

Independence and Accountability: The Future of ICANN

Comments of the Center for Democracy & Technology

submitted to

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

in response to the Notice of Inquiry regarding

**Assessment of the Transition of the Technical Coordination and Management of the
Internet's Domain Name and Addressing System**

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It is time to develop and implement a plan to complete the process of transforming the Internet Corporation for Assigned Names and Numbers (ICANN) into a fully independent and accountable entity. Achieving such a transition will require active leadership of the U.S. government and some crucial changes on the part of ICANN. In these comments, we recommend the key elements of a comprehensive plan for ICANN's future.

ICANN is intended to serve a narrow but important role in the management of the Internet's Domain Name System (DNS). ICANN was created in 1998 with the encouragement of the U.S. government as part of a plan to transition the DNS from U.S. government control to a decentralized system suited to the global nature of the Internet, based on private enterprise and competition, and free of governmental interference while accountable to stakeholders around the world. ICANN, despite some significant problems, has been remarkably successful in ensuring the expansion, security and stability of the DNS and thereby contributing to the growth of the Internet. The core elements of the ICANN model – non-governmental, narrow mission, not-for-profit, global, and consensus-based – should be preserved, because they have proven successful and because the alternative of continued governmental control threatens the innovation, openness, freedom and continued expansion of the Internet.

A Joint Project Agreement (JPA) between ICANN and the U.S. Department of Commerce (DoC) expires on September 30 of this year. Some, including ICANN itself and Commissioner Reding of the EU, have called for the “full privatisation” of ICANN as of that date. Others have suggested that DoC should renew the JPA either because ICANN has not yet met the organizational reform goals established in the JPA or because elimination of the JPA would open the way for greater governmental interference with ICANN. All agree that this transitional moment raises important questions about the future accountability of ICANN and the role of governments in the operation of the Domain Name System.

CDT strongly supports the goal of a fully independent and accountable ICANN. Many others have noted that, in order for governments to defer to ICANN's form of multi-stakeholder coordination, ICANN must be reliably accountable. However, there are two crucial pre-conditions of accountability (and hence of independence) that have been too often overlooked: mission (what matters can ICANN address) and decision-making standards (by what means and on what grounds can it set policy on the matters within its purview). To achieve the goal of an independent and accountable ICANN, new steps must be taken to ensure that (i) ICANN's policy-making role is clearly and narrowly limited to issues affecting the DNS (and only a subset of DNS issues at that – only those requiring global coordination); (ii) that the criteria on which ICANN can make decisions are limited to protecting the security and stability of the DNS and ensuring competition in services related to the DNS; and (iii) that the rules ICANN imposes are demonstrably based upon consensus among those affected by the rules.

Mission and decision-making criteria hold the key to independence and accountability. If ICANN's mission is narrowly defined and if its decision-making is based on limited criteria and consensus-driven, then it is much less likely to take actions that threaten either sovereign interests or the openness of the Internet, and it is therefore easier to justify making it fully independent. However, if its authority is ambiguous, such that ICANN can be confused with broader issues of Internet governance such as cybersecurity in general, or if it can base its decisions on criteria such as “morality and public order,” governments will claim that they should have a dispositive role in ICANN.

Similarly, if ICANN's mission is narrowly defined and if its decision-making is based on limited criteria and bounded by the principle of consensus, then any accountability process will have suitable reference points against which to hold ICANN accountable. If ICANN's purview and the criteria for its decision-making are unclear, it is hard to see how an accountability process would have any objective basis for assessing and setting aside ICANN decisions.

