NTIA affirmed that the IANA stewardship transition — the technical, procedural, and structural changes to ICANN and the IANA process necessary to replace the U.S. contractual role — would be directly linked to improved accountability measures for ICANN and that both issues must be addressed before the Transition.²⁸ The ICANN Community identified a number of serious reforms that it deemed critical to make ICANN accountable, but it was clear that not all of the reforms could be fully developed or implemented under the original projected deadline for the Transition: September 2015. Therefore, the ICANN cross community working group on accountability divided the reforms into “Work Stream 1” reforms that had to be in place prior to the Transition and “Work Stream 2” reforms that could be implemented after the Transition. The difference between the two was not their importance, but whether or not they directly involved replacing the U.S. role in the IANA process.

When NTIA blessed the Transition, it was signing off on Work Stream 1 reforms, which had been developed and are expected to be fully implemented in the coming weeks. But “Work Stream 2” reforms are not expected to be fully resolved and implemented until the summer of 2017 — well after the Transition if NTIA proceeds. Important issues yet to be settled include the nature and extent of ICANN’s commitment to human rights, making ICANN more transparent to the community, adopting measures to make the staff more accountable. This is worth highlighting

²⁵ Austin Knoblauch and Barry Stavro, *A timeline on the FIFA scandal*, L.A. Times (June 2, 2015), <http://www.latimes.com/sports/soccer/la-sp-fifa-scandal-timeline-20150603-story.html>.

²⁶ Bea Edwards, *Continuing Cover-up at the UN's World Intellectual Property Organization*, Government Accountability Project, (Aug. 26, 2016), <https://www.whistleblower.org/blog/033526-continuing-cover-un%E2%80%99s-world-intellectual-property-organization>.

²⁷ See Kristian Stout, Geoffrey A. Manne, & R. Ben Sperry, *In ICANN We Trust: Assuring Accountable Internet Governance* (ICLE Innovation Policy Research Program White Paper 2016-1, Mar. 17, 2016), available at http://laweconcenter.org/images/articles/icle-icann_accountability_short_final.pdf.

²⁸ Testimony of Lawrence Strickling, Assistant Secretary for Communications and Information, U.S. Department of Commerce, Before the Committee on Commerce, Science, and Transportation United States Senate: “Preserving the Multistakeholder Model of Internet Governance”, (Feb. 25, 2015), available at <https://www.commerce.senate.gov/public/cache/files/3abbe751-4440-4c5f-83bd-382b38cbdc05/3DDDFE90301F5AE41ED2489DB98E32F84.ntia-testimony-02-25-15-scc-hearing.pdf>.

because each of these could develop in a positive or negative direction. For instance, the reforms to ICANN transparency or staff accountability could be cosmetic rather than substantive. Or, those who wish to use a commitment to human rights as a gateway for ICANN to control content could succeed.

A major reason why the ICANN Board has been willing to accept accountability measures is that the U.S. government has said that the Transition is dependent on their adoption. Even then, the Board has been recalcitrant at times and forced the community to retreat from reforms that it sought. But significant reforms remain incomplete. After the Transition, the ICANN Board will likely be less accommodating to community demands for greater accountability and transparency. Adding to this concern is the fact that ICANN has significantly curtailed the budget for independent legal advice for Work Stream 2 versus Work Stream 1.²⁹ In short, there is reason to doubt that the Work Stream 2 reforms will be implemented to the level desired by the much of the ICANN Community as expressed during the past two years. An extension of the contract for a year or two would place the ICANN Community in a much stronger position to demand full implementation of Work Stream 2 reforms.

F. ICANN Jurisdiction Remains Uncertain

Defenders of the Transition note that, while it means that the U.S. government would give up its contractual relationship with ICANN, the corporation would remain subject to U.S. law because ICANN is a non-profit incorporated in California. So, if nothing else, those who objected to how ICANN made decisions, spent money, and so on could appeal to a robust body of American corporate law, and have their day in America's impartial, professional court system.

In July, Assistant Secretary Strickling confidently declared "ICANN is a California corporation and will remain so," noting that a three-quarters vote of the Board would be required to change this requirement of ICANN's Article of Incorporation, or to amend the "fundamental" bylaw requiring ICANN to maintain its primary place of business in California.³⁰

Yet these amendments *are* possible — and ICANN is very much keeping hope alive internationally that they could still happen. The final report of the CCWG-Accountability describes "jurisdiction is a multi-layered issue."³¹ ICANN's announcement of the launch of Work Stream 2 at the recent Helsinki meeting claims that

The main issues that need to be investigated within Work Stream 2 relate to the influence that ICANN's existing jurisdiction may have on the actual operation of policies and accountability mechanisms. This refers primarily to the process for the settlement of disputes within ICANN, involving the choice of jurisdiction and

²⁹ IANA Stewardship Transition, FY17 activities, Suggested Cost control mechanisms (for approval by Chartering Organizations), (on file with author), *available at* <https://community.icann.org/download/attachments/61608072/CCWG%20-%20Budget%20ownership.pdf?version=1&modificationDate=1471871529000&api=v2>.

³⁰ See Strickling Remarks, *supra* note 8.

³¹ Final of of the CCWG-Accountability, Annex 12, ICANN (last visited Sept. 8, 2016), <https://community.icann.org/pages/viewpage.action?pageId=58723723&preview=/58723723/58725532/Annex%2012%20-%20FINAL.pdf#page=7>.

of the applicable laws, but not necessarily the location where ICANN is incorporated.³²

However, ICANN left the door open to reconsidering what the CCWG-Accountability report called the first layer of jurisdiction: “Place and jurisdiction of incorporation and operations, including governance of internal affairs, tax system, human resources, etc.” In other words, the very thing we are concerned about.

