

# Congress of the United States

Washington, DC 20510

June 27, 2016

The Honorable Lawrence Strickling  
Assistant Secretary for Communications and Information  
National Telecommunications and Information Administration  
United States Department of Commerce  
1401 Constitution Avenue, N.W.  
Washington, DC 20230

Dear Assistant Secretary Strickling:

The Internet Corporation for Assigned Names and Numbers (ICANN) recently submitted a proposal to the National Telecommunications and Information Administration (NTIA) regarding the proposed transfer of key Internet domain name functions to the global multi-stakeholder community. On June 9, 2016, NTIA released a report concluding that this proposal meets the criteria set by NTIA when it announced its intention to transition these functions, known as the Internet Assigned Number Authority (IANA) functions. We are writing to express concerns regarding this proposal and NTIA's conclusions. As we have stated previously, it is unfortunate that this proposal to eliminate the United States historical stewardship role over key Internet management functions has been undertaken not because of technical considerations but for political ones.

When announcing this proposed transition in March, 2014, NTIA specified that such a proposal must have broad community support, maintain the security, stability, and resiliency of the Internet Domain Name System (DNS), meet the needs of the multi-stakeholder community and enhance the multi-stakeholder model, and maintain the openness of the Internet. Importantly, NTIA stated that it would "not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution."<sup>1</sup> Further, ICANN and NTIA have repeatedly stated that it is more important to get this right than it is to get it done by an artificial or political deadline.

Despite NTIA's intention of ending the United States government role, a number of important issues and concerns exist that indicate that this course is misguided or, at the very least premature. These include whether or not the administration has the constitutional authority to conduct this transfer without the authorization of Congress because of the United States property interest in the root zone file – or any other similar component of the Internet that was created and financed by the United States. This concern was raised in 2000 by the Government Accountability Office ("GAO"), which questioned whether NTIA could relinquish authority over the root zone file. GAO concluded that it was "unclear whether such a transition would involve a transfer of government property to a private entity."<sup>2</sup> To date this question has not been answered with any certainty and we filed a request with the GAO seeking clarity to this question. As of yet we have not received an answer and the question of the United States property interest remains outstanding. Consequently we remain concerned that NTIA's planned transition of the IANA functions may potentially relinquish ownership of United States property. It does

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<sup>1</sup> <https://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>

<sup>2</sup> U.S. Government Accountability Office., GAO-B-284206, Department of Commerce: Relationship with the Internet Corporation for Assigned Names and Numbers (2000)

not make sense to proceed without definitive answers to this question and doing so may possibly violate the Constitution.

In their rush to meet artificial, politically imposed deadlines, the multi-stakeholder working groups have failed to address important issues regarding freedom of speech and human rights. The Cross Community Working Group – Accountability (CCWG) proposal recommends that the ICANN bylaws incorporate a commitment to internationally recognized human rights, yet what this term actually means remains undefined and open-ended. This could lead to the adoption of definitions of free speech that run counter to American values and jurisprudence, in opposition to a free and open Internet. Further, leaving these terms undefined has raised fears that foreign governments could use this ambiguity to use ICANN as a tool to moderate content. The CCWG has deferred resolution of these important considerations until a later date. Without resolution of these issues, the multi-stakeholder community and policymakers cannot in good faith vote to eliminate the United States' role as a necessary and responsible backstop against threats to openness and free speech on the Internet.

Recognizing the harmful impact of potential capture by foreign governments, NTIA explicitly stated that any proposal would not replace the status quo with a governmental or inter-governmental model. However, under the current proposal, the power of foreign governments would be significantly increased via the Governmental Advisory Committee (GAC) as the threshold for the ICANN board to reject GAC advice increases from 50 to 60 percent. Further, foreign governments, via the GAC, will continue to be able to exert special power to convey advice to the board directly for a mandatory vote, unlike other advisory bodies.

Additionally, despite the Fiscal Year 2016 Omnibus spending bill's prohibition on NTIA using any funds in furtherance of the transition, NTIA has been working to transfer the IANA functions by devoting staff time and commissioning outside studies on the subject. Specifically Section 539 of the FY2016 Omnibus states that funds provided in the Act may not be used to relinquish NTIA's responsibility for the Internet domain name system functions, including responsibility with respect to the authoritative root zone file and the IANA functions. However, in NTIA's recent "IANA Stewardship Transition Proposal Assessment Report,"<sup>3</sup> NTIA states that, among other actions, it "utilized a number of resources and tools" to review and assess the IANA stewardship proposal. Further NTIA states that it utilized the DNS Interagency Working Group, comprised of 15 government agencies, to "engage U.S. federal government agencies on matters related to the IANA Stewardship Transition, including proposal review and assessment." As we are sure you are aware, it is a violation of federal law for an officer or employee of the United States Government "to make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation."<sup>4</sup> It is troubling that NTIA appears to have taken these actions in violation of this prohibition.

