

## US Senate Committee Holds Hearing on Plan for IANA Stewardship Transition

On May 24, 2016, the US Senate Committee on Commerce, Science, & Transportation (the “Committee”) held a hearing on “Examining the Multistakeholder Plan for Transitioning the Internet Assigned Number Authority.” In this Legal Update, we provide you with a brief summary and analysis of this hearing.

### Witnesses

During the hearing, testimony was presented by:

- Michael Beckerman, President and CEO of the Internet Association;
- Steve DelBianco, Executive Director of NetChoice;
- David A. Gross, former US Coordinator of International Communications and Information Policy at the US State Department;
- Rick Manning, President of Americans for Limited Government;
- Brett Schaefer, Jay Kingham Fellow in International Regulatory Affairs for the Heritage Foundation; and
- Andrew Sullivan, Chair of the Internet Architecture Board.

### Divided Views

The witnesses were more divided in their views regarding the Internet Assigned Number Authority (IANA) stewardship transition than in other recent hearings. While Mr. Beckerman, Mr. DelBianco, Mr. Gross and Mr. Sullivan were

clearly in support of a timely transition, Mr. Schaefer supported a transition only after ICANN accountability enhancements were put into effect (suggesting a delay of up to two years) and Mr. Manning appeared to oppose a transition altogether (fairly ironically, given his representation of an organization that generally favors limitations on governmental regulation). Pro-transition witnesses offered numerous persuasive rationales for why the transition should occur within the currently envisaged timeframe (i.e., to coincide with the impending lapse of the current contract between the US National Telecommunications & Information Administration [NTIA] and the IANA Functions operator, which is scheduled to take place on September 30, 2016), including the following arguments:

- US interests will be better served under a post-transition IANA, because it will solidify global multi-stakeholder control of these functions including direct enfranchisement of US businesses, technologists, civil society and individual Internet users;
- A post-transition IANA, in which control over these key Internet functions is held by the global multi-stakeholder community, will democratize the Internet and mitigate attempts by foreign governments to push for greater governmental control of the Internet (including for purposes of content regulation); and

- The transition proposal and the enhancements to ICANN accountability incorporated therein create checks and balances to ensure that the post-transition IANA—and ICANN more broadly—is more accountable to the global Internet community by:
  - Limiting ICANN’s mission so as to avoid the specter of ICANN as a content regulator;
  - Implementing the concept of “fundamental bylaws” that cannot be changed by the ICANN Board (the “Board”) alone;
  - Improving the Reconsideration Requests and Independent Review Process to challenge bad decisions by the Board; and
  - Constraining the power of the Governmental Advisory Committee (GAC) by requiring that:
    - Only consensus GAC advice receive Board deference;
    - Such advice must be accompanied by supporting rationale;
    - Implementation of GAC consensus advice by the Board must not violate the ICANN Bylaws or else be subject to community challenge (in which the GAC itself would be prohibited from participating).

In his [testimony](#), Mr. Beckerman also critically noted that ICANN should be carefully monitored post-transition to ensure appropriate commitment to adhering to the accountability framework approved by the community, including its commitment not to act beyond its mission, such as by overstepping its limited coordination role to police online content. Mr. DelBianco’s [testimony](#) focused on why the transition would not increase the likelihood of government control over the Internet—a primary fear held by members of Congress. Mr. DelBianco noted that by retaining its unique oversight role over IANA, the US government was inviting more vigorous efforts by foreign

governments to wrest control over Internet governance, particularly in the context of the global surveillance revelations made by former Central Intelligence Agency (CIA) employee Edward Snowden.

As noted above, the proposal constrains governmental power within ICANN and balances governmental voices with those of other stakeholders, which would not be the case if Internet governance issues were advanced in other forums, such as the United Nations International Telecommunication Union (ITU), which is a multilateral rather than a multistakeholder body. In a similar vein, Mr. DelBianco assured Committee members that several of their key concerns have been addressed by the proposal, including retention of ICANN as a California not-for-profit corporation under US law and incorporation of the Affirmation of Commitments into the new ICANN Bylaws. Mr. DelBianco also highlighted a critical distinction regarding the ability of governments to control online content, clarifying that efforts by the government of China and other authoritarian regimes who prefer to censor the Internet for their citizens are only able to do so for content within their own borders by regulating in-state Internet networks but are not able to regulate content at the “core” of the Internet, namely at the root zone level. Indeed, so long as ICANN and the IANA functions are controlled by the multistakeholder community, such regulation would not be possible. Further, by significantly delaying or rejecting the transition proposal, the US government would signal that it does not trust the multistakeholder model of Internet governance, the hypocrisy of which would undoubtedly be leveraged by foreign authoritarian governments to advance their own state-controlled Internet agenda.