If where ICANN is incorporated were *actually* a settled issue, ICANN would not have used the qualified “necessarily.” The announcement would simply have said “but *not* the location where ICANN is incorporated” — period, full stop. In fact, there was serious discussion of the jurisdiction issue both at ICANN’s Helsinki meeting in June and ongoing meetings and discussions in a jurisdiction working group.

The idea that ICANN would pack up and move has been contemplated by ICANN’s leadership. Back in June 2014, ICANN CEO Fadi Chehade announced, in testimony to the French Senate, that the Board had authorized him to begin, as one of five major initiatives, the creation of a “parallel legal, international structure (maybe in Switzerland) for ICANN.”³³ In July, the French Senate published a lengthy report (in French), building upon Chehade’s testimony.³⁴ The report proposed the “Swiss Model” that would, instead of transferring Internet governance to a one-country, one-vote system like the ITU, have ICANN assume international legal personality as a “World ICANN” in the model of the Red Cross. The report lamented that this idea had become a “dead letter” since NTIA’s announcement that March that ICANN would, instead, be expected to reform itself.

But Chehade’s idea may live on — as a road map for how the jurisdiction issue actually plays out. More important than the fact that Chehade got the Board to approve the “Swiss Model” is how it would have worked: not as a one-time, pack-up-in-the-middle-of-the-night-and-leave-town thing, but as a more gradual process. Setting up a parallel structure could make it far easier for ICANN to eventually leave the U.S. Even if that takes a $\frac{3}{4}$ vote of the Board, it might just be a question of waiting until the next political crisis, a la Edward Snowden.

Will ICANN change its jurisdiction? It’s hard to say. But the answer will be clearer after the Work Stream 2 process is complete.

³² Press Release, ICANN, Launching Work Stream 2 in Helsinki, (June 23, 2016),

<https://www.icann.org/news/blog/launching-work-stream-2-in-helsinki>.

³³ Fadi Chehade, CEO of ICANN, Testimony before the Sénat (French Senate): *Will ICANN Move to Switzerland*, (May 4, 2014), <http://www.domainmondo.com/2014/05/fadi-chehade-will-icann-move-to.html>.

³⁴ Catherine Morin-Desailly, Report, Rapport d’information n° 696 (2013-2014) L’Europe au secours de l’Internet : démocratiser la gouvernance de l’Internet en s’appuyant sur une ambition politique et industrielle européenne (July 8, 2014), http://www.senat.fr/rap/r13-696-1/r13-696-1_mono.html (English: Europe to the Rescue of the Internet: Democratizing Internet Governance, Based on a European Political & Industrial Ambition ...”), available at https://www.senat.fr/fileadmin/Fichiers/Images/commission/MCI_nouvelle_gouvernance_de_l_internet/EUROPE_TO_THE_RESCUE_OF_THE_INTERNET_english_summary.pdf.

G. U.S. Control of .MIL and .GOV Remains Uncertain

Today, the United States has exclusive use of the .MIL and .GOV top level domains, but that might not be as certain post-Transition. Allowing other governments or the private sector to use these TLDs poses security risks. When asked at a 2015 hearing about this matter, Assistant Secretary Strickling testified, “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.”³⁵ Since then, however, NTIA has demonstrated a curious complacency over .MIL and .GOV. According to NTIA,

[P]er the policies, procedures, and practices in place, .mil and .gov cannot be transferred without explicit agreement first from the current administrators of those domains – namely, the U.S. government. However to address concerns that have been raised, NTIA and ICANN have formally reaffirmed that the U.S. government is the administrator of .mil and .gov and that any changes made to .mil or .gov can only be made with the express approval of the U.S. government.³⁶

This reaffirmation was made through an exchange of letters.³⁷ These letters are non-binding and lack the certainty of a legal contract that would guarantee U.S. control and ownership in perpetuity. This is a serious matter. In its letter to ICANN, NTIA acknowledges that requests for reconsideration of the .MIL, .GOV, .EDU, and .US domains is possible and that ICANN could re-delegate them. Further, NTIA stated it needed to be notified if a Separation Cross-Community Working Group that could lead to a recommendation that ICANN separate the naming-related Internet Assigned Numbers Authority (IANA) functions from ICANN is formed because:

It is critical to the stable and secure operation of the U.S. Government Administered top level domains that any potential successor operator commit in writing that it will honor and maintain ICANN’s commitments with respect to these U.S. Government-administered TLDs.

Why wouldn’t the U.S. want maximum legal certainty over something that is “critical to the stable and secure operation of the U.S. government administered top level domains”? The less formal arrangement over U.S. administered TLDs was acceptable as long as the U.S. contractual relationship remained in place. Now that the NTIA has announced its intention to approve the transition, this contractual leverage will no longer be in place and collegial assurances are no longer sufficient.

³⁵ Testimony of Lawrence Strickling, Assistant Secretary for Communications and Information, National Telecommunications and Information Administration, U.S. Department of Commerce, Before the U.S. House of Representatives, Subcommittee on Communications and Technology, Committee on Energy and Commerce, 53 (July 8, 2015), available at <http://docs.house.gov/meetings/IF/IF16/20150708/103711/HHRG-114-IF16-20150708-SD006.pdf>.

³⁶ NTIA, Q and A on IANA Stewardship Transition, (Aug. 16, 2016), <https://www.ntia.doc.gov/other-publication/2016/q-and-iana-stewardship-transition-0>.

³⁷ NTIA, Exchange of Letters - U.S. Government Administered TLDs, June 2016, <https://www.ntia.doc.gov/page/exchange-letters-us-government-administered-tlds>.

III. Unresolved Legal Issues

A. New ICANN Bylaws Face Legal Challenges

Two critical provisions of the new bylaws may be challenged under California non-profit corporations law.

Under the new bylaws, a 60% supermajority of the ICANN Board is necessary to reject the advice of the Governmental Advisory Committee (GAC) when the GAC has reached a consensus.³⁸ If the Board reaches this threshold, it and the GAC must work together to “try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.”³⁹ If that fails, the Board need only explain why it did not follow the GAC’s advice.

