Testimony of

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on

Protecting Internet Freedom: Implications of Ending U.S. Oversight of the Internet

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Introduction

Chairman Cruz, Ranking Member Coons, and Members of the Subcommittee, thank you for your invitation to appear today. There can be few greater honors for an American lawyer than to be asked to testify before members of the Judiciary Committee.

My name is Berin Szóka. In 2010, I founded TechFreedom, a think tank dedicated to principles of free markets, technological dynamism and constitutionally limited government. Previously, I was a Senior Fellow at The Progress & Freedom Foundation, where I directed the Center for Internet Freedom. That's what I'm here to talk to you about today: Internet Freedom.

TechFreedom fights to defend the First Amendment right to free speech and Fourth Amendment rights against unlawful invasion of privacy. We defend the freedom to innovate without permission.

But there's more to Internet freedom than causes that make for catchy bumper stickers. These freedoms depend on procedural and institutional safeguards. Few people get excited about these things. But they do the real work of constraining those in power. And ultimately, that's what freedom means.

The Framers of our Constitution understood that, because, men are *not* angels, "Ambition must be made to counteract ambition." To paraphrase James Madison "You must first enable the government to control the governed, but then government must control itself."[1]

As a skeptic of government in general, I support the Transition. I do not believe the U.S. government should be involved in the editing of the root zone file, the technical heart of the Internet. But I also worry about what will happen after the Transition. And I'm skeptical of the Administration's assurances that all will turn out well.

President Obama's Administration repeatedly assured Congress and the American people that it was more important to get the Transition right than to get it done on time. Unfortunately, the Administration has allowed political concerns to trump prudence and U.S. officials have downplayed and dismissed the many legitimate concerns that people have raised about the Transition because it wants the Transition to occur before the President leaves office.

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[1] Federalist No. 51 (James Madison).

Among these concerns are the fact that important transparency and accountability measures will not be completed until next summer, governments will have more authority in ICANN after the Transition, and we don't know if the multistakeholder community is capable of governing ICANN and assuming the U.S. oversight role. In addition, ICANN has recently been accused of cavalierly ignoring its bylaws and procedures. If ICANN cannot be trusted to follow the rules with U.S. oversight in place and the transition on the line, how much more abusive could the organization be once it is autonomous? We could be dealing with another FIFA, but the stakes would be far higher: not just soccer, but the Internet. I believe that the current contract needs to be extended so that (1) a "test drive" of the new ICANN governance model and bylaws can be conducted to make sure that it works as expected, (2) outstanding legal concerns can be resolved, and (3) to allow for the full implementation of the remaining accountability and transparency measures.

Put differently, I support a staggered transition, including a *partial* transition at the earliest time it can be managed legally. The partial transition would mean removing the U.S. government from the active role it currently has in the editing of the Root while maintaining a safety net to reassert that role in case things don't turn out as planned — or simply to re-bid the function to some entity other than ICANN. That possibility, of ICANN losing the contract, has always been the *real* source of leverage by which the U.S. government has checked potential misbehavior by ICANN.

A staggered transition is the only prudent course. And it's also the only way to avoid tying the Transition up in U.S. courts. Instead of assuaging international concern about the U.S. role, a botched transition could greatly aggravate such concern.

NTIA Is Violating Clear Instructions from Congress

My first Concern involves Article I of the U.S. Constitution. Congress very clearly ordered NTIA not to relinquish its responsibility over the domain name system functions, including the authoritative root zone file and the IANA functions. Congress did so not once but twice — for this fiscal year and the last. NTIA *seemed* to acknowledge this in written answers to Senator Thune in February 2015. NTIA admitted that Congress prohibited "using appropriated dollars to transition key Internet domain name functions during fiscal year 2015, which co-

incides with the end of the base period of the IANA contract on September 30, 2015."[2]

This *seemed* like a clear promise to respect the wishes of Congress — and *not* to move forward with the Transition so long as the rider remained in place. Yet now NTIA argues that the rider didn't really prohibit anything — other than, perhaps, terminating the contract early. But the question has always been whether NTIA would exercise its option to renew the contract for another year each August. That's obviously what Congress meant when it barred NTIA from relinquishing its rights. Yet NTIA now seems to argue otherwise, to claim that Congress can't stop NTIA employees from making the decision to relinquish the contract, so long as the relinquishment doesn't happen until the first nanosecond of the new fiscal year.

