

United States Senate

WASHINGTON, DC 20510

May 19, 2016

The Honorable Penny Pritzker
Secretary
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, D.C. 20230

The Honorable Lawrence Strickling
Assistant Secretary for Communications and Information
National Telecommunications and Information Administration (NTIA)
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

Dear Secretary Pritzker and Assistant Secretary Strickling:

We write to express our deep concerns with a proposal submitted to the Department of Commerce and NTIA for review by the Internet Corporation for Assigned Names and Numbers (ICANN). As you are aware, ICANN's proposal seeks to end United States government oversight of key operating functions of the Internet that were originally financed by U.S. taxpayers and created pursuant to government contracts.

Upon reviewing the proposal, we believe that, if enacted without the backing of the Internet Assigned Numbers Authority (IANA) contract, it will greatly endanger Internet freedom. The proposal will significantly increase the power of foreign governments over the Internet, expand ICANN's historical core mission by creating a gateway to content regulation, and embolden ICANN's leadership to act without any real accountability. Simply put, regardless of its intentions, the proposal as a whole does not adequately address the grave concerns expressed by Congress.

First, ICANN's proposal significantly increases the power of foreign governments. Under the proposal, the foreign government body at ICANN known as the Government Advisory Committee (GAC), which consists of 162 countries, will not only continue to have a special advisory power with ICANN's Board of Directors, but the threshold for the board to reject GAC advice will increase from 50 percent to 60 percent. The inclusion of this provision directly contradicts an assurance ICANN CEO Fadi Chehadé made to Senator Deb Fischer during a 2015 Senate Commerce Committee hearing in which he stated that increasing the margin that it would take to reject government-led proposals or advice would be "incongruent" with the stated goals

of the IANA transition and that “[t]he board has looked at that matter and has pushed it back so it’s off the table.”¹

In addition, any GAC advice that has been adopted by consensus will obligate ICANN’s Board of Directors to find a mutually acceptable solution to implement government-led proposals. The proposal also enshrines the GAC as one of five decisional participants in the Empowered Community. The EC intended to replace the U.S. as the authority overseeing ICANN and the board, and it will have critical powers, including the ability to dismiss the board and approve fundamental changes to the bylaws, which could change the scope of ICANN’s core mission. Including a provision that increases the power and influence of governments is especially concerning as it directly contravenes a 2014 letter authored by Senators John Thune and Marco Rubio which clearly stated, “[t]he IANA transition should not provide an opportunity for governments to increase their influence.”² This proposal undoubtedly increases the influence of governments and fails to meet this critical requirement established by Congress.

Second, the proposal to insert into ICANN’s bylaws an undefined commitment to respect “internationally recognized human rights” 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 the protocol parameters which are way down in the plumbing of the Internet.”³ 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.

As you know, many countries and activist corporations use human rights commitments as vehicles to limit individual’s freedom of speech by regulating and forcing the moderation of content. Perhaps most concerning is that this undefined “internationally recognized human rights” commitment is expected to be addressed during a process referred to as “work stream 2,” which is not required to be submitted to the administration or Congress for review and may very well be formally adopted after the IANA transition is completed. Currently, the best way to guarantee an individual’s online freedom of speech is to keep the IANA contract in place, which carries with it the protections afforded by the U.S. Constitution and the First Amendment.

Third, neither Congress nor the administration knows with absolute certainty if the IANA transition would include the transfer of government property. This is despite the fact that Assistant Secretary Strickling testified before the United States Senate that “there is no Government property that is the subject of this contract.... I think the GAO agrees with us as well based on a study they did back in 2000 when they looked at this question.” Assistant Secretary Strickling’s testimony is very concerning. The 2000 GAO report was actually

¹ *Preserving the Multistakeholder Model of Internet Governance.*, 114th Cong. (2015) (testimony of Fadi Chehadé). Print.