But what if the Board fails to reach the 60% threshold? An expert on California corporate law hired to advise the CCWG-Accountability expressed her concern about this possibility during a CCWG-Accountability call for lawyers in January:

[I]f the GAC is able to come up with consensus advice, that the Board can only reject with a two-thirds [sic] 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.⁴⁰

She questioned whether this requirement would be legal under California law: “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.”⁴¹ Although there is no public record, ICANN and outside lawyers discussed this and concluded that this bylaw was legal. But that is an opinion, not a certainty. There are a number of mechanisms by which this bylaw could be challenged, potentially by ICANN stakeholders, Board members, contracted parties or the California Attorney General. If the bylaw were invalidated, ICANN would, presumably, revert to a normal majority requirement for handling board advice. That’s good, because it would partially reverse the increased power of governments under the new bylaws (although the GAC would still be a voting member of the Empowered Community).

But that would also break a carefully balanced political consensus. At a minimum, that would provide the perfect pretext for those arguing for a change of ICANN’s jurisdiction. That, in turn,

³⁸ Bylaw for Internet Corporation For Assigned Names And Numbers, 12.2(a)(x), adopted by ICANN Board on 27 May 2016 (“Any Governmental Advisory Committee advice approved by a full Governmental Advisory Committee consensus ... may only be rejected by a vote of no less than 60% of the Board”), available at <https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf>.

³⁹ *Id.*

⁴⁰ CWG IANA Meeting Transcript, Moderator Brenda Brewer, January 8, 2016, 21-22 https://community.icann.org/download/attachments/56989655/Transcript%20CCWG%20ACCT_CoChairs-Lawyer%20Meeting_8%20Jan.doc?version=1&modificationDate=1453041576000&api=v2. It is worth noting the depth of Rosemary Fei’s expertise in such matters as Co-Chair of the Subcommittee on Political & Lobbying Activities & Organizations of the Exempt Organizations Committee of the Tax Section of the American Bar Association.

⁴¹ *Id.* at 21.

could lead to other bylaw changes or, in the worst case scenario, an ITU takeover. It's impossible to say. The point is that the reform proposal blessed by NTIA could be a political house of cards: take away one part of the Transition package and the rest collapses.

Indeed, the same challenge could be made to the Bylaws' requirement that the Board follow Policy Development Process (PDP) recommendations approved by a supermajority vote of the Generic Names Supporting Organization (GNSO) unless the Board itself can reach a two-thirds supermajority.⁴² Since the same legal issue applies in both cases, it is likely that both provisions would fall together. If so, this could make for a perfect storm to force either a significant revision of the ICANN bylaws or a shift in jurisdiction where this requirement would not apply, because it would create the potential for governments to ally with members of the GNSO — ICANN's broadest constituency, including the Commercial Stakeholder Group (including the Business Constituency, the Intellectual Property Constituency, the Internet Service Providers and Connection Providers Constituency), the Non-Commercial Stakeholder Group, the Registrars Stakeholder Group, and the Registries Stakeholder Group.

B. Is There a Government Asset Involved?

The Transition may not be legal without affirmative Congressional authorization. Last year, Rep. Chuck Grassley, Rep. Bob Goodlatte, Rep. Darrell Issa and Sen. Ted Cruz asked the U.S. Government Accountability Office (GAO) to review and address specific questions, including this one: whether the termination of the U.S. contract with ICANN would "cause Government property, of any kind, to be transferred to ICANN."⁴³ Nearly a year later, the GAO has not yet released its report. Although some⁴⁴ dismiss this possibility out of hand, and NTIA insists the answer is "no," the fact that the GAO has spent nearly a year examining the question indicates that the answer is not simple or clear cut.

If the Transition *does* involve a transfer of property, ending the contract without congressional authorization would violate the Constitution. Article IV⁴⁵ requires express Congressional approval to dispose of U.S. property. If so, a U.S. court could unwind the Transition after the fact — by

⁴² ICANN Bylaws, Annex A, Section 9(a):

Any PDP Recommendations approved by a GNSO Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such policy is not in the best interests of the ICANN community or ICANN. If the GNSO Council recommendation was approved by less than a GNSO Supermajority Vote, a majority vote of the Board will be sufficient to determine that such policy is not in the best interests of the ICANN community or ICANN.

⁴³ Letter from Rep. Chuck Grassley, Rep. Bob Goodlatte, Rep. Darrell Issa and Sen. Ted Cruz to Comptroller General, Gene Dodaro, the U.S. Government Accountability Office (GAO) (Sept. 22, 2015) (on file with the author), *available at* <http://www.cruz.senate.gov/files/documents/Letters/20150922%20Grassley%20Cruz%20Goodlatte%20Issa%20GAO%20Request%20ICANN.pdf>.

⁴⁴ Milton Mueller, *Does The IANA Transition Constitute a Transfer Of US Government Property?*, Internet Governance Project (Sept. 29, 2015), <http://www.internetgovernance.org/2015/09/29/does-the-iana-transition-constitute-a-transfer-of-us-government-property/>

⁴⁵ U.S. Const. Art. IV.

declaring that non-renewal of the contract meant the IANA function reverted to NTIA, not ICANN. NTIA would then have to negotiate a new contract with ICANN — or take over administration of the root server itself. NTIA’s decision to proceed with the Transition before the GAO weighed in on this question was, at best, highly irresponsible.

Even if the GAO’s report is inconclusive, this the risk of litigation — and a judicial stay or reversal — remains. And, of course, a court would not be bound by the GAO’s opinion even if the GAO said there was no property interest involved.

