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Mark Grabowski

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Should the U.S. Reclaim Control of the Internet?

Evaluating ICANN's Administrative Oversight Since the 2016 Handover

Mark Grabowski*

As the two-year anniversary of its abdication approaches, U.S. government officials recently caused a stir by publicly questioning whether they should reassert their control over the Internet's administrative functions. ICANN, the non-governmental organization that now independently oversees the Internet's backbone, has arguably been plagued by mission creep, budget problems, and challenges to its authority. Although reversing the handover may be difficult, this paper argues that U.S. officials are justified in putting pressure on ICANN.

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* Mark Grabowski is an associate professor at Adelphi University, where he teaches Internet Law. He gave a 2014 TEDx talk in Shanghai on "The Battle for Control of the Internet" and writes a column for the *Washington Examiner*. Grabowski holds a J.D. from Georgetown Law.

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I. INTRODUCTION

About two years ago, the United States of America surrendered oversight of the Internet Corporation for Assigned Names and Numbers (ICANN), an obscure, private company that oversees the Internet's backbone: the domain-name system, IP address allocation, and network protocol number assignments. The hope was this power transfer would usher in an era of international cooperation on Internet governance. But, after taking one step forward, it appears the Internet has taken two steps back. The transition has arguably exacerbated existing Internet governance problems, according to experts. Now, the U.S. government is mulling snatching back control. This paper argues that government officials should pressure ICANN to fix its problems, but stop short of a power reversal.

II. BACKGROUND

Global cooperation on Internet governance has always been a challenge. No one country owns the Internet, and each nation regulates how its citizens use the Internet within the framework of its political, legal, moral and cultural values. Because online activities often involve actors and intermediaries in multiple physical locations, diverse sets of potentially incompatible laws and rules overlap and frequently are in conflict.¹

But, with a few exceptions—such as North Korea, which has its own intranet that is isolated from the rest of the world—the vast majority of nations have at least agreed to participate in the global Internet that is administered by ICANN.² ICANN acts as the phonebook of the Internet by assigning and matching domain names with IP addresses. To reach a website or person on the

¹ See generally Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. PA. L. REV. 1951 (2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=691501.

² Meghan Keneally, *Here's What the Internet Looks Like in North Korea*, ABC NEWS (Dec. 23, 2014, 11:25 AM), <https://abcnews.go.com/International/internet-north-korea/story?id=27789459>.

Internet, a user gives his or her computer a destination—usually entered as a name or number.³ That destination has to be unique so computers know where to find each other. Humans prefer to find web and email addresses by name, such as google.com.⁴ But computers know each other by numbers, or Internet Protocol addresses. ICANN coordinates these matches. Without their coordination, we would not have one global Internet.

Although this non-profit, Los Angeles-based organization has typically made its own decisions on how to best manage these behind-the-scenes technical operations, it ultimately answered to the U.S. government.⁵ That is because America essentially invented the Internet and thus decided who manages it. U.S. officials always kept an eye on ICANN and let it know when its policies had gone astray. But this all changed in September 2016. Then-President Barack Obama decided ICANN was better off without any government intervention. As a result, ICANN has had absolute control of key Internet infrastructure and has answered to no one since September 30, 2016.

Proponents insisted this power shift was necessary for various reasons.⁶ They argued that the Internet had become too American-centric. Since countries such as China and India have many more Internet users than the U.S., proponents reasoned it was no longer fair for one nation to control the world's communication tool. Moreover, the world no longer trusted the U.S. to oversee the Internet after the Edward Snowden spying scandal.⁷ There was a risk that other countries could

³ Elizabeth Weise, *U.S. Set to Hand Over Internet Address Book*, USA TODAY (Sept. 29, 2016, 8:52 PM), <https://www.usatoday.com/story/tech/news/2016/09/29/icann-iana-internet-address-book-autonomous-department-of-commerce-ip-address-transition-internet-corporation-for-assigned-names-and-numbers/91281960>.

