Written Testimony of J. Beckwith (Becky) Burr[1]

"Protecting Internet Freedom: Implications of Ending U.S. Oversight of the Internet
Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts
United States Senate
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Many of the witnesses you will hear this morning have a long history of involvement in the multistakeholder policy development processes coordinated by the Internet Corporation for Assigned Names and Numbers (ICANN). I bring a somewhat unique perspective to the discussion in that I participated in the public consultations leading up to its creation in 1998, and since that time have had the opportunity to represent a wide variety of stakeholders. As head of NTIA's Office of International Affairs from 1997 to late 2000, I led the inter-agency team that conducted the public consultation and policy development process resulting in the 1998 Statement of Policy on the Management of Internet Names and Numbers, widely referred to as the White Paper,[2] which provided for the now-imminent transition. I negotiated the 1998 amendment to the Department's Cooperative Agreement with Verisign (then, Network Solutions, Inc. or NSI) that – for the first time – required the operator of the Domain Name System's (DNS) authoritative root (the "A" Root) to seek United States Government (USG) approval for changes to that root. Amendment 11 to the Cooperative Agreement specifically contemplated a temporary role for the Commerce Department and expressly provided for transfer of that approval authority to a "NewCo" that turned out to be ICANN.[3] And, until I returned to the private sector in late 2000, I represented the United States on ICANN's Government Advisory Committee.

Since that time, as a lawyer in private practice and now as in-house counsel, I have worked on a variety of ICANN policy matters of interest and concern to top level domain registry operators. I currently serve on the Country Code Name Supporting Organization Council representing North

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[2] UNITED STATES DEPARTMENT OF COMMERCE, Management of Internet Names and Addresses. Docket Number: 980212036-8146-02, available at: https://www.ntia.doc.gov/federal-register-notice/1998/statement-policy-management-internet-names-and-addresses

[3] Amendment 11 to Cooperative Agreement Between NSI and U.S. Government Dated: 7 October 1998, available at: https://archive.icann.org/en/nsi/coopagmt-amend11-07oct98.htm.

America, and Registries and Registrars have elected me to the ICANN Board for a three-year term beginning in November. I am testifying today in my personal capacity and not as a prospective member of ICANN's Board.

Over the past two years I have focused on ICANN accountability, serving as a member of the cross community working group (CCWG) tasked with reviewing and enhancing ICANN's accountability mechanisms in advance of the upcoming transition. I chaired the sub-group that drafted the revised statement of ICANN's Mission Statement, Commitments, and Core Values, now enshrined in the ICANN bylaws. I currently chair the sub-group responsible for implementation of the bylaws changes providing for an independent, accessible, and binding mechanism to ensure that ICANN acts at all times within the newly enumerated limits of its Mission, and in accordance with its bylaws obligations.

My focus on accountability issues and the creation of an independent judiciary for ICANN came as no surprise to the ICANN stakeholder community because, while I am convinced that the multistakeholder model is the very best approach to coordinating the DNS, I have never been shy about criticizing important aspects of ICANN's execution. Over the years I have defended the boundaries of ICANN's limited remit against over-reach, and I have repeatedly called for the creation of a truly independent judicial function with the ability to create precedent that proactively guides ICANN's actions. I am not here to tell you that ICANN has been wholly transformed or that there is no room for improvement. However, I can say that what started out in 1998 as an experiment to preserve private sector leadership in DNS management – and to prevent takeover of that function by an intergovernmental body – now has the processes, procedures, safeguards and tools to ensure that the DNS continues to be coordinated by the private sector – including business, the technical and academic communities, and civil society - in the public interest. In addition, the maturity of the ICANN model has been tested and proven resilient, particularly in the more than two years since the Commerce Department announced its intention to complete the transition started in 1998.

The transition now scheduled to take place on October first is just the final step in a process that began in 1992. It reflects the reality of DNS coordination today and the commitment of every US president since then to preserve inclusive, private sector coordination of the DNS.
In my testimony this morning I will discuss why the transition should go forward now, and why I believe the concerns expressed by critics of the transition are misplaced. But I'd like to begin by providing a historical perspective on this process.

