Response to the National Telecommunications and Information Administration's Notice of Inquiry on the Management of the Domain Name and Addressing System

By the Center for Democracy & Technology

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Preface:

The Center for Democracy & Technology (CDT) is a Washington-based nonprofit organization that works to promote democratic values and constitutional liberties in the digital age. CDT works with public interest groups, technology companies, individuals, regulators and lawmakers to support rules and structures that preserve the essentially democratizing nature of the Internet.

From the outset of the global Internet governance debate, which began in earnest with the establishment of the Internet Corporation for Assigned Names and Numbers (ICANN) in 1998, CDT has played an active role. Working through the ICANN process, CDT has advocated for changes to make the organization more transparent and representative. Outside of ICANN, through its Global Internet Policy Initiative, CDT has worked on the ground in developing nations to promote the creation of legal and regulatory structures that support open Internet development. CDT is actively committed to bringing together voices from industry, civil society and governments to address the unique issues posed by this global medium.

ICANN approaches the next step in its evolution in a global environment that has changed dramatically since its inception:

The Internet's evolution from an academic experiment to a global engine for free speech, political organization and commerce has occurred at a pace and on a scale that no one -- not even its most ardent early proponents -- could have foreseen. Driven by historic leaps

in technical innovation and fostered by a light-touch regulatory environment, the Internet is now an essential tool for governments, companies and most importantly, individuals, throughout the world.

More than nine years ago, the US Government began the process of transitioning the Internet's core functions to private sector oversight. It was an unprecedented, forward-thinking decision that was critical in encouraging broader global acceptance of the medium. The nongovernmental body that emerged from that process -- the Internet Corporation for Assigned Names and Numbers (ICANN) -- has been an effective, if flawed, steward of the Domain Name System (DNS) that lies at the heart of all Internet communication.

Initially, the US Government intended to maintain its special oversight role over ICANN for the first two years of the organization's existence -- in theory, long enough for the fledgling nonprofit company to establish stable control over the DNS and to develop a robust, bottom-up and transparent decision-making process that represented the needs of all Internet users. It is clear now that the original timetable established for ICANN was overly ambitious. Nine years later, questions remain about how well ICANN has met those initial goals, and the US Government retains an increasingly controversial oversight role in the ICANN process.

The latest MOU with ICANN expires in September, and as part of the process of renewing that agreement, the National Telecommunications and Information Administration (NTIA), which oversees ICANN directly, has solicited public comments on how well ICANN has met the goals laid out for it in the MOU and the 1998 DNS White Paper. Specifically, NTIA asks whether ICANN has made enough progress to assume full, unsupervised control over the DNS. As NTIA notes in its notice of inquiry, the MOU identifies a series of milestones that ICANN was required to meet before severing its ties to the US Government.

These are important questions, and the NTIA is to be commended for initiating this discussion in advance of reinstating its agreement with ICANN. As recent experiences in the two-year World Summit on the Information Society (WSIS) demonstrate, issues of Internet Governance have grown increasingly contentious, and could eventually become destabilizing, as nations that oppose US Government involvement consider the use of alternative addressing systems that could undercut the Internet's value as a global, interconnected medium. A detente of sorts was reached in November 2005 when world leaders agreed to leave the current governance structure untouched and to convene an Internet Governance Forum (IGF) to discuss lingering issues. Still, many nations remain dissatisfied with the status quo, and are likely to remain so as long as the US Government retains a special role in Internet oversight.

Meanwhile, the stakes in the Internet governance debate have increased dramatically since ICANN was first conceived. Although the concerns raised by members of the international community about the US Government's disproportionate control over the DNS management were legitimate, many of the alternatives those nations proposed

during the WSIS process were troubling. None of the governments involved in the discussion pushed for ICANN to become a truly independent, nongovernmental entity, as was originally conceived. Rather, most nations opposed to US involvement in the ICANN process supported various iterations of a proposal that called for replacing light-touch NTIA oversight with control of ICANN by a massive global bureaucracy akin to (and possibly a part of) the United Nations' International Telecommunications Union (ITU). Such bodies are fundamentally unsuited to the task of managing ICANN or of operating any governance process intended to have a bottom-up management structure.

Although we in the public interest community remain concerned with US involvement in ICANN, it is difficult to imagine how replacing the US government with an even more complex, slower moving, international bureaucracy would be an improvement. With a few important exceptions, NTIA has been a responsible steward for ICANN, taking a largely hands-off approach that has benefited the global Internet community. Clearly, an ICANN process free of direct government control is preferable to the current structure, but if the only viable options for the ICANN are continued US Government oversight or international control, many of in the Internet community will find themselves in the unfortunate position of supporting the status quo.