Finally, as you know, there exist Public Interest Commitments (PICs) in ICANN's contracts with new gTLD registries that specifically obligate new generic Top-Level Domain (gTLD) registries (and by extension) registrars to mitigate DNS abuse by Registered Name Holders, including "piracy, trademark or copyright infringement."<sup>5</sup> While the revised bylaws make it clear that the PICs and the registry contracts

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<sup>3</sup> [https://www.ntia.doc.gov/files/ntia/publications/iana\\_stewardship\\_transition\\_assessment\\_report.pdf](https://www.ntia.doc.gov/files/ntia/publications/iana_stewardship_transition_assessment_report.pdf)

<sup>4</sup> 31 U.S.C. § 1341.

<sup>5</sup> <https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-09jan14-en.pdf> (See Specification 11).

that contain them are deemed within ICANN's mission and not subject to a facial *ultra vires* challenge,<sup>6</sup> we remain concerned that ICANN's Board, especially in light of comments made earlier this year, is not fully committed to enforcing the PICs. How will they enforce them?

The openness, security, stability the resiliency of the Internet are of paramount importance to all Internet users. The significance of NTIA's proposed action demands that answers to these concerns and questions be resolved.

As many aspects of this proposal lack legal clarity or organizational stability, our Committees are committed to ongoing oversight and examination of these issues as discussions of a potential transfer continue. Any discussion of a transfer of the IANA functions without answers to the following questions remains premature.

- As noted above, the CCWG has deferred resolution on important free speech and human rights issues until a later date, potentially after a transition were to occur. How can NTIA ensure that future actions by ICANN do not bring about potentially harmful changes that would limit free speech or human rights once the United States no longer maintains the IANA functions contract? What recourse would NTIA have should this situation occur?
- Under the current proposal, the threshold for the ICANN board to reject GAC advice increases from 50 to 60 percent and foreign governments, via the GAC, will continue to be able to exert special power to convey advice to the board directly for a mandatory vote. Many observers are wary that this transition could lead to foreign, totalitarian governments making demands on ICANN that would limit an open and free Internet, harming free speech and human rights across the globe. Others have raised concerns that this could be the first step in an eventual move to transfer control of the Internet to a non-governmental organization such as the International Telecommunications Union (ITU). What contingency plans has NTIA put into place to deal with these possibilities? Please share with us such detailed contingency plans that would ensure continued freedom of the Internet.
- The transfer of government property without Congressional approval raises Constitutional issues and the prospect of illegality. The Government Accountability Office is currently conducting a study to determine the United States Government's property interest in the root zone file – or any other similar component of the Internet that was created and financed by the United States. The Department of Justice's Office of Legal Counsel (OLC) provides authoritative legal advice to the President and all Executive Branch agencies. Has NTIA requested OLC to analyze this issue concurrently with the GAO? If not, why?
- Without the proper analysis regarding the United States Government property interest, it is premature to conduct any transition. Will NTIA commit to postpone any transition in the absence of a determination by GAO and OLC relating to this property issue?
- Did NTIA inform other members of the DNS Interagency Working group of the transition related appropriations provision in the FY2106 Omnibus spending bill?
- Why did NTIA proceed in utilizing funds in furtherance of the transition in light of the clear prohibition created by the FY2016 Omnibus spending bill?

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<sup>6</sup> <https://www.icann.org/en/system/files/files/proposed-new-bylaws-20apr16-en.pdf> (See Section 1.1(d))

- ICANN's revised bylaws make it clear that the Public Interest Commitments and the registry contracts that contain them are deemed within ICANN's mission and not subject to a facial *ultra vires* challenge.<sup>7</sup> However, some members of the multi-stakeholder community have expressed concern that the ICANN Board may not believe that mitigating certain types of DNS abuse, such as IP infringement, is within ICANN's mandate. How will this proposal require ICANN's commitment to maintaining and enforcing the Public Interest Commitments, now and in the future?
- Is NTIA opposed to Congress requiring an affirmative, up-or-down vote for the IANA functions transition to be completed? Why or why not?

Please provide answers to the above questions by July 22, 2016. Contact Jonathan Nabavi (Chairman Grassley) or Vishal Amin (Chairman Goodlatte) on our staffs if there are any questions regarding this request. We appreciate your timely reply.

Sincerely,



Charles E. Grassley  
Chairman  
Senate Committee on the Judiciary



Bob Goodlatte  
Chairman  
House Committee on the Judiciary

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<sup>7</sup> <https://www.icann.org/en/system/files/files/proposed-new-bylaws-20apr16-en.pdf> (See Section 1.1(d))