This is an absurd legal theory. If NTIA acknowledges that Congress can prohibit the Transition in one fiscal year, surely it can prohibit the Transition in the next. How could there be any gap in between? Congress has every right to wait until the last nanosecond of this fiscal year to decide what to do about the next fiscal year. If ICANN fails to exercise its option to renew the contract tomorrow, and Congress decides to extend the rider, or to prohibit the Transition even more clearly, will NTIA simply say, "Sorry, too late!"?

This is not how our Constitution is supposed to work. James Madison called the power of the purse "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."[3] In other words, the power of the purse is not an auxiliary power, to be used sparingly and construed narrowly, it is *the* ultimate power of Congress.

Our Constitution rests on the idea that the "Power of the Purse" belongs to Congress, not the President — because, as Elbridge Gerry put it at the Constitutional Convention of 1787, the House is "more immediately the representatives of the people and … the people ought to hold the purse-strings."[4]

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[2] Questions and Answers from Senator John Thune to Lawrence Strickling, Assistant Secretary for Communications and Information, U.S. Department of Commerce, (Feb. 2015), https://www.commerce.senate.gov/public/_cache/files/893c7447-6ed3-495e-ae0f-bd99283e592b/29EA1DCC9B2EEF9EC20C84919898D353.wr---ntia-qfr.pdf.

[3] Federalist No. 58 (James Madison).

[4] U.S. House of Representatives, History, Art & Archives: Power of the Purse, (Aug. 4, 2016, 5:05 PM), http://goo.gl/hjFLko .

The GAO report issued Monday confirms that Congress *can* prohibit the Transition through appropriations riders. It merely notes that, if Congress attempts to extend the rider into Fiscal Year 2017 through a continuing resolution, it must take care to make its intent clear: NTIA may not use 2016's funds to do what Congress prohibits in 2017.[5]

So what does this mean, concretely? At the very least, the contract between NTIA and ICANN requires NTIA to notify ICANN thirty calendar days in advance of the expiration of the contract of the possibility of an extension. And the contract requires NTIA to give ICANN 15 calendar days' notice if it intends to exercise that option.

So, to comply with the terms of the contract, ICANN would have to extend for at least 30 calendar days. Yes, NTIA has already provided these two notifications, but it had no power to do them because government employees can do only what Congress decides to fund. Period. So NTIA would have to start over.

NTIA has also acknowledged that it is "under an obligation to notify Congress 45 days before we make any changes to the contract."[6] To fulfill this obligation, NTIA would presumably extend the contract, at a minimum, for 45 days — calculated from October 1.

Just last week, however, an NTIA representative informed ICANN, "[I]f we are forced to extend the contract, the current option period of the contract is a full year. So, if we follow the current terms of the contract and we extend it, because of Congress or some impediment appears, the contract will be extended through next September."[7] While NTIA would, under the contract, retain the ability to terminate the contract prematurely, an extension of a year would be ideal — and Congress should insist on at least that much.

It will take at least that much time to complete Work Stream 2 reforms and verify that ICANN is following through on its commitment to implement accountabil-

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[5] Letter from Susan A. Poling, General Counsel at U.S. Government Accountability Office to Property to The Honorable Charles E. Grassley, The Honorable Ted Cruz, The Honorable Bob Goodlatte, The Honorable Darrell Issa, Implications of Proposed Transition of U.S. Government Oversight of Key Internet Technical Functions (Sept. 12, 2016), (on file with the author), *available at* http://www.gao.gov/assets/680/679691.pdf

[6] ICANN Transcript of Transition Program Facilitation Call (July 9, 2015) https://www.icann.org/en/system/files/files/transcript-transition-facilitation-09jul15-en.pdf

[7] ICANN Transition Program Facilitation Meeting # 14 (Sept. 6, 2016), *available at* https://www.icann.org/uploads/iana_work_session_asset/attachment/547/1473369760353TPFM_06SEP16.pdf

ity reforms regardless of whether the Transition occurred on September 30. Regardless of the length of the extension, however, Congress should take action to ensure that an extension occurs by renewing the funding prohibition in the upcoming continuing resolution. Further, to avoid the loophole identified by GAO, Congress should either rescind NTIA's unobligated FY 2016 funds or specifically prohibit those funds from being used to facilitate a complete Transition. And, of course, Congress could also attach a legislative prohibition to a continuing resolution that would prohibit a complete Transition outright for at least year, or until Congress authorizes it.