⁴ Mark Grabowski, *Obama's Risky Internet Giveaway*, WASH. EXAM'R (Sept. 26, 2016, 12:03 AM), <http://www.washingtonexaminer.com/obamas-risky-internet-giveaway/article/2602802>.

⁵ *Id.*

⁶ *Id.*

⁷ See Edward Wyatt, *U.S. to Cede its Oversight of Addresses on the Internet*, N.Y. TIMES (March 14, 2014), <https://www.nytimes.com/2014/03/15/technology/us-to-give-up-role-in-internet-domain-names.html>.

form an alternate Internet rather than participate in our existing global and interconnected cyberspace.⁸

The power transfer, while controversial, was widely lauded. The Internet is “best protected by . . . geeks, rather than any government or agency,” journalists argued.⁹ The U.S. surrendering control is not a big deal, academics said.¹⁰ This will “not affect Internet users and their use of the Internet,” assured ICANN, which also promised to govern using a global multistakeholder model based on consensus.¹¹ “The U.S. government’s willingness to allow the Internet to be a more truly global asset will improve the[ir] stature . . . as a global citizen,” predicted Greg Shatan, a partner at New York City law firm McCarter & English, who assisted ICANN with its transition.¹²

However, the handover was not without notable detractors.¹³ For example, Senator Ted Cruz and then-presidential candidate Donald Trump preferred that the U.S. government maintained oversight of ICANN and took an “if it ain’t broke, don’t fix it” viewpoint. Some lawmakers even attempted, albeit unsuccessfully, to block the transfer through a lawsuit. Others supported ICANN’s independence, but were concerned the transition plan was hasty and needed more fine-tuning.

Now, as the two-year anniversary of ICANN’s independence approaches, President Trump’s administration is reevaluating the decision. On June 5, 2018, the National

⁸ Claire Ricke, *Texas AG Files Lawsuit Against Obama Over 'Internet Control'*, KXAN (Sept. 29, 2016, 3:56 AM), <http://www.kxan.com/news/texas-ag-files-lawsuit-against-obama-over-Internet-control/995016013>.

⁹ David Ignatius, *Let the Geeks Rule Over the Internet*, WASH. POST (Aug. 2, 2016), https://www.washingtonpost.com/opinions/let-the-geeks-rule-over-the-Internet/2016/08/02/7121eb68-58f6-11e6-9767-f6c947fd0cb8_story.html.

¹⁰ Jonathan Zittrain, *No, Barack Obama Isn't Handing Control of the Internet Over to China: The Misguided Freakout Over ICANN*, NEW REPUBLIC (Mar. 24, 2014), <https://newrepublic.com/article/117093/us-withdraws-icann-why-its-no-big-deal>.

¹¹ *Frequently Asked Questions About the Transition*, ICANN (March 14, 2014), <https://www.icann.org/en/system/files/files/functions-transfer-faqs-14mar14-en.pdf>.

¹² Grabowski, *supra* note 4.

¹³ *Id.*

Telecommunications and Information Administration (NTIA) published a formal notice of inquiry in the *Federal Register* asking, “Should the [ICANN] Transition be unwound? If yes, why and how? If not, why not?”¹⁴ Those questions were among twenty-three posed by U.S. government officials who are seeking public comment on the handover. Other questions included, “What are the challenges to the free flow of information online?”; “Are the existing accountability structures within multistakeholder internet governance sufficient?”; and “Does the multistakeholder approach continue to support an environment for the internet to grow and thrive?”¹⁵ NTIA stated that they would use the public’s input to shape their policy agenda going forward.¹⁶

III. ANALYSIS

The Register, an online tech publication that has closely followed the transition, called the inquiry “extraordinary given how controversial such a reversal would be,” stating “nobody expected the question to be [so] blunt . . . which risks exploding what most feel is a settled matter.”¹⁷ But it is understandable why the U.S. government may want to backtrack. Since the handover, many experts argue that ICANN has fallen short of meeting its goals. Moreover, they argue that ICANN’s struggles threaten to put the security, interoperability and openness of the entire Internet at risk. Consider some of ICANN’s post-transition problems related to free speech, accountability, governance and the Internet’s future.