To that end, it may be useful to discuss whether the goals and milestones established nearly a decade ago for ICANN on its path to full autonomy remain adequate in the face of a drastically different global environment. Certainly the goals of fostering stability, competition, representation and private, bottom-up coordination remain as relevant today as they were eight years ago, but in light of recent developments it is important for the Internet community to at least ask whether reaching all of those milestones (something ICANN has yet to accomplish) would be sufficient cause to cut the tether between ICANN and the US Government.

Once a tool for enhancing communication, the Internet has become an essential underpinning to free expression, democratic organization and commerce. The first obligation for those in control of its core functions must be to "do no harm." At the same time, global pressures are such that simply clinging to existing structures may no longer be a viable option. The very stability of the global Internet may depend on addressing these issues in a way that both respects the needs of the international community, and preserves the light-touch regulatory environment essential to the Internet's continued evolution.

ICANN has made important progress on competition and stability, but still falls short on representation and bottom-up management:

Since its inception, ICANN has been a lightning rod of legitimate criticism, as well as a convenient scapegoat for people dissatisfied with aspects of the Internet beyond the control of any single management body. Many of those criticisms have been well earned. ICANN has yet to achieve the procedural transparency, and more importantly the broad

involvement of Internet users essential to its bid for global legitimacy. On the issue of representation specifically, ICANN has taken notable steps backward, hastily abandoning direct public representation after an abortive experiment with global elections.

But for all of its flaws, it is equally important to note the things ICANN has done well. ICANN's first mission was to introduce competition to a domain name market that was under the control of a government-sanctioned monopoly at the time of its creation. ICANN has made remarkable strides in introducing competition to the wholesale and retail domain name markets. Buyers of Internet addresses can choose from among hundreds of retail registrars selling addresses in dozens of top-level Internet domains like .com, .info and .biz -- all operated by different wholesale registries. As options for consumers have increased, prices have plummeted, and address sellers have broadened their service offerings in order to woo consumers in the competitive market. As part of its mission to increase competition, ICANN has introduced several new generic top-level Internet domains, further increasing the options available to consumers. Although there is some debate over the process ICANN used to create those domains, it must be noted that the domains were introduced to the DNS in a way that respected and preserved its underlying stability.

Preserving the stability of the DNS is another of ICANN's charter responsibilities, and here too, the organization has an impressive track record. The DNS under ICANN oversight has resisted both internal failures and external attacks. Much of that stability can be attributed to the ingenious design of the Internet's addressing system and to the extensive investments in security and redundancy made by the companies and organizations that operate the Internet's infrastructure, but credit too is owed to ICANN, which has made stability its top priority in recent years. It is ICANN's track record in preserving DNS stability that makes so many in the Internet community reticent to consider major changes to global Internet management. Any future changes to Internet management must be made in a way that preserves the strong framework for global DNS stability established by ICANN.

While ICANN has made commendable progress in fostering competition and preserving DNS stability, the same cannot be said for the important goals of facilitating broad user representation and developing a system of private, bottom-up coordination.

ICANN's failings are most apparent in the areas of representation and transparency. Under its original charter ICANN was intended to have a board divided equally between Internet "stakeholders" (Internet companies, standards-setting bodies, etc) and "at-large" members elected to represent the broad Internet community. Although those Internet stakeholders have always had a place at the ICANN table, the at-large representation has never materialized in a meaningful way. ICANN experimented with global at large elections in 2000, allowing Internet users from five regions of the world to elect one representative each to the 19-member board of directors. While still far short of the 50-50 mix envisioned in ICANN's founding documents, it was a strong step toward representation. But in 2002, ICANN inexplicably voted to end public elections altogether and restructure its board makeup permanently. Now, the ICANN board includes no

elected representatives, and ICANN's poorly coordinated efforts to develop an "at-large constituency" to represent Internet users have yielded little success.

Achieving representation would address many of the underlying concerns about ICANN. At a core level, a representative ICANN would be more responsive and accessible to ordinary Internet users. Also, regular elections would give Internet stakeholders around the world an outlet to redress their grievances with ICANN and play an active, definable role in the process. The current international tension over ICANN may never have reached its current level, had ICANN early on committed to establishing a meaningful system of global representation.

Equally troubling is that ICANN has made little effort and even less progress toward improving the transparency of its decision-making processes. Too much deliberation on important issues still takes place behind closed doors and on private phone calls. ICANN's non-appointed, full-time staff is still perceived as wielding too much influence in setting ICANN policy. Absent real representation, this lack of transparency has dealt a serious blow to ICANN's efforts to establish a truly bottom-up coordination structure. Most people outside the ICANN structure and even some that are ostensibly participating in the "bottom-up coordination" remain perplexed as to how ICANN reaches its decisions and which stakeholder groups maintain the real influence with decision makers.