C. Is NTIA Violating Appropriations Law?

Just as Article IV of the Constitution requires Congressional approval to transfer government property, Article I vests all spending power in Congress.⁴⁶

Congress twice enacted appropriations riders prohibiting any use of taxpayer funds “to relinquish the responsibility of the National Telecommunications and Information Administration [NTIA] ... with respect to Internet domain name system functions, including responsibility with respect to the authoritative root zone file and the Internet Assigned Numbers Authority [IANA] functions.”⁴⁷ In other words, Congress ordered NTIA not to let the government contract lapse. Assistant Secretary Strickling, in response to a written question from Senator John Thune, acknowledged this in February 2015, “The Act restricts NTIA from using appropriated dollars to transition key Internet domain name functions during fiscal year 2015, which coincides with the end of the base period of the IANA contract on September 30, 2015.”⁴⁸

The same language was included in the appropriations bill for fiscal year 2016. Yet, if NTIA decides not to extend the contract, there is no question that NTIA will have used appropriated funds during fiscal year 2016 to arrive at, and make, the decision.

In June, NTIA issued a 172-page report finding that the package of reforms proposed by ICANN to its governance structure “meets the criteria necessary to complete the long-promised privatization of the IANA functions.”⁴⁹ This report was based, in part, on a third party study of ICANN’s proposal commissioned by NTIA. Taxpayers funded not only this study, but also the salaries of NTIA employees who commissioned and reviewed those studies, and who wrote the final NTIA report.⁵⁰

⁴⁶ U.S. Const. Art. I, § 9, Cl. 7. (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”).

⁴⁷ Consolidated Appropriations Act, 2016, Pub. L. 114–113, Sec. 539 (2015), <https://congress.gov/114/plaws/publ113/PLAW-114publ113.pdf>.

⁴⁸ Questions and Answers from Senator John Thune to Lawrence Strickling, Assistant Secretary for Communications and Information, U.S. Department of Commerce, (Feb. 2015), <https://www.commerce.senate.gov/public/cache/files/893c7447-6ed3-495e-ae0f-bd99283e592b/29EA1DCC9B2EEF9EC20C84919898D353.wr---ntia-qfr.pdf>.

⁴⁹ National Telecommunications and Information Administration U.S. Department of Commerce, IANA Stewardship Transition Proposal Assessment Report, (June 2016), https://www.ntia.doc.gov/files/ntia/publications/iana_stewardship_transition_assessment_report.pdf.

⁵⁰ **Independent Review of Internet Assigned Numbers Authority (IANA) Stewardship Transition, NTIA, “Award SB1335-16-SE-0091,” (March 22, 2016),**

NTIA argues that Congress did not bar it from merely studying the issue, citing language in a Senate Report contemplating that NTIA would “conduct a thorough review and analysis of any proposed transition.”⁵¹ Of course, it is the *text* of the statute that controls, not an isolated piece of legislative history. But in any event, NTIA did not stop at merely studying the issue. NTIA staff, including the Assistant Secretary in particular, informed ICANN in writing that “barring any significant impediment” they would not exercise NTIA’s option to renew the contract.⁵² It is a metaphysical impossibility that making this decision — as opposed to renewing the contract again, as NTIA did in 2015 — did not require at least *some* time of NTIA employees. Obviously, it did — which means that NTIA spent taxpayer dollars on the decision to relinquish NTIA’s contractual rights. As one scholar of appropriations rider has noted, “there is no de minimis exception to appropriation limitations, just as there is no de minimis exception to the constitutional appropriations requirement.”⁵³

Making this decision also changed the character of those studies, since they were obviously not merely academic studies of ICANN’s reform proposal but part of NTIA’s decision-making as to whether to relinquish its rights. Technically, this is irrelevant, because “there is no de minimis exception to appropriation limitations,” so even the time spent making the decision not to renew would suffice, but it does increase the magnitude of the violation of the appropriations rider.⁵⁴

Finally, NTIA argues that the rider prohibits it only from completing relinquishment during fiscal year 2016 — leaving NTIA free to make the decision to relinquish its contractual rights during fiscal year 2016 provided that the contract did not lapse within fiscal year 2016. NTIA’s announcement that it would complete the Transition attempts to frame the relinquishment as happening in fiscal year 2017 by saying that the contract will lapse at midnight September 30, 2016 and that the Transition will happen on the first day of fiscal year 2017.

<https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=0f5669edb5105610cd99f011edc643fd&cvview=0>.

⁵¹ Letter from Steve Haro, Assistant Secretary for Legislative and Intergovernment Affairs, United States Department of Commerce, to Senator Cruz, Senator Lankford, Senator Lee, Senator Duffy, (June 29, 2016), (on file with the author), available at https://www.ntia.doc.gov/files/ntia/publications/20160629_haro_response_to_cruz_lankford_lee_duffy_iana_0.pdf.

⁵² See Strickling Remarks, *supra* note 7.

⁵³ Kate Stith, Congress’ Power of the Purse, 97 Yale L.J. 1343, 1343 (1988), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2282&context=fss_papers.

And salaries are clearly part subject to riders:

Where Congress thus denies appropriations, the denial is not merely a determination that the public fisc cannot afford spending any money on that activity. By such appropriations legislation, Congress decides that, under our constitutional scheme, for the duration of the appropriations denial, the specific activity is no longer within the realm of authorized government actions.

This legislative action denies the Executive all means of engaging in the prohibited activity because employee salaries and other overhead costs are almost invariably paid out of appropriated funds.

Id. at 1361. All of NTIA’s salaries are paid out of appropriated funds.

⁵⁴ *Id.* at 1362.

We believe NTIA is misreading the statute for several reasons. To start, NTIA's reading would mean that, when Congress originally enacted the rider in 2014, it was not, in fact, categorically preventing NTIA from implementing the Transition announced earlier that year; it was merely preventing NTIA from terminating the contract *earlier* than August, 2015 — when the contract specified that NTIA must provide written notice to ICANN of its intent to extend the contract. This reading is implausible on its own terms, but it grows even more implausible considering that Congress, in September 2015, extended the rider into fiscal year 2016. Surely Congress did not pass two eleven-month long prohibitions, each with a month-long window at the end in which NTIA could do what was forbidden to it for the previous eleven months. Moreover, since the issue has always involved decisions that must be made in August, rather than terminating it earlier in each one-year cycle, NTIA's reading would render the statute effectively meaningless.

