**Comments of the Center for Democracy and Technology**

**submitted to**

**The National Telecommunications and Information Administration**
**U.S. Department of Commerce**

**regarding**

**The Continued Transition of the Technical Coordination and**
**Management of the Internet's Domain Name and Addressing System:**
**Midterm Review of the Joint Project Agreement**

**January 25, 2008**


The Center for Democracy and Technology is pleased to submit these comments on the status of the transition to the private sector of the technical coordination and management of the Internet's domain name and addressing system (DNS), functions that have been entrusted to the Internet Corporation for Assigned Names and Numbers (ICANN).

**Summary**

CDT strongly supports the goal of a fully independent ICANN, and we applaud the steps ICANN has taken to become more transparent, but it is premature to end the Joint Project Agreement (JPA) between ICANN and the U.S. Department of Commerce (DoC) at this time.

The JPA serves as a valuable check on ICANN and an important guarantor that ICANN will continue to maintain and improve its transparency, accountability and adherence to the bottom-up, multi-stakeholder model. Far from interfering with the privatized, internationalized management of the DNS that is at the core of the ICANN concept, the JPA helps to ensure the integrity of ICANN's processes. Ending the JPA (and the possibly more important contract regarding the root file) cannot be tied to some end point of the responsibilities in the JPA because there is no end point to those responsibilities. ICANN acknowledges in its response to this mid-term review that the responsibilities in the JPA are "a never-ending pursuit" and that there will always be more to be done on all 10 responsibilities. We are not advocating endless renewal of the JPA but, for now, it remains a major source of assurance that ICANN will continue to meet those responsibilities.

The compelling reason not to end the JPA is not directly related to the JPA itself but rather it is the more fundamental concern that ICANN does not have a governance structure or other mechanism adequate to protect the DNS against governmental interference once the agreements with the U.S. are ended. This is a concern that has

grown larger as the "Internet governance" debate has developed in recent years. Now, more than ever before in ICANN's short history, there are countries that want to control the DNS. ICANN benefits today from a paradox: The current role of the U.S. government through the JPA and the separate contract with ICANN regarding the Internet's root zone file protects the DNS against interference by other governments, some of which are much more likely to try to use any power over the DNS to interfere with innovation, competition and freedom of expression than the U.S. government has done under the present system. The fact is, despite a few very unwise lapses, the U.S. government has not harmed the core functions of the Internet and has not used its power over ICANN to interfere with the free flow of information, whereas other governments have made it clear that they would interfere if they could.

The continued role of the U.S. government is not optimal. It violates the express intent of the U.S. government when it created ICANN and is not justifiable on a long-term basis. However, at this point, ICANN has not identified procedures or mechanisms that would ensure in the long run its procedural transparency or protect it against undue commercial or governmental interference.

Therefore, rather than focusing narrowly on the 10 responsibilities in the JPA, this midterm review and the continuation of the JPA should be used to jumpstart an international dialogue on ICANN's long-term independence from governmental interference. We urge ICANN and the U.S Department of Commerce to expressly address the threat posed by other governments and to engage in a dialogue with the global Internet community to develop mechanisms that will ensure accountability and representativeness and protect the DNS when the U.S. "umbilical cord" is cut. We urge the U.S. government to re-affirm that it will ultimately end its contractual arrangements and to work for mechanisms that will ensure ICANN's independence. Until such mechanisms are developed and implemented, ICANN should remain subject to U.S. government oversight. We emphasize that developing an acceptable plan should not take years; rather, it should be a matter of urgent attention by ICANN, the U.S. government, and the global Internet community.

Therefore, while concluding that the U.S. government must continue its oversight role regarding ICANN, we call upon the U.S. government to begin immediately to address and resolve the question of governmental interference. In this respect, the U.S. must set the tone for the debate, which it has failed to do. While it is appropriate for the U.S. government to continue for now to oversee the responsibilities identified in the JPA, efforts or threats to exercise control over the DNS (such as the U.S. government unwisely did in to .xxx case) only fuel calls for ending the U.S. role, which – in the absence of a better governance structure -- could result in control by governments less committed to innovation, competition and free expression. The U.S. government must become a credible advocate for ICANN's independence.