US Policy Statement on Management of the Domain Name System[4]

The transition from US government management of the DNS actually began in 1992, when Congress authorized the National Science Foundation (NSF) to allow commercial activity on its high-speed network, then known as NSFNET.[5] This facilitated connections between NSFNET and rapidly expanding commercial network service providers, paving the way for today's Internet. The National Science Foundation entered into a cooperative agreement with Network Solutions, Inc. (NSI) to manage key registration, coordination, and maintenance functions for the network. The NSF-NSI Cooperative Agreement permitted NSI to charge user fees, and all USG funding ceased shortly thereafter. By 1996, when the Cooperative Agreement was first set to expire, NSF determined that its role was no longer necessary or appropriate. At about the same time, the Defense Advanced Research Projects Agency (DARPA), which had funded certain DNS management activities performed by Dr. Jon Postel at the University of Southern California's Information Sciences Institute (ISI), also decided to terminate its funding and oversight. At the time, both NSF and DARPA assumed that a plan put forth by a technical coalition would go forward.[6] While largely composed of technical experts, the International Ad Hoc Committee (IAHC) planning group reflected increasing demands by governments around the world for a greater voice in DNS management, and two UN bodies – the International Telecommunication Union (ITU) and the World Intellectual Property Organization (WIPO) – were poised to play a formal role in DNS management. But as a result of rapid commercialization of the Internet, by 1997 the technical community was no longer fully representative of the diversity of stakeholders, businesses and commercial users in the United States and elsewhere who also began to demand a seat at the management table.

When it appeared that the IAHC plan would not garner sufficient support from non-technical segments of the Internet community, the Commerce Department stepped in on a temporary basis

[4] This history of DNS management summarizes a more extensive history contained in the White Paper referenced in Footnote 1 above.

[5] See Scientific and Advanced-Technology Act of 1992; Pub. L. 102-476 § 4(9), 106 Stat. 2297, 2300 (codified at 42 U.S.C. § 1862 (a)).

[6] The coalition included Jon Postel, technical members of the Internet Society, a representative of the ITU and WIPO, and called itself the International Ad Hoc Committee.

to facilitate consensus on DNS management. NTIA published a "green paper" for public comment, setting out principles for DNS management going forward – stability, competition, private, bottom-up coordination, and representation.[7] NTIA managed a robust public consultation process resulting in the White Paper, issued in June of 1998, which affirmed the US commitment to continued private sector management of the DNS and called on stakeholders to create a new, non-profit entity to organize and manage the bottom-up policy development processes needed to fulfill this role. Our goal was simply to evolve traditional management of the DNS by the technical community to accommodate the increasing diversity of Internet stakeholders.

In anticipation, the Commerce Department assumed NSF's contract with Network Solutions, and extended the Cooperative Agreement for the express purpose of facilitating the smooth transition of every day authority from NSI to the new entity. Amendment 11 to the Cooperative Agreement, entered into in Octover of 1998, required NSI to seek USG approval for changes to the authoritative root for the first time. No such obligation existed prior to 1998, and with one exception, Network Solutions had operated quite independently of governmental authority.[8] Amendment 11 also expressly provided for transfer of that approval authority to a "NewCo" that turned out to be ICANN.

The Transition Will Not Create Antitrust Incentives for ICANN to Change its Status

The White Paper specifically provided that ICANN would be subject to antitrust laws. Indeed, the White Paper affirmatively anticipated that competition law would serve as a healthy constraint on ICANN.[9] ICANN has been subject to antitrust lawsuits, and no court has ever

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[7] Improvement of Technical Management of Internet Names and Addresses; Proposed Rule. (February 20, 1998) Docket Number: 980212036-8036-01, available at: https://www.ntia.doc.gov/federal-register-notice/1998/improvement-technical-management-internet-names-and-addresses-proposed-.

[8] Critics of the transition cite that exception as evidence that ICANN enjoys some sort of antitrust immunity. See, An Internet Giveaway to the U.N., WSJ August 28, 2016, available at: http://www.wsj.com/articles/an-internet-giveaway-to-the-u-n-1472421165. *Name.Space, Inc. v. Network Solutions, Inc., et al*. 202 F. 3d 573 (2d Cir. Jan. 21, 2000), as discussed below, the facts do not support that argument, except in a hypothetical situation that does not reflect the relationship between the Department of Commerce and ICANN.