Moreover, the wording of the statute suggests that Congress intended to tie the fiscal year window to the use of taxpayer funds (*i.e.*, when the decision not to exercise the renewal option was made), not to the relinquishment (*i.e.*, when the contract actually lapsed). The critical phrase in the statute, “during fiscal year 2016,” is set off by commas. Grammatically, these commas would be unnecessary if the timing clause referred to its immediate antecedent (relinquishment). Such commas serve to clarify that the antecedent of “during” is the *entire* previous clause, which is “[n]one of the funds made available by this Act may be used to relinquish the responsibility of the National Telecommunications and Information Administration” — and “used,” in this context, can only mean “make the decision not to exercise the renewal option.”

No other reading makes sense in light of the nature of appropriations riders, which, after all, focus on what taxpayer funds may be used to do. And the use of taxpayer funds here was in the decision over relinquishment, not the relinquishment directly. Thus, the rider can only be understood to bar any decision to expend taxpayer funds *during fiscal year 2016* in making a decision to relinquish, *regardless of when the relinquishment happens*.

And of course, Congress may vote this September to extend the rider into fiscal year 2017 — just as they did last September. If so, will the Administration really thumb its nose at Congress and say, “Sorry, too late!”?

This may seem, especially to non-lawyers, like so many angels on the head of a pin. But the fundamental issue at stake is nothing less than the balance of powers between Congress and the Executive. Our reading of the statute does not bar the Transition forever. It merely says that, so long as Congress chooses to renew the rider, the NTIA cannot make a decision *not* to exercise the renewal option during that fiscal year.

If a U.S. court finds that NTIA violated the appropriations rider, the consequences could be serious. First, it could effectively force a reversal, ordering NTIA to renew the contract or replace it with a new one — which would be more disruptive than simply negotiating another extension. Second, NTIA officials would also be in violation of Federal criminal law,⁵⁵ and could be prosecuted or impeached.⁵⁶

⁵⁵ 31 U.S.C. § 1341(a)(1)(A) (“[a]n officer or employee of the United State Government . . . may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation”).

⁵⁶ 31 U.S.C. § 1349(a). Knowing and wilful violations of the Act result in fines of up to \$5,000 and imprisonment of up to two years. 31 U.S.C. § 1350.

D. Antitrust Litigation Will Be Used to Undermine ICANN

ICANN has always been in an awkward position. It was created to maintain a unified, globally interoperable Internet. Ensuring that domain names work the same way all over the planet is obviously a good thing. But it has also led to claims that ICANN is essentially a cartel. Those concerns have grown significantly as ICANN has become embroiled in fights over expanding the Domain Name space to create new Top Level Domains (TLDs). ICANN's fundamental power is to decide who gets control over TLDs, both new ones like .CPA and old ones like .COM. As the amount of money at stake has increased overall, and ICANN's budget exploded, fueled by auctions whose rules are set by ICANN, allegations over anti-competitive conduct abound.

For instance, ICANN recently received a whopping \$135 million for auctioning off the .WEB TLD.⁵⁷ Under normal auction rules, the auction proceeds would have been split among all the bidders. But one bidder offered to give the auction proceeds directly to ICANN. ICANN gladly agreed to this windfall — more than its 2016 budget, \$113 million, which is itself a staggering budget for an organization that was created to be a humble technical coordinating body. After winning the auction, that bidder was acquired by Verisign, operator of the .COM registry, raising concerns that Verisign had been willing to pay a huge premium for control of .WEB as the clearest threat to its .COM cash cow, and that ICANN was all too willing to play ball. In this and other such future fights, a plaintiff might well argue that ICANN was involved in a conspiracy to fix prices and perpetuate a Verisign monopoly over premium web properties.

Despite claims by some, it appears likely that ICANN lost its antitrust immunity as a “state actor” in 2009, when NTIA significantly weakened its policy oversight of the IANA function.⁵⁸ If so, the Transition wouldn't change anything — legally: ICANN was subject to antitrust suit in the U.S. before, and will remain so — and could probably have been sued in certain foreign jurisdictions anyway where state actors *are* subject to suit. Nonetheless, other significant antitrust issues do remain unanswered. And the same basic concern remains: that antitrust litigation could be used strategically by those who want to move Internet governance to the ITU, or to a World ICANN.

To start, it's troubling that the Administration doesn't seem to have thought through these issues. As a recent *Wall Street Journal* editorial notes, the Administration was sent a FOIA request regarding “all records relating to legal and policy analysis . . . concerning antitrust issues for [ICANN]” that have been raised about the Transition. The administration replied it had “conducted a thorough search for responsive records within its possession and control and found no records responsive to [that] request.”

In response, ICANN's General Counsel wrote a letter to the WSJ editor reiterating what Commerce said back in 1998, when it created ICANN: “Applicable antitrust law will provide accountability to and protection for the international Internet community.” This is an important claim, because those defending the Transition point to antitrust law as one of the key means by which U.S. courts can discipline ICANN, punishing anticompetitive conduct and deterring it from happening in the first place. But it's not clear how true it really is.

⁵⁷ ICANN, Results Available for 27 July 2016 New gTLD Program Auction (July 28, 2016), <https://www.icann.org/news/announcement-2-2016-07-28-en>.

⁵⁸ L. Gordon Crovitz,, *An Internet Giveaway to the U.N.*, Aug. 28, 2016, The Wall Street Journal, <http://www.wsj.com/articles/an-internet-giveaway-to-the-u-n-1472421165>.

