

**Comments on ICANN reform and the Stewardship Transition submitted by
Milton Mueller, Internet Governance Project
to the
Senate Judiciary Committee, subcommittee on Oversight, Agency Action, Federal Rights
and Federal Courts, September 14, 2016**

My name is Dr. Milton Mueller, thank you for the opportunity to submit comments to the subcommittee. I am the Director of the Internet Governance Project (IGP) and a Professor at the Georgia Institute of Technology School of Public Policy. I write about and teach Internet governance and have published two widely cited books on the topic with the MIT Press.[1] Aside from my scholarly work on the topic, I was involved in the U.S. Commerce Department proceeding that led to the creation of ICANN in 1997, and have remained involved ever since. I helped to found the Noncommercial Users Constituency, which represents nonprofits and educators in ICANN's policy processes. IGP is well-known as an independent entity that has been critical of ICANN and the U.S. government when we believe they have taken steps inimical to Internet freedom.

In this statement we strongly urge the U.S. Congress to let the NTIA complete the transition as planned. The NTIA is doing the right thing. Congress should not obstruct it. Attempts to delay or suspend the transition will undermine our government's status and play into the hands of the opponents of Internet freedom.

IGP is an advocate of Internet freedom and a free, open market economy. As such, we have always favored a non-governmental, global regime for the Domain Name System (DNS). This was the strategy favored by the Internet technical community, most internet businesses, and both Republicans and Democrats for the past two decades. The plan was to keep the DNS out of the hands of governments and intergovernmental organizations such as the UN so that it would not be fragmented by jurisdiction and burdened by geopolitics, censorship and bureaucracy. The only way to do that was to create a new, global self-regulatory regime based in the private sector, with fair representation for civil society and other stakeholder groups.

The ICANN transition would be the final step in the institutionalization of this non-governmental regime. Critics who claim that the transition would "give the internet to foreign governments" are not only wrong; they are pushing the opposite of the truth. The creation of ICANN was a way to keep Internet infrastructure out of the hands of governments, and getting the U.S. out is the logical and requisite final step in that process. The U.S. is, in fact, a government, and you can't have a nongovernmental, multistakeholder model with one government in charge.

The transition is not giving the Internet away to foreign governments, it is giving the Internet to the people – the people who use it, operate its infrastructure and run its services. The people of the Internet are not confined to the United States, they are everywhere. Only the U.S. government had the vision and values to propose this innovative form of internet governance; it is true to the principle of popular sovereignty upon which this country was founded, but elevates

it to a global scale. We should be proud of that accomplishment as reflecting our principles of self-determination, and not attempt to tear it down.

The Internet protocols were created in 1981 to provide universal compatibility in data communications. In pursuit of that goal, the software was designed in a way that simply did not refer to national boundaries or governmental jurisdictions. As one Internet engineer put it, "it's not being rude, they just weren't relevant."^[2]

In 2005, during the World Summit on the Information Society, authoritarian governments were very hostile to the idea of ICANN. They knew, I think, how revolutionary the idea was. They wanted governments to be in control. China, Brazil, Iran, Russia, Saudi Arabia and even some European governments thought that public policy for the Domain Name System should be made by nation-states, not by a new, open, nongovernmental agency like ICANN. When Senator Cruz and his supporters call for U.S. control of the Internet they sound a lot like those governments. Their logic and their arguments are the same. You cannot give special powers over a global communications infrastructure to one government without giving all other governments the idea that they should also share some control. If the opponents of the transition succeed in blocking it based on claims that the Internet belongs to the US, they profoundly undermine the cause of Internet freedom and the Internet's independence from governments.

Some opponents of the transition are arguing that ICANN cannot be trusted and point to bad decisions it has made in the past. It is true that ICANN had terrible accountability arrangements. IGP has written extensively about this.^[3] But these critics overlook the fact that the decision to end U.S. control was linked to a comprehensive reform plan. The transition brings with it major corporate governance changes that would significantly improve ICANN's accountability and transparency: a new set of bylaws that gives the public enhanced rights to inspect ICANN's books, the right to remove board members, and the power to prevent the board from unilaterally modifying its bylaws. Under U.S. government supervision for the past 18 years, ICANN has been almost completely unaccountable – yet this is the status quo the opponents want to retain.

By opposing the transition, the Congressmen are getting in the way of reforms that address the very things ICANN critics have been complaining about.