[9] The White Paper noted that Green Paper commenters suggested that the U.S. Government should provide full antitrust immunity or indemnification for the new corporation. The White Paper rejected this and stated:

> "[a]pplicable antitrust law will provide accountability to and protection for the international internet community. Legal challenges and lawsuits can be expected within the normal course of business for any

found that it enjoyed immunity from those suits by virtue of its contract with the USG or for any other reason.[10] It is, of course, possible that ICANN would have some derivative immunity for actions taken at the *explicit direction of the US government*. For example, in Name.Space v. Network Solutions, Inc., the Second Circuit held that Network Solutions' refusal to add new top level domains at the request of Name.Space's predecessor, PGMedia, was entitled to implied antitrust immunity because "such conduct was expressly directed by the government and the terms of the Cooperative Agreement" and in furtherance of the transition process outlined in the White Paper.[11] Before that kind of immunity could apply, however, the Department of Commerce would have to direct ICANN to do – or not do – something.

The underlying concern, of course, is that antitrust liability might incentivize ICANN to seek protection as an international organization with privileges and immunities typically enjoyed by those organizations. I agree that would be a very negative outcome. But, in addition to the fact that ICANN has operated for 18 years subject to the antitrust laws of the United States - *and every other jurisdiction in which it conducts business* - the revised bylaws erect powerful barriers to ICANN's doing so. The revised Articles of Incorporation provide that ICANN is a California Nonprofit Public Benefit Corporation Law organized for charitable and public purposes. The revised bylaws also retain the requirement – as a "fundamental Bylaw" - that ICANN remain rooted in the private sector (including business, stakeholders, civil society, the technical community, and end users).[12] Neither of these provisions can be changed without the

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enterprise and the new corporation should anticipate this reality. The Green Paper envisioned the new corporation as operating on principles similar to those of a standard-setting body. Under this model, due process requirements and other appropriate processes that ensure transparency, equity and fair play in the development of policies or practices would need to be included in the new corporation's originating documents. For example, the new corporation's activities would need to be open to all persons who are directly affected by the entity, with no undue financial barriers to participation or unreasonable restrictions on participation based on technical or other such requirements. Entities and individuals would need to be able to participate by expressing a position and its basis, having that position considered, and appealing if adversely affected. Further, the decision making process would need to reflect a balance of interests and should not be dominated by any single interest category. If the new corporation behaves this way, it should be less vulnerable to antitrust challenges." See, *White Paper*, supra Footnote 1.

[10] In *Manwin Licensing v. ICM Registry* (2012 U.S. Dist. Lexis 125126) ICANN argued that it should not be liable under antitrust claims because it is not engaged in commerce. The judge in that case flatly rejected ICANN's argument.

[11] Name.Space v. Network Solutions, Inc. supra Footnote 6.

[12] Bylaws Section 12(b)(vi)

affirmative support of stakeholders acting through the "Empowered Community" mechanism set out in ICANN's revised bylaws.

This sets a very high bar for altering ICANN's so-called "fundamental bylaws." As Professors John Coffee and Dana Reiser report on ICANN's post-transition corporate governance structure noted, the diversity of ICANN stakeholders, both within and across Supporting Organizations and Advisory Committees is a natural and robust protection against the kind of capture that would be required to support a move out of California, let alone an affiliation with the ITU.[13] Moreover, before any such move could take place, one would have to repeat the process – which took nearly two years, tens of thousands of volunteer hours, and millions of dollars - by which the community concluded that ICANN should adopt the "Sole Designator" mechanism available to California non-profits.