The Five Key Elements of a Plan for ICANN Independence and Accountability¹

ICANN will be ready for independence when five elements are in place. Insofar as the JPA offers the strongest current lever for ICANN reform, the U.S government should set forth these five elements, before September 30, as the pre-conditions under which it would obligate itself to recognize a fully privatized and fully independent ICANN. And

¹ In developing these recommendations, we have drawn from or make reference to a number of proposals that have been put forth recently by key parties engaged in the ICANN debate; as our citations show, there may be a developing consensus around some or all of the proposals we outline here. Overall, our recommendations are premised on the first principle of Commissioner Reding's proposal: the goal is to achieve in the near future “a fully privatised and fully independent ICANN that complies, in its structure as a private corporation, with the best standards of corporate governance, in particular with those on financial transparency and internal accountability.” Viviane Reding, EU Commissioner for Information Society and Media, “The Future of Internet Governance: Towards an Accountable ICANN,” May 4, 2009.

then, over the course of a year, ICANN, the U.S. government, other governments, and the Internet community globally should work to achieve these five elements:

1. Affirm, in a Binding Fashion, a Narrow Mandate: As we explain further below, ICANN should not be seen as the locus of generalized “Internet governance.”² ICANN’s sole mission should be to manage the global aspects of the Domain Name System in such a way as to promote competition, internationalization and fair access to names and numbers while preserving the stability and security of the DNS.³ By some binding means, enforceable by the appeal process we outline below, ICANN should make it clear that its role is limited to matters that directly affect and are reasonably necessary for the operation of the DNS.⁴

There was some ambiguity as to mission even in ICANN’s earliest documents.⁵ Over time, this ambiguity has been compounded as ICANN has gone very far afield, using its

² In this, we believe a premise of Commissioner’s Reding’s proposal for ICANN is fundamentally wrong. Commissioner Reding states that “day-to-day management of the internet should be left to the independent decisions of ICANN and of the global internet community.” In fact, ICANN has almost nothing to do with the day-to-day management of the Internet. Her proposal for a “G-12 for Internet Governance” may or may not be a good idea, but Internet governance is far broader than ICANN, and the development of any new structures for “Internet governance” in general should not be driven by the need to make ICANN independent and accountable. The goal of ICANN independence and accountability can be achieved by measures much narrower than the creation of an Internet governance entity, and, conversely, any broader “Internet governance” entity need not and should not have control over the DNS if ICANN is properly constituted. For more on what Internet governance is, and on all the bodies (governmental and non-governmental) that are already doing Internet governance, see CDT’s paper, “Governance of Critical Internet Resources: What Does ‘Governance’ Mean? What are ‘Critical Internet Resources,’” Nov. 14, 2007, <http://www.cdt.org/dns/20071114Internet%20gov.pdf>.

³ In general, the “stability” of the domain name system refers to the continued availability of a single root zone file that can be used in the resolution process. (The need is to avoid conflicting root zone files that would produce uncertainty regarding how a domain name lookup inquiry might be answered). The “security” of the domain name system refers to steps required to prevent or minimize attempts to defeat its intended functioning. (ICANN is not the only entity with a role in this area; many others are also working to improve DNS security.) Neither of these terms should be confused with general matters of “Internet security.” ICANN does not have the mission or resources to address the many issues encompassed within the concept of “cybersecurity” or “Internet security.” “Competition” refers to the reliance of the ICANN model on market mechanisms to promote affordability and innovation in the DNS space; the interest of “competition” should not justify unbounded ICANN intervention into the business practices of registries, registrars or registrants.

⁴ This recommendation is consistent with, for example, the recommendations of AT&T, which calls for a “Charter.” <http://forum.icann.org/lists/iic-implementation-plan/pdf/mQebAQFJb.pdf>.

⁵ For example, the very first registry agreement (for .com, with NSI, in 1999) stated that NSI would comply, “**in the operation of the registry,**” with ICANN policies relating to “issues for

power to approve new TLDs to impose on registries, registrars, and registrants obligations not related to the narrow mission of adopting policies necessary for the global operation of the DNS and not supported by broad consensus. ICANN should eliminate from its contracts any provisions not necessitated by the interests of competition, security and stability in the DNS.⁶ Likewise, consideration should be given to how to make it clear that decisions must respect all of the “core values” in ICANN’s by-laws.⁷