¹⁴ National Telecommunications and Information Administration; International Internet Policy Priorities, 83 Fed. Reg. 26,036, 26,038 (June 5, 2018), <https://regmedia.co.uk/2018/06/05/ntia-internet-policy-noi-jun18.pdf>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Kieren McCarthy, *US Govt Mulls Snatching Back Full Control of the Internet’s Domain Name and IP Address Admin*, REGISTER (June 5, 2018, 9:30 PM), https://www.theregister.co.uk/2018/06/05/us_government_icann_iana.

A. Controversial Policy Changes

First, ICANN has implemented controversial policy changes since assuming total control of the Internet. After the handover occurred, the Internet continued to function as usual and the average user likely did not notice any differences in his or her online experience. But, as time has passed, ICANN has made decisions that could potentially harm Internet users worldwide.

Some observers contend that ICANN's core values have been compromised since it is no longer subject to U.S. jurisdiction and the First Amendment, a federal constitutional right that provides freedom of speech and transparency.¹⁸ For example, Whois—ICANN's worldwide database containing who owns which website and how to contact these owners—will no longer be publicly available despite strong objections from U.S. officials.¹⁹ Businesses and law enforcement rely on these open records to track down scammers, copyright pirates, child pornographers and other bad actors online.²⁰

Mission creep could worsen at ICANN, experts warn, due to a changing company culture that endangers ICANN's mission of managing Internet traffic in a neutral way. "The company started hiring the wrong type of people," explained *Domain Name Wire's* editor Andrew Allemann.²¹

It started hiring people that don't want to do boring work. People who want to make a name for themselves. It hired people who want to be at the helm of a growing organization that takes on an important role in the world. . . . Hiring people that want to make a difference is usually a good thing, but not for an organization that should be boring.²²

¹⁸ U.S. CONST. amend. I.

¹⁹ Kieren McCarthy, *Uncle Sam Slams Plans to Give Govts Final Say Over Domain Privacy*, REGISTER (Mar. 13, 2018, 10:29 PM), https://www.theregister.co.uk/2018/03/13/us_government_icann_domain_privacy.

²⁰ John D. McKinnon, *U.S., Tech Firms Warn Against Internet Monitor's Privacy Tightening*, WALL ST. J. (Mar. 15, 2018, 8:22 AM), <https://www.wsj.com/articles/u-s-tech-firms-warn-against-internet-monitors-privacy-tightening-1521115200>.

²¹ Andrew Allemann, *My Thoughts on ICANN's Budget Crisis*, DOMAIN NAME WIRE (Apr. 10, 2018), <https://domainnamewire.com/2018/04/10/my-thoughts-on-icanns-budget-crisis> (last visited Aug. 5, 2018).

²² *Id.*

ICANN has long tried to play the role of Switzerland in virtual world conflicts, maintaining that it “is not the Internet [c]ontent [p]olice.”²³ But digital rights group Electronic Frontier Foundation cautioned that censorship is a “real concern.”²⁴ In the past year, several American tech companies have been criticized for censoring online speech—one highlighted instance being a Twitter employee temporarily deactivating President Trump’s account.²⁵ Likewise, ICANN is facing increasing pressure to engage in censorship of offensive online speech. An ICANN employee could conceivably punish Russia for election meddling or “resist” a democratic nation that elects a contentious leader by disabling their Internet domain. Individual employees have the power to bring the entire Internet to its knees, *Business Insider* revealed.²⁶ Had ICANN remained an arm of the U.S. government, it would have been prohibited from engaging in such censorship due to the U.S. Constitution’s free speech protections.²⁷ However, the First Amendment prohibits only U.S. government censorship, and not censorship from private companies inside America.