To be sure, there are those in the ICANN community who would have preferred a different outcome, and who will no doubt continue to push for a re-examination in the course of ongoing accountability work. But to the extent the ongoing discussion of "jurisdiction" produces proposals for change, I expect such proposals to relate to choice of law and venue provisions in ICANN's contracts. For example, ICANN's agreements with registries and registrars currently specify that disputes will be resolved under California law and resolved in California courts. That will continue to be true for contracted parties based in the United States. But ICANN does operate in many countries around the world, and contracts with registries and registrars around the globe. European registries and registrars may prefer to resolve contract disputes in, for example, Belgium, and Asia Pacific companies would prefer to do so in Singapore – both places where ICANN has a presence. This is the main purpose of Work Stream 2's "jurisdiction" review,[14] and this kind of flexibility (which is routine in international contracting arrangements) for contracted parties has no affect on ICANN's incorporation in California. Rather, this kind of flexibility would further undermine the arguments of those who would prefer to locate ICANN outside the United States.

The Transition Need Not and Should Not Be Delayed Pending Completion of "Work Stream 2"

[13] NTIA IANA Transition Proposal Assessment Report (June 2016), Attachment 6 (Corporate Governance Report) at 16-20. https://www.ntia.doc.gov/files/ntia/publications/combined_iana_stewardship_transition_assessment_report.pdf.

[14] Press Release, ICANN, Launching Work Stream 2 in Helsinki, (June 23, 2016).

It is true that there is ongoing work on accountability. Post transition work – a form of continuous improvement – was built into the design of the CCWG-Accountability. The community expressly determined what work needed to be undertaken in advance of the transition and what work could be accomplished in a post-transition environment. The test turned on whether the community would have sufficient tools to ensure that Work Stream 2 (WS2) outcomes would be implemented.[15] For example, the CCWG- Accountability is looking at implementation of ICANN's bylaws commitment (contained in the bylaws section on "Core Values") to human rights – which first and foremost in connection with ICANN means freedom of expression.

Without in any way diminishing the importance of this ongoing discussion, the bylaws already contain independent, fully operating protections for expression. The revised bylaws obligate ICANN to act solely within its enumerated authority and flatly prohibit ICANN from engaging in content regulation. Again, those provisions are "fundamental bylaws," meaning they cannot be changed without the affirmative support of stakeholders collectively exercising authority granted in the bylaws. As discussed above, diversity is structurally ensured in the ICANN ecosystem, and that diversity provides a strong protection against capture. Each of those provisions also stands as a separate basis for binding resolution under ICANN's enhanced Independent Review Process. Thus, while work is underway to flesh out the meaning of ICANN's Core Value of respect for internationally recognized human rights, both affected individuals and the community as a whole will have – on day one – an effective tool to ensure that ICANN stays out of the content regulation business. Any effort by an authoritarian government or by a misguided Governmental Advisory Committee (GAC) that caused ICANN to engage in content regulation would flatly violate ICANN's bylaws and be subject to immediate and binding review through the enhanced Independent Review Process. With respect to other Work Stream 2 deliverables, in each instance, the revised ICANN bylaws establish the principles being operationalized. And, in each case, instances of infidelity to the bylaws and

[15] In *ICANN Transition is Premature; Unanswered Questions Require an Extension*, Tech Freedom (September 8, 2016) at 9, Mssrs. Szoka, Rosenzweig, and Schaeffer argue that the difference between the two Work Streams "was not their importance, but whether or not they directly involved replacing the U.S. role in the IANA process." That is inaccurate. The Charter of the Cross Community Working Group – Accountability describes Work Stream 2 items as follows: "Further, Work Stream 1 may identify issues that are important and relevant to the IANA stewardship transition but cannot be addressed within this time frame, in which case, there must be mechanisms or other guarantees that can ensure that the work would be completed in a timely manner as soon as possible after the transition."

Articles of Incorporation – whether by the Board or staff – can be challenged and resolved through the enhanced Independent Review Process.

The Revised Bylaws Ensure that Governmental Authority Remains Constrained

Some opponents of the transition have argued that the revised bylaws adopted by the ICANN Board in May of this year confer additional authority on governments in general, and on the GAC in particular. The bylaws theoretically enable the GAC to participate in an other-than-advisory role in the new "Empowered Community" mechanism through which the community will exercise its powers as a single designator. But to understand what this means in practical terms, it is necessary to understand the checks and balances that have been adopted to prevent expansion of GAC authority.