The Transition May Involve Government Property

My second concern involves Article IV of the Constitution. If the IANA function involves a government property interest, NTIA cannot legally transfer it without affirmative Congressional authorization to do so.[8] GAO issued a lengthy report on this question on Monday. The report raises more questions than it answers. In some respects, GAO concludes that the authoritative root zone file and domain name system are "unlikely" to be property. Yet GAO also repeatedly notes throughout its report that it lacks sufficient information to suitably answer many questions on this account. For instance, the report specifically notes that the current Cooperative Agreement specifically grants NTIA government property in all the deliverables provided under the contract — yet GAO is currently unable to resolve what exactly will and will not count as property for Article IV purposes under the Cooperative Agreement.

Moreover, GAO remains unclear on various intellectual property concerns. Under the terms of the latest IANA functions contract, the GAO can only note "In light of the multiple uncertainties with respect to data and software produced under or used to perform the contracts, we can only say that if the Government has any rights or licenses in such data or software, they would constitute Government property under Article IV."[9]

Most fundamentally, the GAO report's conclusion rests on the assertion that there can be no property interest in the root zone file because the U.S. government has no right to exclude others from accessing and using it. This simply misunderstands the domain name system, property law or both. NTIA has *always* had the right to control the process of editing the root. That is the essence of the

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[8] *See supra* note 4.

[9] *Id.* at 21.

IANA functions contract. Choosing to contract out its maintenance and to not directly exercise that right most emphatically does not operate as a waiver. Nor does the fact that anyone may access or copy the root make it non-exclusive. This root is "*The* Root" because it is the one trusted by the Internet community. No matter how many copies there are, it is the original that everyone points to. That makes this fundamentally different from copyright law or the common law of property in the physical world. Yes, someone else could try to convince the Internet community to point to a different copy, but that does not mean the U.S. government has no property interest in *this particular* root — not the data in it, but the place to which others point their servers.

These are, indeed, hard legal questions. But these Article I and Article IV safeguards grew out of the long struggle of Parliament to reduce the "overgrown prerogatives" of the Executive. They cannot be discarded lightly. Congress has a duty to defend its prerogatives — with every tool at its disposal, including litigation.

NTIA Has Ignored Difficult Unresolved Questions

My final concern is about the process that has led us to this point. That we are still debating such difficult questions the day before NTIA must make its great leap into the unknown reveals just how unready we are to make the Transition. The way NTIA has handled this issue has made a travesty of the Administrative Procedure Act — which is essentially a constitution for the Fourth Branch of government.

The APA's requirements boil down to two words: "*reasoned decisionmaking*." NTIA failed to fulfil that commandment in multiple ways. NTIA delegated to two ICANN bodies the question of how to reform ICANN. It then reviewed the compromise proposal ICANN's staff and board negotiated with ICANN's stakeholders. But it is clear that NTIA effectively rubber-stamped what these non-governmental bodies proposed. This amounts to a delegation of rulemaking power to non-governmental entities. The only additional comment NTIA sought on the proposal was that of a hand-picked set of outside experts, whom NTIA commissioned to review ICANN's proposal under a no-bid contract. This is a sure-fire way to confirm a preconceived course of action, rather than produce reasoned decisionmaking. NTIA never sought *public* comment on the ICANN's proposal, or the difficult legal questions it raises about the Constitution, California law, antitrust law and so on. If NTIA had done so, we would not be trying to suss out these concerns at this late hour.

What This Debate Is *Really* About

This debate isn't really about the merits of ICANN, which I consider — to paraphrase Winston Churchill — the "worst form of Internet governance, except for all the others." Nor is this debate really about the Transition itself. Again, I support the Transition in principle.

No, this debate is simply about three questions:

1) Are we really ready to make this leap — to abandon the failsafe that has guaranteed Internet governance for decades?
2) Does NTIA have the legal authority to decide that question on its own — without Congress?
3) Who bears the burden in answering these questions?

Of these questions, the last is really the most important. Senators, you will hear debate today about the first and second questions. If you listen carefully and with an open mind, you will probably conclude that the answer to both questions is unclear. So the *real* question becomes: what should we do in light of that uncertainty? In other words, who bears the burden of proof here?

To me, that question is not a difficult one to answer. The Internet is simply too important to assume that things will work out for the best.

Don't assume NTIA will win in court. If the agency refuses to slow down and allow us all more time to think this through, there is a very real risk that a U.S. court could block the Transition, or try to unwind it after the fact. If NTIA is wrong about its constitutional theories, those involved in making the decision not to extend the contract tomorrow face stiff criminal penalties. Congress crafted these penalties to protect its constitutional powers from precisely what NTIA is doing today: claiming that hard legal questions should be resolved in favor of the Executive, rather than the Legislative, branch. And if the Transition gets tied up in the U.S. courts, the diplomatic blowback will far exceed any benefit to the U.S. in giving up its IANA role in the first place.