It's a difficult question because it requires thinking through not just whether ICANN can be sued in the U.S. (it can) or even whether those suits would succeed, but whether they *should* succeed. Put differently, might ICANN be able to get away with anticompetitive conduct? Or would antitrust do what it's supposed to: strike the right balance between over- and under-enforcement, recognizing pro-competitive justifications for what might *look* anti-competitive, but properly dismissing specious arguments.

The most relevant law review article on point explains why ICANN likely lost its state actor immunity back in 2009, when the Affirmation of Commitments defined ICANN's primary commitment as coordinating "the Internet DNS at the overall level"⁵⁹— in other words, "greatly relax[ing] DOC's policy oversight over ICANN."⁶⁰ Even if Lepp is right that the Transition won't change ICANN's technical legal status, it *will* at least make it easier for plaintiffs to overcome the state actor immunity defense if ICANN raises it. And that, in turn, will increase the likelihood of lawsuits against ICANN, at least on the margins — simply because lawsuits are expensive to manage and less worth bringing if the chance of getting tossed out is greater.

But if you don't see NTIA and ICANN rushing to cite this article on this point, it'll be because the main thrust of the article is that ICANN, even without the state actor immunity, will be very difficult to constrain through the antitrust laws — hence the title, "ICANN's Escape from Antitrust Liability." Lepp explains a number of reasons why U.S. antitrust lawsuits against ICANN would stumble. Most relevant is ICANN's Byzantine governance structure. While that is, in theory, designed to diffuse influence of particular stakeholders to ensure that ICANN serves the overall community rather than particular interests (good), that structure could just as easily be used to mask such influence (bad). Since U.S. antitrust analysis hinges, in part, on the role of competitors in decision-making, this opacity could be fatal to antitrust plaintiffs — even the ones that have legitimate concerns.

Moreover, while ICANN's General Counsel definitively declared, in this WSJ letter to the editor, that "ICANN is not, and never has been exempted from antitrust laws," there are major caveats to that claim. Under the same general counsel, ICANN invoked a different argument back in 2012, when it sought to dismiss an antitrust suit⁶¹ over failing to put .XXX up for competitive auction, arguing: "ICANN cannot, as a matter of law, be liable under the antitrust laws with respect to the conduct alleged in the Complaint because ICANN does not engage in 'trade or commerce.'"⁶² That's not the same as arguing that ICANN is completely exempt as a state actor, so the two arguments aren't exactly inconsistent, but ICANN is likely to make this argument in *all* antitrust suits. To the extent it works, U.S. antitrust law won't do much to keep ICANN accountable — or deter, let alone punish, anti-competitive behavior.

⁵⁹ ICANN, Affirmation of Commitments by The United States Department of Commerce And The Internet Corporation for Assigned Names And Numbers, § 8 (Sept. 30, 2009), <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en>.

⁶⁰ Justin T. Lepp, "ICANN's Escape from Antitrust Liability", Wash. U. L. Rev., Vol. 89, I.4 955 (2012), http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1023&context=law_lawreview.

⁶¹ Manwin Licensing Int'l S.A.R.L. v. ICM Registry, LLC, 2012 U.S. Dist. LEXIS 125126

⁶² Kevin Murphy, *ICANN: antitrust law does not apply to us*, Domain Incite (Jan. 21, 2012), <http://domainincite.com/7472-icann-antitrust-law-does-not-apply-to-us>.

This isn't to say that ICANN is necessarily wrong, or that it *should* lose any particular antitrust suit. There are good reasons why U.S. courts have dismissed antitrust suits against umbrella groups like sports leagues — because there are solid, pro-competitive justifications for things that *seem* anti-competitive. Limiting what individual teams can do, how much they pay their players, how they deal with broadcasters, etc, can actually make the overall league healthier. But the antitrust analysis around ICANN may be more complicated. In part, that's because of ICANN's particularly Byzantine governance structure. After summarizing that structure, Lepp concludes, "The opacity of the decision-making process obscures how and why ICANN's decisions are made.... The sources of the recommendations are buried under this mountain of bureaucracy. ICANN's complicated procedures make it difficult for potential plaintiffs to prove antitrust abuses."⁶³ Lepp notes that "antitrust scholars are increasingly skeptical of the use of intent to evaluate antitrust abuses," but also that "the Supreme Court continues to invoke anticompetitive intent."⁶⁴ In other words, anti-competitive intent still matters in U.S. antitrust law, yet it could be hard to prove in ICANN's case.

To the extent that's true, those who worry that ICANN may be subject to capture and used in anticompetitive ways actually should worry about the Transition, not necessarily because the Transition changes the legal analysis over whether ICANN can be sued, but because if U.S. antitrust law can't provide an effective remedy (or deterrent), one could legitimately worry that the Transition means giving up the leverage the U.S. has now: the possibility of putting the IANA contract out for re-bid (to an organization other than ICANN) if ICANN misbehaves.

And what about *foreign* antitrust law? Foreign courts are, in general, not only more willing to allow suit against state actors but also to discount pro-competitive justifications and, frankly, to allow firms to bring suits against their rivals. So it's entirely possible that, while U.S. antitrust law might under-enforce, ICANN could be vulnerable to antitrust suit in other jurisdictions.

One might think the two would balance out, and that foreign courts would allow valid suits that might fail in the U.S. for whatever legal reason. Maybe. But there are so many potential antitrust suits that could be brought. While they'd all, no doubt, be framed as protecting consumers, some may really have narrow corporate agendas or broader political agendas.

China and Russia have made no secret of their push to gain greater control over Internet governance. And there's every reason to think they would use antitrust as a weapon to that end. It wouldn't be hard for them to find (or create) plaintiffs to carry their water. Again, it's hard to say exactly what the suits would look like, but it's clear what their basic objective would be: to portray ICANN as a cartel dominated by, in particular, American companies. The fact that U.S. courts might have tossed out such suits would simply help with the political framing. The goal would be to say that the Transition isn't enough, that Internet governance should be transferred to the ITU, where it would be "democratically accountable" (i.e., dictated by governments).