Those reforms and the new organizational arrangements for the new IANA took two years to design. The NTIA laid down 5 criteria for the transition, including the idea that governments or intergovernmental agencies should not be in control of the IANA. The plan developed by the multistakeholder community met all the NTIA criteria. It commanded consensus support among organizations representing Internet access providers, Internet standards developers, social media platforms, the domain name industry, consumer groups, tech policy public interest groups, and millions of users worldwide. The proposal emerged from an elaborate public process involving dozens of meetings over two years, multiple congressional hearings, multiple public comment periods, the participation of thousands of people in hundreds of organizations and businesses, and a global consensus among the directly affected stakeholders. If the U.S.

reneges now, it would destroy its own credibility and throw the whole nongovernmental model upon which the ICANN regime is based into suspicion and uncertainty. And ICANN would remain the same, the same bad old ICANN that it was before.

Some Congressmen have claimed that uncertainty about ICANN's antitrust status should impede the transition. This is a phony issue. ICANN is not, and never has been, exempt from antitrust liability, nor should it be. That is another one of the benefits of a private sector based governance model. The 1998 Statement of Policy [4] that led to the creation of ICANN considered both sides of this issue, and explicitly ruled that:

“Applicable antitrust law will provide accountability to and protection for the international Internet community.”

Some point to a court decision in 2000 that exempted Network Solutions from antitrust liability because it was acting under the direction of the US Government. But if the transition goes through, ICANN obviously will *not* be acting under the authority of the federal government anymore – so it would surely be a private actor subject to antitrust law. It is the status quo, in which ICANN makes no changes to the root without U.S. government approval, which might allow it to claim an exemption. Unless you want ICANN to be exempt from antitrust, the transition is a good thing and clarifies the issue.

The transition also clarifies the jurisdiction issue. ICANN's new accountability reforms are firmly rooted in U.S. jurisdiction (California law). The transition reforms doubled down on ICANN's ties to U.S. jurisdiction. The new, post-transition IANA (PTI) [5] will also be a California Corporation. The new rights of the empowered community are based on California law. The idea of a change in jurisdiction was resoundingly rejected in the reform process. The stakeholders who fought hard for accountability reforms dependent on California corporation law are not about to give them up. Also, the hundreds of businesses who have signed contracts with ICANN based on U.S. jurisdiction are not interested in destabilizing things. ICANN would be unable to amend its bylaws and articles of incorporation without approval by its stakeholders anyway. While the jurisdiction debates in Work Stream 2 may explore ways to harmonize conflicts of law and find new ways to prevent political manipulation of ICANN by virtue of its location in the U.S., there is no possibility of a massive, disruptive change of jurisdiction.

Equally uninformed is the claim that the DNS root zone constitutes a form of “U.S. government property” that cannot be transferred without Congressional approval. The root zone file (RZF) is a text file that contains a list of top level domains and information about the nameservers that support them. Where does this data come from? It comes from the registries who run top level domains. They all need to get this data in the RZF or their domains don't work on the Internet. The registries who supply the data that is compiled in the RZF come from all over the world (in other words, they are not all in the U.S.A.). They give it to IANA, which updates the RZF and sends it off to NTIA for approval and to Verisign for publication.

The RZF is not like a copyrighted movie or photograph, to which an owner restricts access so that users can be charged. It is, rather, a pooling of data about private name servers into a

publicly accessible resource so that any domain name user in the world can connect to any other domain name user in the world. The whole point of pooling data about registries' privately run name servers into the RZF is to get it openly and globally shared. The claim that this is government property is absurd, and shows that the claimants don't understand how the domain name system works.

The U.S. government does not own the RZF and nothing in its contractual relations with ICANN or Verisign asserts that it does. By ending the IANA contract, the US government is not transferring "ownership" of the RZF to a private party; it is ending its contractual authority to approve any changes to the RZF before Verisign publishes it.

In conclusion, we urge the subcommittee to reject false, fear-mongering claims about the transition and allow the NTIA to get the job done.

END

[1] *Ruling the Root: Internet governance and the taming of cyberspace*, 2002, MIT Press.
Networks and States: The global politics of Internet governance, 2010, MIT Press.

[2] Leslie Daigle, Provoking National Boundaries on the Internet? A chilling thought...
17 June 2013, Internet Society blog,

<https://www.internetsociety.org/blog/tech-matters/2013/06/provoking-national-boundaries-internet-chilling-thought>

[3] Mueller, M. (2009, 11). *ICANN, Inc.: Accountability and participation in the governance of critical Internet resources*. Retrieved from Internet Governance Project:

<http://www.internetgovernance.org/pdf/ICANNInc.pdf>

[4]

<http://www.ntia.doc.gov/federal-register-notice/1998/statement-policy-management-internet-names-and-addresses>

[5] <https://www.icann.org/en/stewardship-implementation/post-transition-iana>