ICANN also has a responsibility here, especially by returning to its original narrow mission and making it clear that its decisions will be based on technical considerations. In this regard, it was a mistake for ICANN to insert into the process for adding new Top

Level Domain Names broader questions of "morality and public order." This standard is ambiguous and is often cited by repressive countries to stifle dissent. Its use by ICANN gives countries undue power in the TLD process.

To move forward on the ICANN "transition," the U.S. should articulate neutral principles of ICANN independence, starting with an express commitment not to make any changes in the root zone file that contradict or bypass the outcomes of legitimate ICANN processes. It should begin immediately to work diplomatically to obtain an international commitment to the independence of ICANN and to its privatized, bottom-up process.

**About CDT**

The Center for Democracy & Technology is a Washington-based non-profit organization that works to support and enhance innovation, openness and freedom on the Internet. CDT engages in dialogue and consensus-building with public interest groups, technology companies, regulators, lawmakers and individuals. We seek to promote the democratizing nature of the Internet through legal and policy reform, user education, technology design and corporate best practices.

Since before the establishment of ICANN in 1998, CDT has played an active role in the global Internet governance debate. Ever since ICANN was created, CDT has advocated measures to make the organization more transparent and representative. CDT was an early and prominent proponent of global representation and participation in ICANN. We urged ICANN to select some of its Board members by elections broadly open to Internet users worldwide, and we actively encouraged individuals worldwide to participate in the ICANN's 2000 elections. Afterwards, CDT coordinated the NGO and Academic ICANN Study (NAIS), a diverse group of public interest representatives from around the world, which issued recommendations on representativeness and transparency in August 2001. CDT has stressed the need for ICANN to stay confined to its narrow mission. Our 2003 white paper, our 2004 report on ICANN and Internet governance, and our 2006 comments on ICANN's proposal for transparency and accountability offered concrete recommendations on ICANN's mission and procedures. CDT has vigorously opposed U.S. government intervention in ICANN decisionmaking. At the Internet Governance Forum in Rio de Janeiro last November, we issued a paper on "critical Internet resources" that defended ICANN's non-governmental, private sector structure. The Appendix to these comments provides links to many of CDT's reports on, and recommendations to, ICANN over the past decade.

**A Short Re-cap of ICANN's History**

Just 10 years ago, the U.S government created ICANN with three goals: to privatize the DNS, to internationalize its governance, and to introduce competition into the sale of Internet domain names. In its inception, ICANN was a remarkable innovation: it was designed as a multi-stakeholder, non-governmental, non-profit entity that would make decisions through a bottom-up process taking into account the interests of the global

Internet community.  It is a model well-suited to the nature of the Internet, and it has been remarkably successful.

Through a series of agreements with the U.S. Department of Commerce (DoC), ICANN was charged with certain responsibilities and given certain authorities with respect to the DNS.  Most recently, the DoC and ICANN signed a Joint Project Agreement (JPA) on September 29, 2006. The JPA established 10 responsibilities for ICANN, intended to make it a more stable organization with greater transparency and accountability in its procedures and decisionmaking.   The JPA provides oversight of ICANN's procedures. A second contract between ICANN and the U.S. government controls additions to the root zone file, which sits at the top of the DNS hierarchy of tables and servers translating domain names into Internet addresses.

When the U.S. government created ICANN in 1998, it announced that it would turn full control over to ICANN when the organization achieved the stability, accountability and global legitimacy to stand on its own. The U.S. government thought that this would happen within just 2 years.  The process has proven more difficult.  Deciding how to select the corporation's board took years, as did the development of mechanisms for bottom-up development of policy proposals.  Early in its history, ICANN suffered from a serious lack of transparency.  It generated further controversy when it developed dispute-resolution procedures that some civil society advocates found overly deferential to the concerns of trademark holders.  For too long, it appeared unresponsive to the global interest in establishing domain names in non-Roman characters.  More recently, it has grappled unsuccessfully with the privacy issues associated with the Whois database. These and other disputes fueled concerns about ICANN's status and its progress in developing a management system for the DNS based on accountability, transparency, and multi-stakeholder participation.

The JPA represents the latest effort by the U.S. government and ICANN to address these concerns.  By notice dated October 30, 2007, the DoC invited public comments on the progress achieved on the Responsibilities identified in the JPA.  Undeniably, there has been progress, but ICANN has used this mid-term review as an occasion to call for ending the JPA entirely.