The overall point is that, even as ICANN may be subject to under-enforcement in the U.S., it may yet be very vulnerable to attacks abroad under foreign antitrust law — which may have little to do with consumer welfare. And we ultimately can only know the fate of ICANN on these issues only after ICANN is actually challenged on these grounds. Thus, at a minimum, the trial period for an independent ICANN should be extended until a serious examination of the antitrust implications of

⁶³ See Lepp, *supra* note 54 at 953.

⁶⁴ *Id.* at 953-954.

ICANN's operation is conducted by NTIA. And, moreover, a major element of this examination should be the consideration of whether the U.S. should retain a reversionary interest in the root zone file should any party successfully challenge ICANN's operation on antitrust grounds. This would accomplish the twin goals of both completely separating ICANN from the U.S. while also providing a disincentive to foreign governments who think that they could seize operation of the DNS following abusive litigation.

E. Did NTIA Violate Administrative Law?

In some ways, this process has looked like a normal administrative proceeding: Last August, NTIA issued a Notice of Public Comment seeking comment on the IANA Stewardship Transition Plan and Enhancements to ICANN Accountability.⁶⁵ This June, NTIA issued its report on both.⁶⁶ So far, this is typical administrative agency process.

But in between, something unusual happened. That 2015 Notice of Public Comment directed commenters to provide input not to NTIA itself, but to IANA Stewardship Transition Coordination Group (ICG) and the Cross Community Working Group on Enhancing ICANN Accountability 2nd Draft Report (CCWG-Accountability). NTIA declared that it would "utilize the input provided in making its determination of whether the proposals have received broad community support and whether the plan satisfies the criteria required to transition its stewardship role."

This is unusual because NTIA effectively delegated the task of reviewing comments to two outside bodies. Both the ICG and CCWG-Accountability were created by ICANN at NTIA's request, but both are clearly non-governmental. It's also quite clear from NTIA's correspondence with these groups that NTIA understood what it did as a delegation of authority.⁶⁷ Less clear from NTIA's final report is how thoroughly the agency actually considered the substance of comments — as opposed to simply noting that they were filed and congratulating itself for listening to all stakeholders.

For instance, the NTIA report briefly discusses the Sole Designator model by which the multi-stakeholder community will indirectly govern ICANN (legal rights are vested in a separate entity, the Empowered Community, which appoints the ICANN Board of Directors and has other powers) but says nothing at all about comments from the community requesting the alternative structure: the Membership model, in which ICANN stakeholders would have had direct rights as the voting members of ICANN under California law. Regardless of the merits or drawbacks of either model, the point of administrative law is that the agency is supposed to consider both options — and explain why it chose one over the other. On what may well be the most fundamental question facing the

⁶⁵ NTIA, Internet Assigned Numbers Authority Stewardship Transition Consolidated Proposal and Internet Corporation for Assigned Names and Numbers Accountability Enhancements (Aug. 10, 2015), *available at* <https://www.federalregister.gov/articles/2015/08/10/2015-19525/internet-assigned-numbers-authority-stewardship-transition-consolidated-proposal-and-internet>.

⁶⁶ National Telecommunications and Information Administration U.S. Department of Commerce, IANA Stewardship Transition Proposal Assessment Report, (June 9, 2016) <https://www.ntia.doc.gov/report/2016/iana-stewardship-transition-proposal-assessment-report>.

⁶⁷ Letter from Lawrence Strickling, Assistant Secretary for Communications and Information, U.S. Department of Commerce, to Alissa Cooper, Patrick Faltstrom, Mohamed El Bashir, *available at* <https://www.ianacg.org/icg-files/correspondence/Letter-to-ICG-May-6.pdf>.

new ICANN, NTIA simply did not do what administrative agencies are supposed to do: avoid arbitrary and capricious, or simply unexplained, action.⁶⁸

This is clearly a dereliction of NTIA's responsibilities as a supposedly expert agency and belies the Administration's claims to have carefully considered this issue. But whether it actually violates administrative law is unclear because NTIA's penchant for utilizing multi-stakeholder processes in recent years falls into something of a gray zone not clearly contemplated by American administrative law of which the core was enacted back in 1946. If there is litigation over the Transition, the question would surely arise. NTIA would argue not only (i) that it had fulfilled whatever responsibilities it had to provide reasoned decision-making but also (ii) that it was not subject to the Administrative Procedure Act.

The APA covers all "rule making" (a term that has been interpreted quite broadly) "except to the extent that there is involved— (1) a ... foreign affairs function ... or (2) a matter relating to ... public property ... or contracts."⁶⁹ NTIA would certainly invoke the first and third exceptions, while vigorously denying that the Transition involved public property. But while recognizing that any agency may potentially claim it, the courts have interpreted the "foreign affairs" exception narrowly.⁷⁰ Thus, given that the IANA Transition will have a significant effect upon domestic activity (U.S. companies and end users), it seems unlikely a court would allow NTIA to claim this exception, lest the overall purpose of the APA — to ensure that Americans have an opportunity to comment upon regulation that affects them — be thwarted.

NTIA would have a better claim to the "public contract" exception, since the Transition revolves around a government contract. But the IANA function contract is the bedrock of a complicated structure of Internet governance that would have been unfathomable as a legal or governance construct to the Congress that enacted the APA back in 1946 (even setting aside the technical details). And the issue that NTIA delegated to the ICG and CCWG-Accountability isn't actually the contract or the Transition, but reforms to ICANN's governance structure. NTIA has tied the two together by saying it wouldn't complete the Transition until the reforms were made, but they're distinct issues — and it's far from clear that a court would rule that this delegation of the rulemaking process is exempt from the APA. The "public contract" exception is worded in a way — "except to the extent that there is involved..." — to allow a court ample room to say that the issue NTIA delegated was essentially a rulemaking about Internet governance, rather than the narrower question of the contract.

