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"Stakeholder Perspectives on ICANN: The .SUCKS Domain and Essential Steps to Guarantee

Trust and Accountability in the Internet's Operation"

Before the

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Subcommittee on Courts, Intellectual Property and the Internet

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Chairman Issa, Vice Chairman Collins, Ranking Member Nadler, and members of the subcommittee, I appreciate the opportunity to share with you my thoughts about the ongoing efforts to promote trust and accountability in the governance of the Internet. I am vice president of the Information Technology and Innovation Foundation (ITIF). ITIF is a nonpartisan think tank whose mission is to formulate and promote public policies to advance technological innovation and productivity. In my testimony, I will discuss the challenges presented by the U.S. government's decision to relinquish its historical oversight of key technical Internet functions and the importance of U.S. government oversight of this transition to ensure the adoption of the accountability mechanisms proposed by the global Internet community.

The U.S. Decision to Relinquish Oversight Creates Risk to the Stability of Internet Governance

While the U.S. government has long championed the goal of building an inclusive, global community of stakeholders to govern the Internet, it has also played a direct role in ensuring the security, stability, and resiliency of the Internet through its historical oversight of the Internet Assigned Numbers Authority (IANA) functions by the National Telecommunications and Information Administration (NTIA) in the U.S. Department of Commerce. The IANA functions include managing the root zone of the Domain Name System (DNS), allocating Internet Protocol (IP) addresses, and various other technical functions integral to the stability and security of the Internet. The DNS is the system that translates URLs, such as www.congress.gov, into IP addresses, such as 140.147.249.9. These functions were originally managed directly by contracts held by the U.S. government, but the U.S. government decided to transfer the management of the DNS and related functions to the private sector after it began to allow commercial use of the Internet in the 1990s. While the IANA functions deal mostly with technical issues, these issues can have an impact on a variety of important policies including intellectual property, free speech, privacy, trade, and commerce.

Last year, the NTIA announced that it intends to relinquish its oversight of the IANA functions before the existing IANA contract with the Internet Corporation for Assigned Names and Numbers (ICANN) expires in September 2015.[1] As I testified last year, this transition will create unique risks and challenges for Internet governance because ICANN, in its current form, lacks accountability mechanisms to ensure that decisions made about the DNS are in the public

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[1]. "NTIA Announces Intent to Transition Key Internet Domain Name Functions," National Telecommunications and Information Administration, March 14, 2014, http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions.

interest.[2] Without the U.S. government serving as a backstop or additional accountability

measures in place, ICANN's governance could be co-opted by special interests or foreign

governments. In addition, ICANN may choose to put its own interests ahead of those of the

global Internet community. For example, ICANN could expand or increase the fees it charges for

key Internet resources to grow its own revenue at the expense of the best interests of global

Internet users. While the current ICANN leadership has presented a positive vision for the future

of the organization, any pledge, commitment, or oath it makes is not binding unless there is some

accountability mechanism in place to back up that promise. Without U.S. oversight, ICANN

needs new accountability measures that cannot be overturned by the whims of ICANN's current

or future leaders. The reason the transition is so important is because this represents the last

opportunity for the U.S. government to force ICANN to improve its governance.

ICANN Has Repeatedly Shown It Lacks the Capacity to Operate Without Oversight

One reason for such grave concerns about a future where ICANN is operating without

any oversight is that the organization has a disappointing history of failing to uphold its

commitments. Last year, an investigation into ICANN found that the organization ignored

thousands of complaints about illegal websites that it was contractually obligated to investigate.