The outcome of the CCWG-Accountability work reflects the ICANN community's determination to prevent government capture of ICANN's multi-stakeholder processes, and its commitment to holding the line on GAC authority. By codifying a very high standard of consensus for GAC action, eliminating ICANN's obligation to seek a mutually acceptable solution before rejecting GAC Advice that is not supported by full consensus (defined as the absence of any formal objection), requiring GAC Advice be written and explained, and the ready availability of a mechanism to challenge GAC Advice that would cause ICANN to exceed its limited Mission or violate its Commitments and Core Values, the revised ICANN bylaws materially improve the current situation and provide robust safeguards against increased governmental influence in the multistakeholder process.

- First, the revised bylaws provide – for the first time – that ICANN's obligations to attempt to find mutually acceptable solutions before rejecting GAC advice applies only where the GAC is acting by general agreement and in the absence of any formal objection. This is a very high consensus requirement, and the formal objection of any government – including the United States government – defeats this obligation. This is a powerful check in a post-transition ICANN, where United States objections cannot be dismissed or discounted on the basis of its alleged "control" over ICANN.

- The new bylaws do provide that in the event that GAC Advice is supported by the now codified standard for consensus, the ICANN Board may nonetheless reject that Advice with the support of 60% of the Board. While the effect of this change is to increase – by 1 – the number of Board votes required to reject GAC Advice, as a practical matter, the ICANN Board has never had a close vote on GAC Advice.

- The revised bylaws include a new requirement that the GAC communicate its Advice in a clear and unambiguous written statement, including the rational for such advice.[16]

- The revised bylaws retain the requirement that ICANN remain rooted in the private sector (including business, stakeholders, civil society, the technical community, and end users).[17]

- Although the revised bylaws theoretically permit the GAC to vote on certain decisions as a member of the "Empowered Community," the so-called GAC carve-out prevents the GAC from participating in community decision about whether to challenge a board action based on GAC consensus advice.[18] And I say "theoretically" with respect to this power, because a significant number of governments, including the United States, Canada, Germany and Denmark, are on record opposing anything but an advisory role for the GAC. Although the bylaws preserve the opportunity for the GAC to participate as a member of the Empowered Community, to do so, the GAC would first have to develop internal consensus to play that role, and in doing so, would need to balance the benefits of such participation (in which case it would be one of five participants) against the down-side of eliminating ICANN's obligation to attempt to find a mutually acceptable solution before rejected related GAC Advice.

- And finally, the revised bylaws specifically provide that affected individuals and the community may challenge the Board's adoption of GAC Advice that would cause ICANN to exceed its Mission or violate its articles of incorporation or the revised bylaws.[19] The bylaws also ensure that the community will have the financial and legal

[16] Bylaws Section 12.3

[17] Bylaws Section 12(b)(vi)

[18] Bylaws Section 3.6(e)

[19] Bylaws Section 4.3(a)

resources to mount such a challenge.[20] In my view, the single most important reform developed and adopted is the enhanced Independent Review Process.

A "Proof of Concept" Period is Unnecessary and Would Be Counter Productive

Recently, some have argued that the accountability enhancements developed by the multistakeholder community in anticipation of this transition are unproven, and that the transition should be delayed until the multistakeholder community demonstrates that it is up to the task. While it is true that the revised bylaws are only now going into effect, I submit that the process leading up to their adoption provides the best evidence of the maturity of ICANN's multistakeholder process, and leaves little doubt about its will, skill, and commitment to this model. From the moment of NTIA's announcement more than two years ago, ICANN stakeholders around the world have developed, refined, and stress tested governance models for post-transition operations of the Internet Assigned Numbers Authority (IANA) functions and for ICANN itself. Indeed, the demand for an overhaul of ICANN accountability in advance of the transition arose from a community united in common cause across the diverse stakeholder groups. Volunteers from around the world – including representatives of the full spectrum of US businesses - devoted tens of thousand of hours on conference calls between 1 and 3 am in the morning to getting this right.