² “Senator John Thune and Senator Marco Rubio, Letter to Dr. Stephen Crocker, Chairman, ICANN Board of Directors.” Letter. 31 July 2014.

³ *Preserving the Multistakeholder Model of Internet Governance.*, 114th Cong. (2015) (testimony of Fadi Chehadé). Print.

indeterminate on the property question and concluded that it was “unclear whether such a transition would involve a transfer of government property to a private entity.”

If Assistant Secretary Strickling’s assertion were correct, GAO would not have accepted a bicameral request on October 6, 2015 to investigate the property question, nor would it, six months later, still be in the midst of conducting both significant audit work and complex legal analysis. As you know, if a transfer of government property is required by the transition, then Article IV, Section 3 of the Constitution would require a vote in Congress to dispose of such property.

Fourth, there is concern that ICANN may consider moving its headquarters outside the United States to escape U.S. law and redraft its bylaws, once the transition has been finalized. During a recent CCWG-Accountability “Review of Draft Bylaws” meeting on April 11, 2016, a representative for Iran stated, “[w]e should not take it granted that jurisdiction is already agreed to be totally based on U.S. law.” Iran was supported by representatives from Argentina and Brazil who suggested that jurisdiction should be a subject for work stream 2, which as previously discussed, will not be subjected to review by the administration or Congress. Moving ICANN’s jurisdiction to outside the United States would be an obvious deviation from ICANN’s Affirmation of Commitments, which affirms a commitment to “remain a not for profit corporation, headquartered in the United States of America.”

This issue is far from resolved. Indeed, the transition proposal clearly states: “The ICG [IANA Stewardship Transition Coordination Group] also notes that a change in jurisdiction at the time of transition of stewardship – given the implications on ICANN and PTI accountability – would increase the complexity of the proposal and increase the level of risk in the transition. The ICG recognizes that jurisdiction remains an important issue that needs to be addressed based on a clear assessment of the implications of different options.”⁴ Simply put, ICANN is not reaffirming its commitment to the United States government to remain headquartered in the United States. The fact that this issue has been deferred to an unspecified point in the future when the U.S. would have a far lesser voice in the transition process raises questions about ICANN’s intent on this matter.

Fifth, this proposal will only further embolden an unaccountable ICANN board, which post-transition will only be beholden to a multi-stakeholder community that has unfortunately shown either an unwillingness or inability to hold the board accountable to its own promises. For example, during a Senate Commerce Committee hearing in February 2015, ICANN CEO Fadi Chehadé promised Senate Commerce Committee Chairman John Thune that, “if the community and the stakeholders present us with a proposal,” “[w]e will give it to NTIA, and we committed already that we will not change the proposal.”

Unfortunately, once again, ICANN did not adhere to its own promise to Congress as it intervened throughout the process in significant ways -- even after the report was supposed to be final. This issue really strikes at the core of the transition because, if the multi-stakeholder

⁴ IANA Stewardship Transition Coordination Group (ICG). Proposal to Transition the Stewardship of the Internet Assigned Numbers Authority (IANA) Functions from the U.S. Commerce Department’s National Telecommunications and Information Administration (NTIA) to the Global Multistakeholder Community.

community cannot hold “a particularly active—even ‘activist’—board”⁵ accountable as the eyes of the world are watching this process, Congress should have absolutely no confidence that the board will be held accountable post-transition.

As the Heritage Foundation has pointed out, “[i]n the face of the board’s opposition, the CCWG-Accountability backed down and did not insist that the board transfer the proposal to the NTIA as promised to Congress.” Not only has ICANN’s board shown a propensity to reverse course on its promises to Congress, but ICANN CEO Fadi Chehadé as well as ICANN Chairman Dr. Stephen Crocker have also demonstrated a complete unwillingness to respond to congressional inquiries with a level of disregard for accountability that is unbecoming an organization seeking to become the sole authoritative overseer of the core functions of the Internet.