For example, U.S. law enforcement agents tried to work with ICANN to take action against an

online pharmacy which allegedly sold controlled substances that caused a man's death, but

ICANN's compliance staff failed to contact the associated domain registrar to investigate the

complaint.[3] In addition, even when ICANN officials were alerted to the organization's

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[2] Daniel Castro, "Should the Department of Commerce Relinquish Direct Oversight of ICANN," Testimony before the Subcommittee on Courts, Intellectual Property and the Internet, April 10, 2014, http://www2.itif.org/2014-castro-icann-testimony.pdf.
[3] Jeff Elder, "Icann, Regulators Clash Over Illegal Online Drug Sales," *The Wall Street Journal*, October 27, 2014, http://www.wsj.com/articles/icann-regulators-clash-over-illegal-internet-drug-sales-1414463403.

compliance department's repeated failures to uphold its contractual commitments, it still did not address the problem while publicly proclaiming it had.[4] Similar enforcement problems by ICANN have contributed to the rise of so-called "revenge porn" websites that feature sexually-explicit non-consensual photographs and videos.[5] ICANN's consistent failure to enforce its contracts, even while under U.S. government oversight, bodes badly for a future where even this limited restraint has been lifted.

Another example of ICANN's failure to uphold the public interest can be found in the current dispute over .SUCKS. In 2014, ICANN authorized the Vox Populi Registry to begin operating .SUCKS, a new global top-level domain (gTLD). This gTLD would allow users to access a website using an address such as "McDonalds.Sucks" rather than "McDonaldsSucks.com." As part of the process of creating the new gTLD, the Vox Populi Registry has created a highly dubious scheme in which it asks companies with well-known brands to pay large sums of money ($2,499 and up) to defensively register these domains to protect them from those who would disparage their brands.[6] Naturally many companies see this as nothing more than digital extortion that hurts both their brands and their consumers. ICANN has done little to address these complaints or take action to bring the Vox Populi Registry into full compliance with its contractual obligations which prohibit this type of behavior. However, ICANN has profited from the addition of this new gTLD. Once again, this shows that ICANN is willing put its own interests ahead of those of the global Internet community.

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[4] For more details, see the presentation by Garth Bruen available at
http://www.knujon.com/icann/APPROVEDONLINEPHARMACY_public.pdf.
[5] Craig Timberg, "How violent porn sites manage to hide information that should be public," *Washington Post*, December 6, 2013, http://www.washingtonpost.com/business/technology/how-violent-porn-sites-manage-to-hide-information-that-should-be-public/2013/12/06/e0861378-3773-11e3-ae46-e4248e75c8ea_story.html.
[6] Gregory Shatan, Letter to Akram Atallah, President of Global Domains Division, ICANN. March 27, 2015, http://regmedia.co.uk/2015/03/27/ipc-sucks-letter-27mar15.pdf.

ICANN Needs Strong and Binding Accountability and Transparency Mechanisms to Become Trustworthy

In response to concerns about the transition as well as ICANN's ability to govern properly, the global Internet community has worked diligently over the past year to develop two proposals: one for the IANA transition and one for enhancing ICANN accountability.[7] Echoed throughout these proposals are a number of key principles to enhance oversight and accountability which have been endorsed by multiple stakeholders, including ITIF.[8] These principles include:

- Community of Stakeholders as Ultimate Authority: The community of ICANN stakeholders should be the ultimate overseer of the DNS, responsible for: promoting a single, decentralized, open, and interoperable Internet; preserving the integrity, transparency and accountability of IP numbers and their assignments; managing domain names, and protocol number assignments; maintaining the security, stability and resiliency of the DNS; and meeting the needs and expectations of global customers and partners of the DNS.

- Separation of Functions: To ensure the form of oversight and accountability that is appropriate for distinct activities, there should be a strong and clear separation of these three functions: policy making, dispute resolution and implementation.

- Policy Making Function: ICANN's existing structure of Supporting Organizations (SOs) and Advisory Committees (ACs), which provide technical and policy

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[7] Drafts of these proposals are now publicly available. See "2nd Draft Proposal of the Cross Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions," ICANN, April 22, 2015, https://www.icann.org/public-comments/cwg-stewardship-draft-proposal-2015-04-22-en and "Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability)," ICANN, May 4, 2015, https://www.icann.org/public-comments/ccwg-accountability-draft-proposal-2015-05-04-en.
[8] "Key Principles for Coordination of Internet Unique Identifiers" is also available electronically at http://www2.itif.org/2014-key-principles-for-coordination.pdf.

guidance and which comprise its bottom-up, consensus multi-stakeholder model, should continue to be responsible for policy making. Their membership should be representative of the community of ICANN stakeholders and of the different regions of the world, including developing and developed countries.