Don't assume the Transition will resolve the issue of transferring Internet governance to a United Nations body, where governments would have direct control. It won't.

Don't assume that the questions of jurisdiction are settled. They aren't. Where ICANN will be located, and what laws it will be subject to, remain live issue in Work Stream 2.

Don't assume that ICANN could never muster the supermajority required to change its jurisdiction or to change other fundamental bylaws. No one really knows how the ICANN community will evolve.

Don't assume ICANN's complicated new legal structure will stand up in court. In the negotiation process, ICANN's own lawyer questioned whether key provisions of the new Bylaws might violate California non-profit law because they require the ICANN Board to follow the instructions of two non-board entities unless it can muster a supermajority to reject those instructions. If these provisions fail, that will open the door for further renegotiation, or for foreign governments to build alliances with other stakeholders in support of abandoning ICANN.

Don't assume that antitrust questions are settled. They aren't. ICANN may well be right that it isn't immune from antitrust suits as a state actor today — and that the Transition won't change that. But the more important question may be: will antitrust law be an effective check against anti-competitive behavior, or capture of ICANN by narrow corporate interests? Don't assume that it will. ICANN has proven quite adept at avoiding antitrust scrutiny. If you think ICANN has not abused its power in the past — despite evidence to the contrary — do not assume this is because U.S. antitrust law was an effective deterrent, and that the status quo will continue unchanged. The chief restraint on ICANN has come from the IANA contract.

Don't assume the U.S. government isn't really giving anything up here. The importance of the IANA functions contract isn't that the U.S. government has ultimate editorial control over the root. It's that NTIA has always been able to threaten ICANN with putting the contract out for bid to some other organization — as it did in 2012. That, by the way, is the ultimate definition of property.

Don't assume that the Constitutional issues here can wait for another day. That kind of thinking has allowed the Executive branch to run roughshod over the checks and balances designed by the Founders.

Don't assume ICANN stakeholders will be able to check the staff or the Board — any more than past Congresses have been willing to stand up to the President.

Don't assume there's any reason to rush this. NTIA has created an artificial sense of urgency that has little to do with ICANN or Internet governance, and everything to do with the U.S. presidential election. There is simply no need to adhere to this artificial timeline.

And most of all, don't assume that this fight is about legal arcana. It is not. It is about the institutions that will govern the Internet, about vital principles of the separations of powers, and about how major decisions should be made. I'm reminded of what Friedrich Hayek said: "it is in the technical discussion concerning administrative law that the fate of our liberty is being decided."[10] So, too, here.

How to Resolve This Debate Responsibly

This fight *can* be defused. While I encourage Congress to defend its constitutional prerogatives, I also believe compromise is well within reach. It simply requires staggering the Transition, beginning with a *partial* transition: remove the U.S. government from active participation in the IANA functions. It is critical that the U.S. retain the ability, for a period of time, to reassert this role if the new IANA process falls short or ICANN governance model proves incapable of actually holding the corporation to account. This kind of "clawback" is, in fact, standard operating procedure for ICANN itself — something ICANN includes in its own Service Level Agreements (SLAs): If a contracted party doesn't adhere to the metrics set forth in the contract, ICANN can revoke the registry or their registrar accreditation. What's good for the goose is good for the gander.

I include two appendices for the record. First is a coalition letter signed by twenty-five organizations, as well as the first Chairman of ICANN, expressing many of the concerns I have raised today and calling for more careful consideration of this issue.[11] Second is a white paper co-authored by myself; Paul Rosenzweig, my fellow witness at this hearing; and Brett Schaefer, entitled, *ICANN Transition is Premature: Unanswered Questions Require an Extension*, which explains my concerns in greater detail.[12]

Thank you for the opportunity to testify here today.

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[10] F. A. Hayek, The Political Ideal of the Rule of Law (Cairo: National Bank of Egypt Printing Press, 1955)

[11] TechFreedom Coalition Letter to The Honorable Paul Ryan, The Honorable Mitch McConnell, The Honorable Nancy Pelosi, The Honorable Harry Reid on ICANN Transition (Aug. 10, 2016), *available at* http://docs.techfreedom.org/Coalition_Letter_IANA_8.10.16.pdf

[12] Berin M. Szóka, Paul Rosenzweig, Brett Schaefer, *ICANN Transition is Premature: Unanswered Questions Require an Extension* (Sept. 6, 2016), *available at* http://docs.techfreedom.org/TF_White_Paper_IANA_Transition.pdf