The effort to narrowly define ICANN’s mission should not require extended negotiation. Taken together, ICANN’s articles of incorporation, by-laws and contracts already contain the core of a “charter” for the organization. As we indicate here, changes need to be made to those documents to eliminate some open-ended language and to clarify and

which **uniform or coordinated resolution is reasonably necessary** to facilitate interoperability, technical reliability and/or stable operation **of the Internet** or domain-name system” (emphasis added). The reference to the interoperability, reliability and stability of the Internet unwisely gives support to broader views of ICANN’s mission. ICANN needs to reaffirm that any attention it gives to the interoperability, technical reliability, or stable operation of the Internet is strictly limited to matters directly relating to and reasonably necessary to the operation of the DNS.

⁶ Of course, in its contracts, it is appropriate for ICANN to consider – indeed, it should consider - the interests of all affected parties. A good list of the acceptable issues for ICANN authority is found in the most recent contract with the .org registry:

- 3.1(b)(iv)(A) principles for allocation of registered names in the TLD (e.g., first-come, first-served, timely renewal, holding period after expiration);
- 3.1(b)(iv)(B) prohibitions on warehousing of or speculation in domain names by registries or registrars;
- 3.1(b)(iv)(C) reservation of registered names in the TLD that may not be registered initially or that may not be renewed due to reasons reasonably related to (a) avoidance of confusion among or misleading of users, (b) intellectual property, or (c) the technical management of the DNS or the Internet (e.g., establishment of reservations of names from registration);
- 3.1(b)(iv)(D) maintenance of and access to accurate and up-to-date information concerning domain name registrations;
- 3.1(b)(iv)(E) procedures to avoid disruptions of domain name registration due to suspension or termination of operations by a registry operator or a registrar, including procedures for allocation of responsibility for serving registered domain names in a TLD affected by such a suspension or termination; and
- 3.1(b)(iv)(F) resolution of disputes regarding whether particular parties may register or maintain registration of particular domain names.

Our concern with the contract is that it states that this list of issues for ICANN action is not exclusive: “Such categories ... shall include, without limitation”

⁷ Currently, the language allows ICANN to pick and choose among those values and to entirely discount one or more of them. Of course, balance will be necessary, and there will be situations in which values compete, but ICANN should have an obligation to accommodate all of the core values to the maximum extent possible and to show why a given decision comes closest among the alternatives to accommodating all of the core values.

constrain ICANN's authority. A challenge that requires further study and dialogue is how to make that "charter" binding and enforceable by any affected party, consistent with California non-profit law.⁸

2. Recommit to the Consensus Principle and Articulate Precise and Exclusive Criteria for Decision-Making: Making ICANN accountable involves not only the "what" but also the "how." ICANN is supposed to adopt rules only insofar as they relate to technical and financial qualifications to operate a TLD and only insofar as they are supported by substantial consensus among those affected by the rules. It was a mistake for ICANN to insert into the process for adding new Top Level Domain names the broader criteria of "morality and public order." Morality and public order are matters within the jurisdiction of national governments; they are impossible to define on a global basis and, even more so, are not concerns to be addressed through the DNS.

ICANN has required new TLD operators to sign agreements that include provisions that do not reasonably relate to minimum technical or financial qualification to operate a TLD and that are not supported by a demonstrated consensus among those affected by such provisions (including registrars and registrants). Moreover, it has used these contracts to pass down requirements on domain name registrars and registrants. This is an abuse of ICANN's de facto monopoly power over the root zone file. The fair and appropriate condition for ICANN's achievement of full private sector status should be its systematic relinquishment of any claimed power to impose such conditions.

3. Develop an Accessible and Credible System of Quasi-Judicial Review: Those affected by ICANN decisions should have the ability to obtain review of those decisions by a small, independent, international entity applying clear standards. By September 2010, ICANN and the international community must develop a mechanism whereby ICANN decisions are subject to review by an independent, internationally credible tribunal or quasi-judicial body that has the power to hear complaints from anyone affected by ICANN decisions.⁹ A key role of the review body should be to ensure that ICANN does not stray from its charter and does not impose on those affected by its decisions any conditions other than those related to the technical or financial stability of registry operators and registrars and the stable and secure operation of the DNS. Such a body must have the power and the duty to set aside any action by ICANN that is not (1) limited to setting and fairly applying the technical and financial requirements for registry

⁸ It might be appropriate also to address concerns that, in approving new gTLDs and taking other actions, ICANN has strayed from its not-for-profit character by giving undue attention to policies that will redound to its own financial benefit.