- Dispute Resolution Function: ICANN's Independent Review Panel should be expanded to ensure a balanced structure with multi-stakeholder participation, strengthened into a new independent dispute resolution panel responsible for resolving disputes involving ICANN, and endowed with the final authority to impose discipline and sanctions and to remove board and staff members in defined egregious circumstances. This remedy process should be transparent, accessible, and timely.

- Transparency: ICANN should be audited annually by an independent accounting firm, and transcripts and detailed minutes of all meetings, including those of ICANN's Board of Directors, as well as complete documents and records should be made readily available.

- Consensus: A significant supermajority should be required for final action on all policy decisions to demonstrate broad support by the community of ICANN stakeholders.

- Budget and Revenue Limitations: ICANN's budget and the revenue to support it should be limited to meeting ICANN's specific responsibilities and should not change without SO and AC approval and the agreement of the registries and registrars who pay ICANN fees.

U.S. Oversight of Transition Is Necessary to Uphold Values of Global Internet Community

Some might argue that the U.S. government should stay out of the transition lest it appear that it is unfairly determining the outcome. However, if the U.S. government sits on the sidelines during the transition it risks letting the ICANN board or other special interests trample the views of the global Internet community. Instead, the U.S. government should use its current oversight authority to insist that it will not sign-off on the transition unless the ICANN board adopts the unadulterated proposals put forth by the global Internet community. This means that ICANN should not attempt to dilute the strength of the proposals by diminishing the role of stakeholders or reducing the oversight and accountability mechanisms. In addition, the U.S. government should insist that ICANN adopt and implement both the proposal for the IANA transition and the proposal for enhanced ICANN accountability before it authorizes the transfer. This insistence will ensure that ICANN does not later fail to implement the reforms demanded by the global Internet community once it is no longer under the watchful eyes of the U.S. government. Close U.S. government oversight of the transition is necessary because ICANN had made it clear that it may dismiss the proposed solutions from global Internet stakeholders. Most notably, ICANN's CEO Fadi Chehade's spoke recently at a forum with domain name industry insiders where he disparaged the independent team working to create more accountability within ICANN.[9] This suggest that ICANN's leadership has little respect for the proposals put forth by the global Internet community and may decide to override their voices as it suits them after freed from U.S. government oversight, regardless of what they commit to prior to the transition.

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[9] Chehade said, "There is no one today in the CWG [Community Working Group] who even understands how the functions work. I sent my CTO David Conrad to explain to them how the system works. ... Frankly, no one there even knew that he was talking about." See Kieren McCarthy, "Caught on camera: ICANN CEO slams the internet's kingmakers," *The Register*, March 24, 2015, http://www.theregister.co.uk/2015/03/24/icann_ceo_iana_transition/?mt=1427304151420.

Conclusion

The future of Internet governance is at a crossroads. For more than a decade, the U.S. government has served as a referee in the geopolitical game that constitutes global Internet governance, not to give an advantage to any particular stakeholders, but to make sure there was a level playing field for all. While the U.S. government does not directly intervene in ICANN's operations, its oversight has acted as a deterrent to most egregious malfeasance. Yet even today ICANN still manages to flout its own policies and procedures. As the U.S. government retires from this position and a new system of oversight and accountability emerges, it has an obligation to ensure that the will of the global Internet community prevails and no special interests, including foreign governments, are able to disproportionately exert influence on the final outcome. And it has an obligation to ensure that ICANN does not turn into the world's largest unregulated monopoly. This means that it should not accept any proposed transition plan that does not fully address the threats posed by this transition and reflect the will of the global Internet community. Through its oversight, Congress has the ability to send a clear and unambiguous message to ICANN's leadership that it will not accept anything short of a full embrace of the accountability, transparency, and oversight reforms recommended by the global Internet community. By insisting on good governance, Congress can help set ICANN on a positive trajectory that will maintain the security, stability, and resiliency of the Internet while allowing participation from a global set of stakeholders.