**ICANN has made substantial progress in key areas, but further work remains to be done**

ICANN has proven the viability of the privatized, non-governmental, multi-stakeholder model for governance of a critical Internet resource. Its accomplishments to date must be acknowledged. Transparency is greatly improved and the Board and leadership are clearly committed to ongoing procedural enhancements.

Progress, however, does not equal resolution.  Leading up to the midterm review of ICANN's progress under the JPA, much attention has been focused on the extent to which ICANN has met the 10 responsibilities laid out in the annex to that document, which

include upholding and advancing commitments to security, stability, transparency and accountability.

With all due respect to the hard work of the Board and staff and recognizing ICANN's progress, the organization has not "achieved" the 10 responsibilities in the JPA. Although ICANN's progress in some areas has been laudable, ICANN itself admits that transparency, accountability and the multi-stakeholder model are ongoing responsibilities. The 10 responsibilities laid out in the JPA do not constitute a checklist, but rather a framework that ICANN must always follow.

There is no question that ICANN has succeeded in facilitating the creation of a competitive market at every level of the domain name industry -- wholesale and retail. Consumers today have wide choice in buying a domain name, and robust competition has reduced prices drastically from their 1998 levels. However, as CDT pointed out in 2004, ICANN could be even more supportive of competition if it exercised less control over gTLD registries.[1] ICANN has used its detailed contracts with registries to condition approval of new gTLDs on ICANN's review of registry business models, placing ICANN in the position of assessing the relationships between TLD registry operators and the communities they seek to serve—with the result of unreasonably delaying the introduction of new registry services, limiting competition, and leading ICANN into areas far beyond its expertise.

ICANN made security a top priority, and here too the organization has a strong track record. Under ICANN's stewardship, the DNS has proven remarkably resilient against external attacks and internal failures. We caution, however, against ICANN using this issue to claim a broader role in Internet security.

Where ICANN has been less successful is in implementing transparent, open, and representative decision-making, based on the bottom-up principle. Too much of the ICANN decision-making process is still inscrutable. Too many policies are developed, changed and advanced almost to the point of adoption in a staff-driven and closed-door process.

ICANN's own outside consultant, One World Trust, identified some of these problems in its recent review. One World Trust concluded:

> However, while openness is undoubtedly common practice within the organisation, there remain a number of areas where ICANN's transparency could benefit. Cutting across the different constituent bodies of ICANN are issues of information accessibility, consistency in what information is disclosed, and consistent compliance with stated commitments in the disclosure of information. One World Trust, "Independent Review of ICANN's Accountability and Transparency – Structures and Practices"

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[1] ICANN and Internet Governance: Getting Back to Basics (July 2004) http://www.cdt.org/dns/icann/20040713_cdt.pdf.

(March 2007) at p. 11.[2]

The consultants elaborated:

> While ICANN is committed to transparency, it suffers from a lack of
> consistency in relation to the type and detail of information that is made
> publicly available by its different bodies.  For example, although all
> Supporting Organisations make the minutes of their meetings available (this
> is mandated in the By-Laws) only the RSAC and the ALAC advisory
> committees do so. Likewise, while the Board makes its minutes publicly
> available, only one of its eight subcommittees posts their minutes on the
> website. Id.

More fundamentally, the review noted the difference between openness and participation.
Regardless of how much information ICANN releases, its decisionmaking remains too
opaque.  The consultants stated the problem as follows:

> Despite this general openness, there remains a lack of clarity among many
> in the ICANN community as to how and why the Board reaches certain
> decisions; specifically, how it weighs up the input of different stakeholders
> (Supporting organisations, advisory committees and the public) and how it
> incorporates these into the decision-making process. Id. at p. 16.

The consultants recommended that ICANN improve its practice in explaining more
clearly how stakeholder input is used when making decisions.  The report warned: "If
basic good practice principles such as explaining to stakeholders how their inputs made
an impact on the final decision are not met, levels of engagement will fall."  Id. at p. 5.

Moreover, the consultants concluded that the current period of agenda disclosure does not
suffice to give stakeholders adequate warning of what issues are under consideration so
as to prepare and provide meaningful input into Board decisions.  Id. at p. 17.  A mere
agenda listing, however early, is often insufficient basis for participation.