On the other hand, Mr. Manning [testified](#) that “no multistakeholder system that can be devised will ever be as effective at protecting a free and open Internet as the current United States

government oversight system.” Mr. Manning further suggested that “the issue of possible content censorship in a post-transition world is left wide open by a proposal to insert into ICANN’s Bylaws a commitment to respect ‘internationally recognized human rights.’” It is unclear how this commitment in the new ICANN Bylaws would increase the probability of censorship, given that one of the internationally recognized principles of human rights is the right to freedom of expression. *See, e.g.*, United Nations, [Universal Declaration of Human Rights](#), Art. 19, which states, “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” Mr. Manning also reiterated previous arguments against the transition, including that the US Executive Branch lacks the authority to transfer IANA Functions because any transfer of US “property” (i.e., the contract between NTIA and ICANN) must be channeled through Congress and that removal of a US government oversight role would open ICANN to antitrust scrutiny and could lead to the development of competing private services seeking to accredit top-level domain registries and domain name registrars, which could undermine reliance on an authoritative Internet root zone that is critical for Internet security and stability. This argument may have some credence, as ICANN has been insulated from antitrust liability at least in part because of its historic relationship with the US government. *See, e.g., Name.Space, Inc. v. ICANN*, 795 F.3d 1124, 1130-1131 (9th Cir. 2015). However, that same historic relationship may very well formulate the basis for continued insulation from antitrust liability distinguishing the “willful acquisition or maintenance of monopoly power” from “development as a consequence of a historic accident.”

*United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). Nevertheless, in conclusion, Mr. Manning hyperbolized that “[t]he United States government stands as the protector of freedom on the Internet.”

Taking a more moderate approach, Mr. Schaefer agreed with much of the underlying rationale for the transition but cautioned that it should not proceed hastily and that the envisaged accountability mechanisms contained in the proposal be implemented first, reviewed to the satisfaction of the community and US government “and then and only then, to proceed with the transition.” Mr. Schaefer also highlighted his ongoing concerns with the transition proposal, including an “undefined commitment to human rights,” “enhanced power for governments” and “an uncertain commitment to US jurisdiction.”

### Senators’ Questions

Senator John Thune noted that Mr. DelBianco and Mr. Schaefer held diametrically opposed conclusions about the role of governments in ICANN post-transition and pressed each witness to address this apparent inconsistency. Mr. DelBianco reiterated that government power does not increase post-transition pursuant to the proposal, noting that:

- Governments, through the GAC, only get one vote in the post-transition ICANN, along with one vote each for the other “decisional participants” in the “empowered community”;
- The community can block government advice that the community as a whole does not support through an Independent Review Process; and
- The accountability proposals include a “GAC carve-out” that provides that the GAC would not have a vote in a community challenge to Board adoption of GAC advice.

Mr. DelBianco also highlighted complaints from several governments that the transition plan has disadvantaged them in comparison to the private sector as further evidence that the plan does not privilege governments. This was a direct reference to a “minority statement” appended to the accountability proposal from various GAC members including France, Russia, Brazil and about a dozen other nations. In response, Mr. Schaefer turned Mr. DelBianco’s response on its head, using it as proof that governments will have powers under the proposal that they currently do not have, such as the participatory role in the empowered community. Mr. Schaeffer also highlighted that the decision as to whether the GAC carve-out would apply is up to the Board. Indeed, the draft new ICANN Bylaws indicate that the carve-out would only be triggered where “a Board resolution is consistent with GAC Consensus Advice and the Board has determined that the GAC Consensus Advice was a material factor in the Board’s adoption of such resolution as described in the relevant GAC Consensus Board Resolution.” See ICANN, [Draft New ICANN Bylaws](#), Section 3.6(e) (Apr. 20, 2016) (emphasis added). Further, Mr. Schaeffer pointed out that the GAC decision-making process can be changed internally, including the possibility that it could shift away from a consensus-driven model. Of course, the Bylaws account for this possibility and require that Board deference only be granted to GAC *consensus* advice, which is defined as “general agreement in the absence of any formal objection.” See *id.* at Section 12.2(a)(x).