B. Financial Mismanagement

A more pressing concern is ICANN’s financial woes. ICANN is struggling with what watchdogs call a “budget crisis.” Revenues have not kept up with ballooning expenses, highlighted by an ever-expanding bureaucracy that is handsomely compensated with high salaries, generous

²³ Allen R. Grogan, *ICANN is Not the Internet Content Police*, ICANN (June 12, 2015), <https://www.icann.org/news/blog/icann-is-not-the-Internet-content-police> (last visited Aug. 5, 2018).

²⁴ Jeremy Malcolm, *Oversight Transition Isn’t Giving Away the Internet, But Won’t Fix ICANN’s Problems*, ELEC. FRONTIER FOUND. (Oct. 3, 2016), <https://www.eff.org/deeplinks/2016/09/oversight-transition-isnt-giving-away-Internet-wont-fix-icanns-problems> (last visited Aug. 5, 2018).

²⁵ Haley Tsukayama, Rachel Siegel & J. Freedom du Lac, *Rogue Twitter Employee Deactivated Trump’s Personal Account on Last Day on the Job, Company Says*, WASH. POST (Nov. 3, 2017), <https://www.washingtonpost.com/news/the-switch/wp/2017/11/02/trumps-twitter-account-was-temporarily-deactivated-due-to-human-error>.

²⁶ Julie Bort, *The Internet is Still Actually Controlled by 14 People Who Hold 7 Secret Keys*, BUS. INSIDER (Oct. 21, 2016, 1:56 PM), <http://www.businessinsider.com/the-internet-is-controlled-by-secret-keys-2016-10>.

²⁷ See U.S. CONST. amend. I.

benefits and essentially “free vacations.”²⁸ As a result, ICANN needs to find a way to cut several millions of dollars from its proposed \$138 million budget for the 2019 fiscal year.

Some watchdogs worry that these financial problems could corrupt ICANN officials’ handling of important issues, such as whether the disputed dot-amazon domain be given to Brazil’s rain forest or to Amazon’s Jeff Bezos.²⁹ ICANN executives have a history of engaging in conflict-of-interest domain sales that have drawn criticism from watchdog groups. In 2011, for example, ICANN’s chairman approved selling new domains to a company he left to join less than a month later.³⁰ There may be insufficient checks and balances to prevent this from happening again. ICANN boasts of its multistakeholder governance model, which solicits input from government representatives, tech experts and others. But ICANN’s board can decide to take their advice or not. Sometimes the board disregards even its own bylaws, one independent review found.³¹

C. Power Struggles

In addition to all of its internal issues, ICANN is now struggling to maintain its authority over the Internet. The European Union has “started rejecting the organization’s authority,” *The Register* reported.³² Brazil officials told ICANN that only governments control the Internet.³³ It seems that with the U.S. no longer backing ICANN, the organization is being easily bullied by

²⁸ Kevin Murphy, *ICANN Slashes Millions from its Budget*, DOMAIN INCITE (Jan. 22, 2018, 11:50 PM), <http://domainincite.com/22559-icann-slashes-millions-from-its-budget>.

²⁹ Kevin Murphy, “*We Own Your Name*” *Government Tells Amazon in Explosive Slapdown*, DOMAIN INCITE (Oct. 29, 2017, 9:43 PM), <http://domainincite.com/22231-we-own-your-name-government-tells-amazon-in-explosive-slapdown>.

³⁰ Eric Engleman, *ICANN Departures Draw Criticism*, WASH. POST (Aug. 20, 2011), https://www.washingtonpost.com/business/icann-departures-draw-criticism/2011/08/19/gIQAzpeDTJ_story.html.

³¹ Kieren McCarthy, *Months After it Ordered a Review into Allegations of Mismanagement, How’s That ICANN Accountability Drive?*, REGISTER (May 9, 2017, 7:02 AM), https://www.theregister.co.uk/2017/05/09/icann_latest_screw_up.

³² Kieren McCarthy, *As GDPR Draws Close, ICANN Suggests 12 Conflicting Ways to Cure Domain Privacy Pains*, REGISTER (Feb. 9, 2018, 7:28 AM), https://www.theregister.co.uk/2018/02/09/icann_whois_gdpr.