In an issue that cuts across many elements of the JPA, the consultants' report confirms a
broadly-held concern about ICANN: that it is a staff-driven organization and that Board
members are not currently able to participate effectively and efficiently in the
organization's decisionmaking.  In part, this is due to the time required for the job but
also the lack of adequate information sufficiently in advance of Board meetings. The
constants reported: "[O]ur review highlighted that timely and concise briefings for
Directors prior to Board meetings were sometimes lacking and that this lead to some
Directors feeling that they did not have adequate time to prepare for important policy
discussions." Id at p. 20.

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[2]  http://www.icann.org/transparency/owt-report-final-2007.pdf.

We know that ICANN is addressing the recommendations in the consultants' report and has already made improvements. Some of the issues are more easily resolved than others.

A final point should be made: The consultants' benchmark for ICANN was comparison to other international organizations. However, as the report notes, ICANN is unique, including in ways that leave it without the normal accountability mechanisms of international organizations. ICANN has no members or shareholders. Properly, it is not subject to governmental control. The absence of these other restraints has required the development of unique mechanisms of governance.

**The Changed – and Highly Charged -- Climate of Internet Governance**

There is a second, more important reason why the JPA should not be terminated: it should be used as a departure point for addressing the "elephant in the room," namely, the current lack of any means to ensure ICANN's long-term independence from government interference. Despite ICANN's progress, the policy climate surrounding the Internet and ICANN has grown superheated in recent years. Internet governance, and ICANN specifically, have come under heavy criticism, beginning with the UN World Summit on the Information Society (WSIS), which concluded in Tunisia in 2005, and continuing with the Internet Governance Forum (IGF), which will hold its third annual meeting later this year. The international Internet governance environment in 2008 bears virtually no resemblance to that of 1998.

One focus of the international debate has been the U.S. government's continuing role in the ICANN process. Some nations and civil society advocates have complained that the contracts between ICANN and the U.S. government are an untenable arrangement that makes ICANN too U.S.-centric and not responsive enough to the needs of other nations. The actual day-to-day workings of ICANN, with its international Board of Directors, non-American President and extensive global engagement, would seem to give lie to those assertions, but nevertheless the U.S. government's limited role in the organization remains a powerful symbol of U.S. "hegemony" over the Internet.

What is troublesome is that these ICANN critics have not merely proposed eliminating the U.S. government's role in the ICANN process, but they have also called for bringing ICANN under the control of an international treaty or some other mechanism that would give other countries a greater say in the management of the DNS. Increased governmental interference could cause serious harm to the integrity of the DNS. As a medium driven by innovation and user control, the Internet is most likely to continue to flourish under a non-governmental, bottom-up management structure. Secondly, a treaty-based structure or other system that increases governmental control could give power to repressive regimes and could more easily be manipulated to impose content restrictions at the core.

Ultimately, the foremost goal of the U.S. government, ICANN and the global Internet community must be to ensure the continued stability and security of the DNS. That can best be accomplished by preserving the non-governmental, bottom-up management

structure that has served the Internet so well.  But where is the guarantee that that management structure will be preserved?  The ultimate goal of establishing an independent, bottom-up, fully non-governmental and globally legitimate ICANN remains relevant, but it would be foolhardy to proceed toward that goal without taking the realities of the current policy landscape into account.

In words and actions, governments and intergovernmental agencies throughout the world have expressed their strong desire to assume greater control over the ICANN process.  In fact, every serious proposal relating to Internet governance offered over the past four years recommends either increasing government involvement in ICANN (either by strengthening the Government Advisory Committee or by imposing direct external control) or replacing the U.S. government's role in ICANN with that of an intergovernmental bureaucracy. Since the inception of the WSIS process, we know of no sovereign government that has publicly expressed support for transitioning ICANN into full-fledged private-sector management protected against government interference.

In light of these global attitudes, it is critical to ask what would happen if ICANN were to sever its ties with the U.S. government. What legal and regulatory structures exist to prevent ICANN from coming under the sway of national or multinational interests? We know that many governments would like to assume control over ICANN. What tools and structures exist to stop them?  ICANN's new "Accountability and Transparency Frameworks and Principles" do not address these concerns.  Neither, however, can the U.S. government credibly claim that it will protect ICANN from governmental interference by retaining its control over the DNS.

At present, it is unclear what checks, if any, exist to prevent future ICANN board members and staffers from steering the group under the oversight of national or multinational overseers.   Already, we are concerned that ICANN has become too deferential to governments, especially in the processes to adopt new gTLDs and to develop internationalized domain names (IDNs).  For example, the challenge process for gTLD decisions seems mainly to increase the influence of governments.

