



**UNITED STATES DEPARTMENT OF COMMERCE**  
**The Assistant Secretary for Communications**  
**and Information**  
Washington, D.C. 20230

JUL 18 2016

The Honorable Ted Cruz  
United States Senate  
Washington, DC 20510

Dear Senator Cruz:

I am writing in response to your May 19, 2016 letter regarding the Internet Assigned Numbers Authority (IANA) Functions Stewardship Transition Proposal developed by the global multistakeholder community and delivered to NTIA on March 10, 2016.

At the outset, we share your goal of protecting Internet freedom. One of our criteria for evaluating the transition proposal is whether it maintains the openness of the Internet. After months of exhaustive review by agencies of the federal government, NTIA concluded on June 9 that the transition met this standard as well as the other criteria NTIA established for the transition.

This conclusion is based in large part on the fact that the best way to preserve Internet freedom is to depend on the community of stakeholders who own and operate, transact business, and exchange information over the myriad of networks that comprise the Internet. Free expression is protected by the open, decentralized nature of the Internet, the neutral manner in which the technical aspects of the Internet are managed and the commitment of the stakeholder community to maintain openness. As you point out, Freedom House recently reported that “Internet freedom around the world has declined for the fifth consecutive year...” Notably, its prescription for defending Internet freedom is to encourage the U.S. Government to “complet[e] the transition to a fully privatized Domain Name System.”<sup>1</sup>

What will not be effective to protect Internet freedom is to continue the IANA functions contract. That contract is too limited in scope to be a tool for protecting Internet freedom. It simply designates ICANN to perform the technical IANA functions of managing the database of protocol parameters, allocating IP numbers and processing changes to the root zone file. It does not grant NTIA any authority over ICANN’s day-to-day operations or the organization’s accountability to the stakeholder community. The transition proposal contains a series of enhancements to ICANN’s accountability that go beyond any authority that NTIA or the U.S. Government has today. For example, the U.S. Government has no ability to reject an ICANN budget or to remove an ICANN board member – two of the new enumerated community powers.

---

<sup>1</sup> See article by Mark P. Lagon and Eileen Donahoe on “Keeping internet governance out of the wrong hands,” The Hill, (July 7, 2016). Lagon is president of Freedom House and served as U.S. ambassador to Combat Human Trafficking under former President George W. Bush. Donahoe is an officer of the Freedom House Board and former U.S. ambassador to the U.N. Human Rights Council under President Obama. *Article available at:* <http://thehill.com/blogs/pundits-blog/technology/286785-keeping-internet-governance-out-of-the-wrong-hands>

Extending the contract, as you ask us to do, could actually lead to the loss of Internet freedom we all want to maintain. The potential for serious consequences from extending the contract beyond the time necessary for ICANN to complete implementation of the transition plan is very real and has implications for ICANN, the multistakeholder model, and the credibility of the United States in the global community.

Privatizing the domain name system has been a goal of Democratic and Republican administrations since 1997. Prior to our 2014 announcement to complete the privatization, some governments used NTIA's continued role with the IANA functions to justify their demands that the United Nations, the International Telecommunication Union (ITU) or some other body of governments should take control over the domain name system. Failing to follow through on the transition or unilaterally extending the contract will only embolden those authoritarian regimes that routinely advocate for government-led or intergovernmental management of the Internet via the United Nations. Former Homeland Security Secretary Michael Chertoff and retired Vice Chairman of the Joint Chiefs of Staff James Cartwright recently noted the risks that would come with rejecting or delaying the transition, writing as follows:

To reject or even delay the transition would be a gift to those governments threatened by a free and open Internet. The multistakeholder model is exactly what has allowed policy to keep pace with the Internet's rapid growth. The proposal includes all voices and is built on a foundation of transparency and accountability. It is a quintessentially American policy. When our values of freedom and democracy spread around the world and are shared by others, we are more secure at home and the world is more stable. We support this stewardship transition, as it will pave the way for American values and the free and open Internet around the world.<sup>2</sup>

Additionally, the Global Commission on Internet Governance, comprised of leading experts around the world, called upon the U.S. Government to adopt the proposal and to meet the September 2016 target date for the transition of the IANA functions. In the words of the Global Commission: "Failure to do so will send the wrong message to the international community, increase distrust, and will likely encourage some governments to pursue their own national or even regional Internets."<sup>3</sup>

The global Internet community, comprised of businesses, technical experts, and public interest groups, support this transition and want to see the United States follow through on its long-standing, well-considered commitment to privatize the domain name system.<sup>4</sup> Your letter

---

<sup>2</sup> See article by Michael Chertoff and James Cartwright on "How to Keep the Internet Free and Open," Politico, (June 8, 2016) at: <http://www.politico.com/agenda/story/2016/06/keep-internet-free-and-open-icann-000140>.