⁹ ICANN currently provides appeal through international arbitration. That is an expensive option, not suitable to many parties affected by ICANN's decision. A more specialized panel, funded by ICANN, could offer less expensive and more rapid dispute resolution services. It could also develop necessary expertise and, over time, produce a set of decisions with some precedential value. CDT believes that the structure and rules and personnel of a truly independent review tribunal can be put in place over the next year.

operators and registrars and (2) demonstrably based on a substantial consensus of those affected by the decision.¹⁰

4. Establish a Suitable Relationship with Governments: ICANN should give due weight to the views of all governments that have an interest in the operation and coordination of the domain name system. ICANN currently has a Governmental Advisory Committee structure that might be sufficient.¹¹ Because some have called for the creation of different inter-governmental structures that could provide recommendations to ICANN (see statement of Commissioner Reding, described in note 2, above), the new JPA might allow different structures to develop. It might be desirable to distinguish between the role of governments to the extent that they are involved in the administration of their national ccTLDs and those ccTLDs have agreed to be bound by ICANN rules (in which case they would participate in ICANN as stakeholders on a par with other registry operators) and any broader advisory role of governments. In addressing the question of mission, as we recommend above, attention should be given to assuring governments that the mission of ICANN is so narrow and so unthreatening to sovereign interests that an advisory role for governments is adequate. And the suggestions we make below regarding transparency and administrative procedure may go a long way in addressing the concerns of governments that they cannot, under current procedures, effectively participate in their advisory capacity. Ultimately, ICANN must demonstrate its commitment to receive advice from all governments while terminating its special relationship with the U.S government and preserving its independence from supervision or control by any other government or group of governments.

5. Improve and Institutionalize the Transparency and Reliability of Its Processes. ICANN has made substantial progress in improving transparency and the regularity of its decisionmaking procedures. The final steps that must be taken are to institutionalize those improvements and to ensure that all decisions follow the same universally accepted model for sound decisionmaking: publish proposed decisions (if a course is not initially apparent, use a notice of inquiry to solicit ideas, followed by a proposed decision), solicit comments from all stakeholders with adequate time to

¹⁰ ICANN's current review process is fundamentally inadequate because the Board can ignore the findings of the review panel whenever the Board concludes that it is in the best interests of the organization to do so. We believe that, through a combination of contract terms and by-law changes, a legally sound means can be found of binding the organization to accept the findings and conclusions of the independent review tribunal.

¹¹ It has been argued, however, that the GAC is flawed: ICANN has indicated that the GAC has responsibility and superior authority over public policy matters, and "yet [the GAC] is completely separate from ICANN's bottom-up, private sector and civil society-based methods for developing public policy." Submission of Dr. Milton Mueller to the 6 May 2009 Hearing on Internet Governance Arrangements, HLGIG, Brussels http://ec.europa.eu/information_society/policy/internet_gov/docs/mueller.pdf. Dr. Mueller recommends that the better approach is to integrate governments into all of ICANN's structures, where governments would participate under the consensus principle.

participate, issue a final decision in writing that addresses all significant comments disagreeing with the proposed decision. In the case of ICANN, this approach must be combined with a feature common to standards-setting bodies: that a decision must be based on a demonstrated showing of consensus. Compliance with these requirements should be a matter for review by the independent tribunal.