And even if a court agrees with NTIA that this is covered by the contract exception, NTIA may essentially have waived that argument by putting the matter out for public comment in Federal Register in the first place. In other words, once it did so, it may have subjected itself to the APA's requirement to do its own independent review of the comments — not merely to review ICANN's proposal based on those comments, or in light of them.

⁶⁸ 5 U.S.C. § 553 (a) (1)-(2)

⁶⁹ *Id.*

⁷⁰ *See, e.g.,* Vanessa K. Burrows & Todd Garvey, *A Brief Overview of Rulemaking and Judicial Review*, Congressional Research Service Report for Congress, January 4, 2011, at 6, <http://goo.gl/ILCR0p> (citing Tom C. Clark, Attorney General, Attorney General's Manual On The Administrative Procedure Act, at 26 (1947), <http://www.law.fsu.edu/library/admin/1947iii.html> [hereinafter AG MANUAL].)

If NTIA does somehow survive these APA issues, it faces another legal problem: standing Executive Orders governing agency rulemaking, starting with Executive Order 12866, issued by President Clinton, which requires Executive agencies like NTIA to consider alternatives to their regulatory action, and to weigh costs and benefits.⁷¹ Like the APA, this EO excludes “foreign affairs” functions but, unlike the APA, *does* apply to government contracts.⁷² If a court finds that NTIA failed to meet one of the EO’s many requirements for more carefully considered rulemakings, it would block NTIA’s action as *ultra vires* — beyond the powers given the agency.

In both cases, the likelihood that a court would find a process violation is greatly increased by the fact that the violation is procedural — and so is the remedy. A court would not be saying that NTIA couldn’t do exactly what it has proposed to do, only that it needs to do a better job explaining itself — by giving the public a chance to comment concerns such as we’ve expressed above, and responding to them. That wouldn’t stop the Transition, but it would require at least a delay of perhaps 6-12 months.

* * *

IV. Conclusion

We in no way question the continued need for multi-stakeholder governance. Just the opposite; we are trying to ensure that multi-stakeholder model is not set up to fail either because the mechanisms created to empower the ICANN Community prove inadequate and ICANN leadership continues to be unwilling to accept further constraints upon its powers or because unanswered questions lead to complications down the road.

Absent intervention by Congress or U.S. courts, the contractual relationship between the U.S. government and ICANN will cease at the end of September. The many outstanding concerns and questions should be resolved before the Transition occurs because:

1. Failing to do so could put ICANN In legal jeopardy, creating uncertainty that threatens the stability of the DNS;
2. The reforms demanded by the Community remain incomplete;
3. Absent the U.S. contract, and the possibility that the IANA function contract might be re-bid to some other entity, the ICANN Board has far less incentive to yield to community demands for stronger accountability and transparency going forward.

For these reasons we recommend a “test drive” period to (i) resolve these legal questions, (ii) verify that the new system works as expected, and (iii) to allow for the full implementation of the remaining accountability and transparency measures. For the test drive to actually test these measures, NTIA would indeed have to “transition” out of its current role in approving final changes to the Root Zone file.⁷³ But NTIA can do that while also retaining the authority to reassert its

⁷¹ Exec. Order No. 12,866, C.F.R. Sec. 1(Sept. 30, 1993), *available at* https://www.whitehouse.gov/sites/default/files/omb/inforeg/EO12866/EO12866_10041993.pdf.

⁷² *Id.*

⁷³ Philip S. Corwin, *Senate Oversight Hearing Explores “Test Drive” of IANA Transition*, CircleID (May 27, 2016 3:45 PM), http://www.circleid.com/posts/20160527_senate_oversight_hearing_explores_test_drive_of_iana_transition.

oversight role and preserving what has always been its most fundamental check on ICANN: the ability to rebid the IANA function contract.

In short, we recommend a *partial* transition now. “Trust but verify,” before completing the full transition. Is that really so radical?

Many in the ICANN Community share some of our concerns or have misgivings about various details of the proposal blessed by NTIA — yet have kept silent in public for essentially political reasons. They’ve been convinced by U.S. political commentators that haste in developing and implementing the proposal is necessary because, if the Transition does not happen now, it will never happen. This is simply not credible. Extending the contract *would* allow time to resolve some or all of our concerns, but it would *not* change the outcome — at least under NTIA’s legal theories.

Hillary Clinton has indicated that she supports the Transition. We are not aware of Donald Trump having expressed a position regarding the Transition, but we note that the Republican Party platform opposes it. In any case, the Transition is still inevitable if NTIA’s twin legal theories are correct: (i) that the U.S. Government has no property interest in the IANA function, and (ii) that the appropriations rider cannot stop the relinquishment of whatever “responsibilities” NTIA has. The current contract will end in 2019. After 2019, continued U.S. oversight would require a new contract, which ICANN would have to be persuaded to enter into. If the multi-stakeholder community and most of the world’s countries are happy with ICANN and support ICANN continuing its role absent U.S. oversight, the U.S. won’t be able compel ICANN to sign a new contract.

In other words, if ICANN fulfills its promises to the Community on accountability and performs its responsibilities well, ICANN will have the independence it desires by 2019 at the latest. But the intervening time could be invaluable in vetting this proposal, finishing incomplete reforms, and resolving outstanding legal concerns.

And if NTIA’s legal theories are wrong, if the Transition requires Congressional approval, we would have avoided a far more complicated situation (litigation over failing to satisfy that requirement). In the end, the most prudent path is to engage Congress — the elected representatives of the American people in our system of divided powers — and convince them that concerns such as ours have been addressed. We believe that *can* happen but only after a test period of one to two years.

Either approach would take time. But the Internet will be still around in a year or two. Isn’t its future worth a bit of time to get this right?