<sup>3</sup> See statement by the Global Commission on Internet Governance at: <http://www.broadcastingcable.com/news/washington/ntia-praised-domain-name-sign/157184>.

<sup>4</sup> For example, the Internet Association, Computer & Communications Industry Association and Internet Infrastructure Coalition stated, "The internet economy applauds NTIA for its deliberative and thorough work reviewing the ICANN transition proposals to ensure its principles for a successful transition are met. Our organizations agree that the proposals to transition ICANN from U.S. Government stewardship to a bottom-up, multistakeholder model satisfy NTIA principles and provide the internet with the best path forward for self-governance. It is important that Congress not artificially slow down the transition beyond the September 30 expiration of the current IANA contract." See NTIA Blog "What They are Saying: Reaction to NTIA's Assessment

reaches a different conclusion and appears to be based on a misunderstanding of the transition proposal. We respond to each concern below and of course are willing to meet with you and your staff members to provide more education on the plan at any time.

First, your claim that “ICANN’s proposal significantly increases the power of foreign governments,” is simply not true. The transition proposal does not expand the role of governments vis-à-vis other stakeholders. The bylaws retain the prohibition on government officials serving as voting board members. The role of governments in ICANN policymaking remains advisory. Under the transition plan, governments will continue, through the Governmental Advisory Committee (GAC), to provide input to the Board in the normal course of business. And, as is currently the case, the Board will be able to reject GAC advice. Today, the Board does give special consideration to consensus GAC advice. The proposal codifies this current practice through a bylaw change that limits this Board deference to consensus advice specifically defined as advice to which no one country formally objects. The threshold for rejecting such GAC consensus advice does increase from 50 percent to 60 percent, but given the codification of “consensus” in the bylaws, this standard only applies to advice from governments to which no government, including the United States, has objected. Given that fact, we would want and expect the Board always to accept consensus GAC advice and never reject it, regardless of the threshold.

The GAC has the potential to participate in the Empowered Community, but only at a level commensurate with other stakeholders. Notably, the GAC cannot unilaterally exercise the community powers. Moreover, the bylaws expressly prohibit the GAC from participating in the community powers when the issue in contention is a Board action on GAC advice.

The GAC has not yet decided whether it will participate in any exercise of community powers. The current position of the U.S. Government, shared by many other nations, is that the GAC should not participate in any exercise of the community powers. To do so risks converting the GAC’s role from that of an expert body providing public policy advice to the Board into an operational role for which the GAC is not organized and at which the GAC likely could not be effective. Accordingly, absent a unique and extreme set of facts, the U.S. Government presumptively will oppose any invitation to the GAC to join other parts of the ICANN multistakeholder community to exercise any of the community powers.

Second, your claim that “the proposal to insert into ICANN’s bylaws an undefined commitment to respect ‘internationally recognized human rights; would open the door to the regulation of content” does not acknowledge the constraints placed on ICANN in its bylaws. Including a commitment to human rights in the ICANN bylaws does not encourage the organization to go beyond its constituency and limited mission. The plan makes it clear that whatever the commitment to internationally recognized human rights, it will be constrained by the mission and core values set forth in the ICANN bylaws. Accordingly, elaborating on the commitment through Work Stream 2 will not lead to an expansion of ICANN’s mission or scope beyond the stable and secure operation of the domain name system.

---

of the IANA Stewardship Transition Proposal” at: <https://www.ntia.doc.gov/blog/2016/what-they-re-saying-reaction-ntia-s-assessment-iana-stewardship-transition-proposal>.