Revise the JPA to Focus on Reforms Associated with a Narrow Mission, Independence and Accountability and Extend It for One Year to Allow International Dialogue and Consensus-Building

Developing these elements and obtaining international consensus cannot be accomplished by September 30 of this year. Therefore, CDT favors a one-year renewal of the JPA, with substantially altered terms that focus on a process and timetable for achieving the five elements of independence and accountability outlined above. Extending the term of the JPA for one year would, if ICANN and the U.S. government act diligently, provide them ample time to work with governments and the Internet community to develop the conditions for full independence and accountability.

In extending the JPA, the U.S. government should state definitively that it is committed to -- and is in no way re-opening -- the fundamentals of the ICANN model (private, non-governmental, narrow mission, not-for-profit, multi-stakeholder, and consensus-based).

As soon as the five conditions outlined above are met, the JPA (as amended) could terminate by agreement between the parties. By revising the JPA to address the issues outlined above, the U.S. government would make clear to the rest of the world that its temporary oversight over ICANN is leading to full independence. By imposing these last remaining contractual conditions, moreover, the DoC would provide the incentive for ICANN and others to develop institutional arrangements that ensure that the functions played by ICANN are sufficiently limited and conducted pursuant to continuing oversight by and accountability to a neutral arbitral or judicial body.

In addition to the JPA, the U.S. government has another contract with ICANN, known as the IANA contract, which addresses several important technical functions. Among these is control over additions to the root zone file, which sits at the top of the DNS hierarchy of tables translating domain names into Internet addresses.¹² Ultimately, the disposition of IANA (the Internet Assigned Numbers Authority) will have to be addressed.

One approach to internationalization of the IANA function would be to create an international Working Group with limited authority to intervene to examine proposed changes to the authoritative root to the extent that such changes pose an unreasonable risk

¹² The other IANA functions relate to the Internet Protocol and the allocation of address blocks to regional registries. The IANA also tracks the use of other protocol parameters, such as port numbers.

to the technical security or stability of the DNS.¹³ Such a Working Group might consist of senior representatives of governments from each region around the world, selected in a manner determined by the governments of each region. It could have the authority to place a time-limited hold on implementation of a particular IANA recommendation regarding changes to the authoritative root zone file solely on the grounds that such change creates an unreasonable risk to the technical stability or security of the DNS.

Leadership by the U.S. Government Is Needed

In addition to the foregoing reforms of ICANN, the U.S. government must make certain binding commitments that clarify its relationship with ICANN. The U.S. government must become a credible advocate for ICANN's independence.¹⁴ The U.S. government should 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. Efforts or threats to exercise control over the DNS (such as the U.S. government unwisely appears to have done in the .xxx case) only fuel calls for measures that could result in control by governments less committed to innovation, competition and free expression. Specifically, the terms of an amended and renewed JPA should provide that DoC will relinquish any right to control the operation of ICANN as an organization, whether through the JPA or otherwise, as soon as the conditions outlined above are satisfied.

One concrete step that the U.S. government can take immediately in this regard is to explicitly and formally disavow any control over ccTLD delegations (except, of course, .us). ICANN/IANA's role with cc delegation should be grounded in RFC 1591. So long as the U.S. government has a contract regarding the IANA function, the U.S. government should commit (possibly in an amendment to that contract that will be enforceable by third parties) to instruct the operator of the authoritative root to implement any and all ccTLD delegation decisions of ICANN. While the U.S. government has never interfered in ccTLD decisions, making such an explicit declaration may help defuse international concerns about U.S. "control" of the Internet.

A Brief Overview of ICANN – What It is and What It Isn't

ICANN's founding mandate was to create a privatized, international and competitive system for registering domain names and preserving the security and stability of the DNS. However, some mistakenly believe the ICANN is involved in "Internet governance" in general or that it is somehow charged with (and has the means of) maintaining the "security of the Internet." Statements by ICANN itself have contributed to this misunderstanding. To the contrary, ICANN was created for the purpose of enabling those who operate and use important but limited aspects of the naming system for the Internet to decide whether and when to establish some few global rules. ICANN can only enforce these rules by means of contracts it enters into with private parties

¹³ This concept was put forth by J. Beckwith Burr and Marilyn Cade. See their paper for details of how they would handle the issue. <http://www.internetgovernance.org/pdf/burr-cade.pdf>.