As we write this letter, Mr. Chehadé has still failed to respond to specific questions posed in a February 4, 2016 letter regarding his agreement to co-chair a high-level advisory committee for the Chinese government’s World Internet Conference, which lends legitimacy to the Chinese censorship regime. Perhaps one reason for this unresponsiveness is that, when ICANN has selectively responded, its responses have revealed troubling details regarding its operational management with authoritarian regimes such as China. For example, we have uncovered that ICANN’s Beijing office is actually located within the same building as the Cyberspace Administration of China, which is the central agency within the Chinese government’s censorship regime. Mr. Chehadé’s agreement to work with the World Internet Conference and ICANN’s subsequent approval of the decision through board inaction should be especially concerning to the administration and Congress. After all, the office of the United States Trade Representative has officially listed Chinese Internet censorship as a trade barrier.⁶ Also noted in our February 4, 2016 letter, some companies that are part of the multi-stakeholder community and will be expected to provide oversight and accountability post-transition have also shown a willingness to acquiesce to the demands of countries like China in order to gain market access. While this is certainly not illegal, it does raise significant concerns as to the increased influence that governments will be able to place upon the multi-stakeholder community as well as the culture of cronyism that may arise.

These are just a few of the reasons why the administration should oppose terminating U.S. government oversight of the IANA functions contract. There are also concerns regarding the future operation and security of .gov and .mil, ICANN’s future antitrust status, and the potential for ICANN to impose global taxes without U.S. government oversight. None of these have been adequately addressed.

As even proponents of the transition have stated, “we only get one chance to get this right.” Given that sentiment, the stakes could not be any higher when considering that Freedom House, an independent watchdog organization dedicated to the expansion of freedom and democracy around the world, found in their recent report “Freedom on the Net 2015” that “Internet freedom around the world has declined for the fifth consecutive year, with more governments censoring information of public interest and placing greater demands on the private sector to take down

⁵ Shatan, Greg. "Man in the Middle: Assessing the Job for ICANN's New Chief." Trademarks and Brands Online. 27 Apr. 2016. Web.

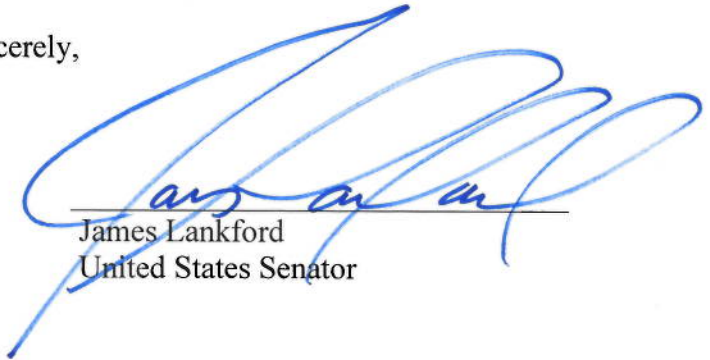
⁶ Froman, Amb. Michael B.G. 2016 National Trade Estimate Report on Foreign Trade Barriers. Rep. Print.

offending content.”⁷ Considering the current state of Internet freedom, it would be unconscionable to transfer supreme oversight authority of the Internet to an organization that is increasing the influence of foreign governments. As former Network Solutions, Inc. CEO Mike Daniels, who administered both the IANA functions and the allocation of domain names in the late 1990’s, has stated, “he who controls all IP addresses controls the Internet.”⁸ In light of all these concerns and the magnitude of the potential consequences, we respectfully request that you extend NTIA’s IANA functions contract with ICANN.

Sincerely,



Ted Cruz
United States Senator



James Lankford
United States Senator



Michael S. Lee
United States Senator

⁷ *Freedom on the Net 2015*. Rep. Freedom House, 27 Oct. 2015. Web.

⁸ Daniels, Mike. "This Summer, Congress Must Make Sure the Internet Stays Free." Editorial. *The Hill*, 27 Apr. 2016. Web