Third, you claim that “neither Congress nor the administration knows with absolute certainty if the IANA transition would include the transfer of government property.” In fact, there would be no transfer of government property when the IANA functions contract ends.<sup>5</sup> Based on a thorough legal review conducted by Department of Commerce lawyers last year in response to a similar question raised by Congressmen Sensenbrenner and Duffy, we reported that termination of NTIA’s contract with ICANN would not result in the transfer of government property because there is no evidence that the Department ever provided government property to ICANN or that contract termination would cause the transfer of government property to ICANN.<sup>6</sup> Each of NTIA’s contracts with ICANN related to the IANA functions required the contractor to furnish the necessary personnel, material, equipment, services, and facilities to perform the IANA functions. As you note, the Government Accountability Office (GAO) is reviewing this issue. In response to questions from GAO legal counsel, the General Counsel of the Department of Commerce informed GAO on December 15, 2015, that, in the Department’s view, the termination of NTIA’s contract with ICANN would not result in the transfer of U.S. Government property and the authoritative root zone file is not U.S. Government property. NTIA and the Department of Commerce are working closely with GAO on its review and will continue to do so; however, the Department’s views on this question are clear.

Fourth, your concern that ICANN “may consider moving its headquarters outside the United States to escape U.S. law” after the transition does not account for the fact that the stakeholder community has spent the last two years building an accountability regime for ICANN that, at its core, relies on California law and on ICANN to remain a California corporation. Article XVIII of ICANN’s bylaws confirms that “the principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California, United States of America.”<sup>7</sup> ICANN’s Board cannot change this bylaw over the objection of the stakeholder community. In addition, ICANN’s Articles of Incorporation already state that ICANN “is organized under California Nonprofit Public Benefit Corporation Law.”<sup>8</sup> Changes to the Articles of Incorporation now require support of a 75 percent majority of the empowered community.

There is no serious likelihood that Work Stream 2 will make any recommendation on the location of ICANN’s headquarters. The matters to be dealt with in Work Stream 2 relate to other jurisdictional issues, such as what law should apply to contract disputes and in which courts parties can seek to litigate claims against ICANN. Every multinational corporation headquartered in the U.S. faces these questions and ICANN is no exception. The fact that there may be individual stakeholders who cling to the false hope that ICANN might someday move out of the United States is not evidence that ICANN has “deferred to an unspecified point in the future” the question of its headquarters location. ICANN is a California corporation and will remain so.

---

<sup>5</sup> The reference to the 2000 GAO report mentioned in your letter regarding U.S. Government property appears to be focused on the authoritative root server which is not part of the IANA functions contract. It is part of a Cooperative Agreement with Verisign.

<sup>6</sup> Letter from NTIA to Congressmen Sensenbrenner and Duffy with enclosure sent June 11, 2015.

<sup>7</sup> See Bylaws for Internet Corporation for Assigned Names and Numbers (ICANN), as adopted by the ICANN Board (May 27, 2016) available at: <https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf>.

<sup>8</sup> See Articles of Incorporation of ICANN (as revised November 21, 1998) available at: <https://www.icann.org/resources/pages/governance/articles-en>.

Fifth, your contention that “this proposal will only further embolden an unaccountable ICANN board, which post-transition will only be beholden to a multi-stakeholder community that has unfortunately shown either an unwillingness or inability to hold the board accountable for its own promises” is not supported by the facts. As you point out, ICANN’s former CEO promised at a 2015 hearing that once the community and the stakeholders present the Board with a consensus proposal, the Board would transmit it to NTIA without change. That is exactly what happened on March 10, 2016. Prior to the chartering organizations’ affirming their support for the plan that week at meetings in Morocco, there was no final plan. Moreover, there was never any promise from the Board that its members would not participate in the process to develop a plan as your letter seems to imply. In fact, ICANN board members are themselves important stakeholders and their participation in the process was not only expected and encouraged, it was necessary for the community as a whole to arrive at a sound, final proposal.

The proposal that Heritage Foundation cites, and that you reference in your letter, was not a final proposal. It did not have the broad support of stakeholders outside of the working group, as was evidenced when the full ICANN community convened in Dublin last fall. Most important, the proposed draft plan proposed such a radical restructuring of ICANN that it might well have failed to satisfy NTIA’s criteria that the proposal had to maintain the security and stability of the domain name system. There is no basis given all these facts to conclude that the Board will not be held accountable post-transition.

At the end of your letter, you provide a list of other concerns that you believe have not been adequately addressed. While your letter does not describe the nature of your concerns, I will also address those issues here.