In rebuttal, Mr. DelBianco rightly highlighted that failure to move forward with the transition now—after a two-year bottom-up multistakeholder process that included governments, business stakeholders, civil society and end users—would signal that the US government does not support or trust the

multistakeholder model and that it wants to relitigate issues the community has already robustly considered and addressed. Further, the accountability powers are not designed to be “beta tested”—most are extraordinary measures that may not be used for a decade or more. The entire purpose of the accountability powers is to provide an important check against the power of the Board and to discourage it from taking unpopular actions in the first instance. Ambassador Gross added that delay to the transition process would lend credence to arguments by foreign governments—such as Russia and China, who want to see an increased governmental role in Internet governance—that ICANN is not mature enough to take on this responsibility. Indeed, such governments have already begun to leverage the ITU as a new forum outside of ICANN to push their own Internet governance priorities.

Senator Brian Schatz followed up by asking the witnesses whether there would be any practical implications of a further delay to the IANA transition on average Internet users. The witnesses struggled to identify concrete examples of how a temporary delay to the transition would adversely affect Internet users, given that current operations remain effective. While Ambassador Gross agreed that there would be no real impact on the day-to-day operation of ICANN, delay would send a clear signal that governments play a primary role, which would be welcomed by foreign governments such as Russia and China as they continue to push their authoritarian Internet regulatory agendas. On the other hand, Mr. Sullivan, representing the Internet technical community, identified several operational concerns that might not be apparent to the average Internet user:

- The additional NTIA approval step in making changes to IANA or the root zone can slow emergency operational responses; and

- Reliance on an IANA with US government oversight has led to the development of external alternative unauthorized root zones that can cause problems in interoperability and Internet stability.

The transition could ease these technical and operational concerns, although they would likely go undetected by those outside the technical and Internet infrastructure communities. However, for new registry operators these concerns should also be paramount, given the increased role registry operators must play in responding to security threats and other DNS abuses.

In a similar vein, in response to questions from Senator Cory Gardner, Mr. Beckerman insisted that the best way of maintaining the free and open Internet is to move forward with the transition, given its basis in the global multistakeholder model. “It is the optimal means of maintaining a democratic Internet,” according to Mr. Beckerman, and “[w]e have limited power to change how individual governments modify Internet within their borders, but we want to be the model.” Mr. DelBianco added that although the Edward Snowden revelations of several years ago were the impetus for an accelerated transition timeline, the transition of the IANA functions was always the intention, as first outlined in the Department of Commerce white paper that resulted in the creation of ICANN in 1998. *See* US Department of Commerce, [Management of Internet Names and Addresses](#) (June 1998), which states, “Agreement must be reached between the U.S. Government and the new corporation relating to transfer of the functions currently performed by IANA.”

In response to questions from Senator Marco Rubio regarding the location of and jurisdiction over ICANN, Mr. DelBianco assured the Committee that the Bylaws and Articles of Incorporation require ICANN to retain its

principle office in Los Angeles County, which is legally sufficient for the US to retain jurisdiction over ICANN. Further, this element cannot be changed unless by a near-unanimous decision of the ICANN community through an amendment to the Articles of Incorporation, which are treated akin to fundamental Bylaws. Although more specific deliberations relating to jurisdiction of and over ICANN are subject to further community discussion as part of subsequent work streams, these elements in the Bylaws and Articles of Incorporation should still help solidify ICANN as a US-based organization.

## In Summary

Those in favor of a transition this year provided more compelling rationale than those who argued that delay is necessary to further consider the proposal—even though its development has taken place over a period of over two years, with profound involvement from every segment of the community (including Congress, which has held periodic hearings on the subject since the NTIA’s announcement of the transition in March 2014)—and those who argued that the transition is not in the best interest of the United States for political reasons. Nonetheless, Committee members continued to appear divided (generally along political party lines) as to whether they support or oppose the transition—at least to the extent that it should only occur after additional delay and an opportunity for further Congressional consideration. The next major milestone in the process will be completion of the new ICANN Bylaws (the public comment period on the draft formally closed on May 21, 2016) and publication of the NTIA’s report detailing its analysis of the transition proposal, which is expected in early June 2016.

If you are interested in reviewing the full hearing, you can watch the archived [webcast](#).

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