When contentious issues arose – as they did with some frequency – those volunteers redoubled efforts to develop consensus support for principled solutions. Objections were heard and addressed and solutions were found without sacrificing principle to expediency. For example, some critics have characterized the community's response to Board objections to reorganization as a membership corporation as a triumph of expediency over principle.[21] That characterization over-simplifies a far more nuanced situation. Although several drafts of the CCWG-Accountability Report did contemplate a membership model, the extent to which that approach reflected a consensus of the working group members was always tenuous. Several strong proponents of ICANN reform, including the At Large Advisory Committee as a whole, and several vocal civil society representatives continued to express serious reservations about the membership model. Others expressed a willingness to support either model. While registries

[20] Bylaws Section 4.3

[21] See, e.g., *ICANN Transition is Premature; Unanswered Questions Require an Extension,* Supra Note 13 at 6.

and registrars generally preferred the membership model, both Stakeholder Groups ultimately evaluated the package of reforms as a whole and concluded that it was sound. Speaking personally, I have always believed that an enhanced Independent Review was likely to be a more important mechanism to secure lasting reform than any of the newly established community powers to be exercised either by a sole member or a single designator under California law. The result of this two-year process is a testament to the commitment of the community and the strength of the multistakeholder processes that constitute today's ICANN.

The Transition Does Not Involve a Give-away of US Government Property

The GAO last night issued its long awaited report on whether or not the transition involves a divestiture of government property requiring Congressional authorization. The report identifies certain rights under the "Rights in Data" clauses in the Cooperative Agreement, a trademark to the term "InterNic," which the Commerce Department licensed to ICANN, and documentation and deliverables owed under the IANA Functions Contract. The report concludes that this property will not be transferred as a result of the transaction.

The GAO Report is consistent with a common sense understanding of the structure and design of both the Internet and the DNS. The Internet is a network of networks – both public and private networks – and nothing about this transition will alter ownership and operation of the networks that make up the global Internet. There is no central point of control, and the technical rules for operation of the Internet and the DNS system have long been the province of established technical bodies like the Internet Engineering Task Force. The tens of millions of authoritative and recursive name servers that facilitate address resolution for the internet will continue to be owned and operated by independent public and private actors after the transition.

The root server system is operated by twelve independent entities – including 3 US government agencies – and, again, the remarkably stable group of entities that have operated the root server system will continue to own and operate those servers. Likewise, ICANN will continue to perform the IANA functions, as it has for nearly 17 years. It is true that Verisign, which operates the authoritative root server, will look to ICANN rather than the Department of Commerce for final sign off on material changes to the root, but as I mentioned earlier, that authority was created in the course of a contract negotiation in 1998 for the explicit purpose of preserving

private sector coordination of the DNS and facilitating the transition we are now talking about.[22] And the stakeholder community will continue to establish the limited set of policies needed to ensure universal address resolution after the transition – just as it has done for years.

Conclusion

The community embraced the challenge that was implicit in the Department of Commerce's 2014 transition announcement. Through the Community Working Group on the IANA Transition (CWG-IANA Transition) and the CCWG-Accountability, ICANN stakeholder met – and exceeded – the USG's criteria for transition. The community developed and deployed principled, consensus-based solutions to address complex issues across an extraordinarily diverse eco-system. The final deliverable has been rigorously studied and pronounced sound. Delay would create questions about the United States commitment to a process that it initiated decades ago – expressly to prevent an ITU takeover - and serve only the interests of the handful of governments who would like this process to fail in order to bolster their argument that the coordination role performed so effectively by non-governmental stakeholders for years must now be taken over by an intergovernmental organization. Completing the transition on schedule will, in fact, strengthen the United States stature and voice in ICANN's Governmental Advisory Committee.

[22] Amendment 11 to the Cooperative Agreement between the Department of Commerce and Verisign, effective October 7, 1998, provides:

> While NSI continues to operate the primary root server, it shall request written direction from an authorized USG official before making or rejecting any modifications, additions or deletions to the root zone file. Such direction will be provided within ten (10) working days and it may instruct NSI to process any such changes directed by NewCo when submitted to NST in conformity with written procedures established by NewCo and recognized by the USG.
> https://www.ntia.doc.gov/files/ntia/publications/amend11_052206.pdf