Regardless of any other issues, no serious consideration of cutting the ties between ICANN and NTIA should begin until 1) the organization has demonstrated that it can operate in an open and transparent manner and 2) meaningful structures have been put in place to ensure that ordinary Internet users assume and retain an appropriate role in the ICANN decision-making process.

NTIA may need to study the impact of the changed global environment on the ICANN process and consider new milestones for ICANN autonomy:

It has become commonplace in the ICANN debate for defenders of the status quo to simply point out the ways in which ICANN has failed to meet its obligations under the MOU as a tactic to head off any debate about altering the organization's oversight. Given the extent of the work that remains to be done in establishing appropriate representation and transparency, it is reasonable to assume that ICANN won't accomplish all of its tasks anytime in the near future. But while members of the US Internet community may have determined that maintaining the status quo is the best of all the flawed alternatives currently available, it is still important -- for the sake of having a meaningful debate -- to ask whether those tasks should remain the only prerequisites for creating an autonomous ICANN.

To be clear, all of the existing milestones remain relevant. An autonomous ICANN would need minimally to preserve DNS stability, encourage competition, provide appropriate representation for all stakeholders and operate in a transparent, bottom-up manner. Future agreements with ICANN should be written with the aim of urging

ICANN to continue striving to meet those fundamental requirements. But none of those accomplishments will be of any value if ICANN is cut free from its existing US government tethers only to be recaptured by other governments.

If the ultimate goal for ICANN remains that it evolve into an autonomous, nongovernmental body with a representative, bottom-up management structure, it is important to examine the potential threats such an organization could face in the current geopolitical environment. The recently concluded World Summit on the Information Society (WSIS) demonstrated that there is considerable interest among governments in playing a more active role in Internet governance. For supporters of a nongovernmental management structure, replacing US Government oversight with that of a intergovernmental bureaucracy would solve nothing. Under the current, imperfect structure, ICANN is protected from external capture by its contractual bonds with the US Government, but it remains unclear how an autonomous ICANN would fare upon dissolution of those agreements.

It may be worthwhile for NTIA to commission an expert panel to study the issues associated with freeing ICANN from US oversight and to propose mechanisms to ensure that a potentially autonomous ICANN would be able remain autonomous upon release from its contractual obligations. And while capture is the most serious issue not addressed by the existing set of tasks and milestones, it may also be worthwhile for such a panel to engage in a broader examination of what new considerations should be taken into account as NTIA and ICANN prepare for the future. Such a study may suggest important new milestones for ICANN and one that helps preserve the continued stability of DNS management.

NTIA should consider lessening the impact of its involvement in ICANN, while upholding its vow to preserve DNS security and stability:

The days of Internet governance debates taking place in an America-centric academic vacuum have long since passed. Heightened international scrutiny of the process is testament to the growth and transformative power of the Internet, and is to be welcomed, but it has also dramatically raised the stakes of these sorts of discussions. Although there are clear arguments to be made that ICANN is not ready to stand on its own, the US Government cannot afford to ignore the mounting concerns raised of those who feel the time has come for the United States to relinquish its special role in global Internet governance.

Even as NTIA gauges the progress ICANN has made toward the milestones established in the MOU, and examines what other issues it may need to consider as it explores the possibility of relinquishing its contractual ties, the agency should also consider what steps it can take to lessen its own impact on the ICANN process. As noted above, NTIA has done a mostly laudable job of not interfering with ICANN's decision-making process, but its record is not unblemished. Members of the world Internet community were rightly

outraged when the NTIA sent a letter pressuring ICANN to delay the creation of a new ".xxx" Internet domain intended for use by adult content providers. To those critical of the current structure, that episode provided the clearest illustration yet of the inherent inequity of US Government oversight.

ICANN may not be ready to stand on its own, but that should not prevent the NTIA from looking into ways in which it may be able to contractually lessen its involvement in the ICANN process, without severing its ties completely. A good-faith plan to reduce the already limited amount of NTIA involvement in ICANN's activities would demonstrate to the world that the United States is serious about promoting non-governmental, bottom-up control of the DNS.

Finding the right balance in this discussion is likely to be as difficult as it is necessary. The US Government has rightly affirmed that it will not take any action that could have the effect of upsetting the security and stability of the DNS, but that should not be interpreted into a strategy of obstinately defending a flawed status quo. We must find ways to make ICANN stronger and more independent, even as we ensure that it be allowed to continue its mission free of unnecessary government interference.