¹⁴ This is the same as Point III in the Burr-Cade proposal.

(registries and registrars). By and large, those contracts were designed from the outset to cover only a very specific range of issues -- so as to prevent the abuse of ICANN's monopoly control over the root zone file from being used (by ICANN itself or at the behest of governments) to impose content controls or other regulations unrelated to the sound operation of the domain name system itself. While ICANN may have a role to play in facilitating the development of protocols or practices that enhance the security of the Domain Name System, it is not the only body that works on that issue and it does not have any power to require adoption of specific practices by entities (such as ISPs) with whom it does not have contracts.¹⁵ Accordingly, concerns about cybersecurity in general, as well as consumer protection and content regulation and many other things that might be thought of as subjects relevant to "Internet governance," must be addressed by other means.

Once the pragmatic elements of ICANN reform outlined above have been addressed, all governments and users of the Internet can become less concerned about ICANN's potential to operate independently. It will at least be clear when ICANN must say that dealing with problems outside its limited scope are not its responsibility -- and that will help other, more appropriate, entities to know when they should take action.

Furthermore, it is important to recognize that there are many issues regarding the DNS that do not require a global rule. Even with respect to the very limited topics on which it does have competence and some responsibility and some powers created by contracts with others, the alternative to a global rule imposed by ICANN is not the absence of any rules. The alternative is merely that decisions regarding the issue in question will be made on a more local basis, by individual registries or registrars or by governments that regulate them. Such an approach will not harm the Internet. From the outset, those engaged in establishing ICANN believed that there would be a need for relatively few global rules. Indeed, the requirement for demonstrated consensus before a rule could become binding was based on the idea that the best way to decide when a global rule was needed would be to ask all affected whether they believed such a rule was necessary and whether they could agree upon the contents of a proposed rule. Obviously, wrongdoers and irrational holdouts can be ignored in such a process. But the consensus policy process is not (or should not be) based on arbitrary allocations of votes to particular types of "stakeholders." That is why we suggest that expiration of the renewed JPA should be tied to clear establishment by ICANN that its contractual relationships embody this core principle and provide a clear method of appeal to a neutral third party tribunal in the event this principle is violated.

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

¹⁵ It is entirely appropriate for ICANN to provide various services of a non-regulatory nature related to the DNS. For example, ICANN's security role should include facilitating information sharing and coordination among TLDs (including ccTLDs) with regard to security.

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.

CDT has long supported the development of an independent and accountable ICANN. Even before the establishment of ICANN in 1998, CDT was active 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 decision-making. At the Internet Governance Forum in Rio de Janeiro in 2007, we issued a paper on "critical Internet resources" that defended ICANN's non-governmental, private sector structure. Our numerous previous comments can be found at: <http://www.cdt.org/dns/>.

Conclusion

In our view, the only path forward for ICANN is one that makes it clear to all stakeholders that the mission of ICANN is narrow and that the criteria and method for its decision-making are clear. The original concept for ICANN was sound and should be reaffirmed: a private, not-for-profit corporation with a narrow mission, making decisions through a multi-stakeholder, consensus-based approach. In moving to separate ICANN from U.S. government interference, we urge ICANN, the U.S. Department of Commerce, and the international community to expressly address the threat posed by interference by other governments and to engage in a dialogue with the global Internet community to develop mechanisms that will ensure accountability and protect the DNS when the U.S. "umbilical cord" is cut. We urge all stakeholders to act assiduously over the next 16 months to clarify the specific conditions under which the U.S. government will become obligated to terminate its special oversight relationship and to join on equal terms with all other governments in providing advice to an ICANN that, because of the very limited nature of its powers and the contractual and arbitral/judicial constraints on those powers, will be entitled to that trust.

For further information, contact James X. Dempsey, jdempsey@cdt.org, 415-814-1712, or David Johnson, davidj@cdt.org, 202-637-9800 x 302.