³³ Kieren McCarthy, *Dot-Amazon Spat Latest: Brazil Tells ICANN to Go Fsck Itself, Only ‘Govts control the Internet,’* REGISTER (Sept. 27, 2017, 9:04 PM), https://www.theregister.co.uk/2017/09/27/brazil_dot_amazon_gtld.

other nations to bend to their will. “ICANN lost 99% of its spine when the U[.]S[.] relinquished control over it. It now lost the remaining 1%,” observed industry analyst Theo Develegas of *Acroplex*.³⁴ *The Register* agreed: “Since that handover on September 30, 2016, two things have become clear: 1. ICANN continues to make terrible decisions, and 2. European governments have decided that they will use their collective power as the EU to force changes on how the Internet functions.”³⁵ Due to its perceived weakness, many critics now mockingly refer to ICANN as “ICANN’T.”³⁶

ICANN could soon face a much greater existential threat. Russia announced it is developing its own Internet that will operate separate from ICANN’s.³⁷ Brazil, India, China, Turkey and South Africa could join them in this “splInternet,” leaving Americans and Europeans cut off from half of the world’s Internet users.³⁸ Smaller nations, such as Taiwan, could face a dilemma: join China’s Internet, which will be in its native Mandarin language but highly censored, or participate in the West’s Internet, which enjoys great freedom of expression, but its content is primarily in English and caters to users located thousands of miles away.

IV. CONCLUSION

Given all of ICANN’s woes, the United States is justifiably concerned about its ability to manage the Internet. However, more upheaval may not be the remedy to this instability. *The Register* warned that if the U.S. attempts to reclaim power, “such a move would risk fragmenting

³⁴ Theo Develegas, Comment to Andrew Allemann, *I Just Fixed Whois and GDPR*, DOMAIN NAME WIRE (April 13, 2018, 2:03 PM), <https://domainnamewire.com/2018/04/13/i-just-fixed-whois-and-gdpr/#comment-2249232>.

³⁵ https://www.theregister.co.uk/2018/06/01/whats_next_for_whois_and_icann/?page=3.

³⁶ See, e.g., Kieren McCarthy, *ICANN’t Get No Respect: Europe Throws Whois Privacy Plan in the Trash*, REGISTER (July 6, 2018, 6:30 AM), https://www.theregister.co.uk/2018/07/06/europe_no_to_icann_whois.

³⁷ Tracy Staedter, *Why Russia is Building its Own Internet*, IEEE SPECTRUM (Jan. 17, 2018, 9:30 PM), <https://spectrum.ieee.org/tech-talk/telecom/internet/could-russia-really-build-its-own-alternate-internet>.

³⁸ Katja Bego, *The ‘Splinternet’ is Coming: Why Countries Will Break Away from Today’s Internet*, QRIUS (Mar. 17, 2018), <https://qrius.com/the-splinternet-is-coming-why-countries-will-break-away-from-todays-Internet> (last visited Aug. 5, 2018).

the internet's global addressing systems.”³⁹ But they speculate, “More likely is that the NTIA is using its notice of inquiry to put pressure on ICANN.”⁴⁰ Indeed, it is uncertain whether U.S. officials can reverse the handover even if they want to. David Redl, President Trump’s top Internet policy advisor, stated at a 2017 U.S. Senate hearing that “it would be very difficult to put the genie back in the bottle on ICANN.”⁴¹ One thing seems clear, however. As the two-year anniversary of the ICANN stewardship transition approaches, things have not gone as envisioned. In fact, the power shift may have caused more problems than it solved. Unless these issues get resolved quickly, the future of a connected world may be in peril. The U.S. is not wrong to second-guess whether the handover was the right decision.

³⁹ McCarthy, *US Govt Mulls Snatching Back Full Control of the Internet's Domain Name and IP Address Admin*, *supra* note 17.

⁴⁰ *Id.*

⁴¹ *Id.*