The potential for capture of an independent ICANN must be thoroughly considered – and preventative measures adopted – before major changes to the existing contractual arrangements are made. To eliminate the U.S. Government's role as a backstop in the ICANN process without a clear understanding of the repercussions of such a move would subject the stability and security of DNS to an unacceptable level of risk.

ICANN and the U.S. government should both be explicit about this conundrum and should work together to solve it.  One step in this direction might be for the U.S. government to plainly and unequivocally state that it is U.S. government policy to oppose any international measures that would increase governmental interference in ICANN or the global DNS.  Another step is for the U.S. government to expressly commit not to make any changes in the root zone file that contradict or bypass the outcomes of legitimate ICANN processes.

**Conclusion**

We applaud ICANN for making great strides in transparency and other procedural reforms.  We earnestly want to see ICANN freed of U.S government control.  However, based on years of monitoring ICANN and working to make it a success, CDT concludes that ICANN has not become sufficiently stable to justify further reducing the U.S. government role in the management of the DNS.  Despite progress towards achieving the responsibilities the JPA, the oversight of the U.S. government is still necessary, given the absence of other guarantors of ICANN's stability, accountability, transparency and independence.

What Winston Churchill once said of democracy also applies to ICANN: it is the worst form of Internet governance, except for all the others that have been considered.  The oversight of the U.S. government has been a small but crucial element of the ICANN success.

In recent years, much has changed both within ICANN and in the world it occupies. As the Internet has spread and become a critical element of the global economy, external pressures on ICANN and Internet governance have mounted. Specifically, there is a concern that ICANN could be subject to external capture, either by sovereign governments or intergovernmental bureaucracies should it be released prematurely from its contractual relationship with the U.S. Government.

ICANN has made remarkable progress over the past decade and is now a respected, functioning entity that manages an important Internet resource. In recent years, ICANN has made significant strides toward meeting the goals laid out under its contractual agreements with the U.S. Government. Although not without flaws, ICANN is to be commended for its steady management of the Internet's global addressing system and its efforts to achieve accountability and legitimacy.

In part, this midterm review should measure ICANN's procedures against the responsibilities laid out in its agreement with the U.S. government. In that respect, ICANN has succeeded in some areas and fallen short in others, but it is clear that the responsibilities are ongoing.  For now, so should be the oversight.

It is more important, however, to take a broader look at the world ICANN inhabits and at the possible unintended consequences that could arise from substantially altering its oversight structure. It is in the best interests of the Internet to free ICANN from any U.S. government involvement, but only after there is relatively high degree of confidence that ICANN was protected against control by other governments.

For more information, contact Jim Dempsey, jdempsey@cdt.org or Leslie Harris, lharris@cdt.org.

**Appendix**

**Major CDT Contributions
to ICANN Representativeness, Accountability, Transparency and Independence**

"ICANN, Legitimacy, and the Public Voice: Making Global Participation and Representation Work" (August 2001) http://www.naisproject.org/report/final/

"Clarifying the Mission and Powers of ICANN: Analysis and Proposed Solutions" (Oct. 2002) http://www.cdt.org/dns/icann/021030cdt.shtml

"Assessing ICANN: Towards Civil Society Metrics to Evaluate the ICANN Experiment" (July 2003) http://www.cdt.org/dns/icann/030731assessingicann.pdf

"ICANN and Internet Governance: Getting Back to Basics" (July 2004) http://www.cdt.org/dns/icann/20040713_cdt.pdf

CDT Letter Opposing Commerce's Department's Comments on .xxx gTLD Proposal (Sept. 2005)  http://www.cdt.org/dns/20050930xxxletter.pdf

"Response to the National Telecommunications and Information Administration's Notice of Inquiry on the Management of the Domain Name and Addressing System" (July 2006) http://www.cdt.org/standards/20060707noiresponse.pdf

CDT comments on ICANN's proposal for transparency and accountability management (Nov. 2006) http://www.cdt.org/standards/20061101icanncomments.pdf

"Governance of Critical Internet Resources: What Does 'Governance' Mean?  What Are 'Critical Internet Resources?'" (Nov. 2007) http://www.cdt.org/dns/20071114Internet%20gov.pdf