First, the future operation and security of the U.S. Government-administered legacy top-level domains (TLDs) of .mil and .gov are well-protected. The operation of and responsibility for the .mil and .gov domains are not impacted by the transition. ICANN cannot reassign the .mil, .gov, or the .edu, or .us domains, without the approval of the U.S. Government. However, to ease all concerns, NTIA and ICANN have reaffirmed that the U.S. Government is the sole administrator of .mil, .gov, .edu, and .us and that no change can be made to these domains without the express written approval of the U.S. Government.<sup>9</sup>

Second, your concerns about ICANN’s antitrust status are misplaced. The U.S. Government has conferred no antitrust immunity on ICANN for its new generic top level domain (gTLD) program or any other ICANN policy making functions through the IANA functions contract. ICANN’s new gTLD program and its other policy making functions are not part of the IANA functions services provided through the current contract with the U.S. Department of Commerce. Moreover, as previously noted, NTIA has no oversight role or regulatory authority over ICANN. In its decision to move forward with the transition at this time, the U.S. Government did not identify any significant competitive issues relating to the proposed transition. Nonetheless, post-transition U.S. competition laws would apply to the conduct of ICANN and its constituent groups in their policymaking activities just as they do today and to the same extent as those laws now apply to other private entities.

---

<sup>9</sup> See letters at: <https://www.ntia.doc.gov/page/exchange-letters-us-government-administered-tlds>.

Third, ICANN currently has no authority to impose global taxes and will not have that ability post the transition. The fees that registry and registrars pay ICANN are established in commercially negotiated contracts which are reviewed by the multistakeholder community. In addition, ICANN is not involved in setting the fees Internet users or domain name registrants pay. Domain name registry and registrars in the content of commercial decisions set those prices.

In conclusion, we all agree that Internet freedom and a global interoperable Internet that is secure and resilient for future generations is paramount for U.S. global policy. Free expression exists and flourishes online not because of perceived U.S. government oversight over the DNS system, or because of any asserted special relationship that the United States has with ICANN. Global stakeholders active in the operation and governance of the Internet understand these facts, which is why civil society leaders and others support the proposal and agree that the IANA transition is the best way to ensure the continued functionality of the global Internet.

I also want to assure you that even after a transition, the United States Government would play an active leadership role in advocating for a free and open Internet within ICANN and in all other international venues. I look forward to working with you as we identify, advocate, and implement the policies that will truly support a free and open Internet.

If you have any questions or need more information about matters described in this letter, please feel free to contact me or NTIA's Director of Congressional Affairs, Jim Wasilewski at (202) 482-1830.

Sincerely,



Lawrence E. Strickling



UNITED STATES DEPARTMENT OF COMMERCE  
The Assistant Secretary for Communications  
and Information  
Washington, D.C. 20230

JUL 18 2016

The Honorable Michael S. Lee  
United States Senate  
Washington, DC 20510

Dear Senator Lee:

I am writing in response to your May 19, 2016 letter regarding the Internet Assigned Numbers Authority (IANA) Functions Stewardship Transition Proposal developed by the global multistakeholder community and delivered to NTIA on March 10, 2016.

At the outset, we share your goal of protecting Internet freedom. One of our criteria for evaluating the transition proposal is whether it maintains the openness of the Internet. After months of exhaustive review by agencies of the federal government, NTIA concluded on June 9 that the transition met this standard as well as the other criteria NTIA established for the transition.

This conclusion is based in large part on the fact that the best way to preserve Internet freedom is to depend on the community of stakeholders who own and operate, transact business, and exchange information over the myriad of networks that comprise the Internet. Free expression is protected by the open, decentralized nature of the Internet, the neutral manner in which the technical aspects of the Internet are managed and the commitment of the stakeholder community to maintain openness. As you point out, Freedom House recently reported that "Internet freedom around the world has declined for the fifth consecutive year..." Notably, its prescription for defending Internet freedom is to encourage the U.S. Government to "complet[e] the transition to a fully privatized Domain Name System."<sup>1</sup>

What will not be effective to protect Internet freedom is to continue the IANA functions contract. That contract is too limited in scope to be a tool for protecting Internet freedom. It simply designates ICANN to perform the technical IANA functions of managing the database of protocol parameters, allocating IP numbers and processing changes to the root zone file. It does not grant NTIA any authority over ICANN's day-to-day operations or the organization's accountability to the stakeholder community. The transition proposal contains a series of enhancements to ICANN's accountability that go beyond any authority that NTIA or the U.S. Government has today. For example, the U.S. Government has no ability to reject an ICANN budget or to remove an ICANN board member – two of the new enumerated community powers.

---

<sup>1</sup> See article by Mark P. Lagon and Eileen Donahoe on "Keeping internet governance out of the wrong hands," The Hill, (July 7, 2016). Lagon is president of Freedom House and served as U.S. ambassador to Combat Human Trafficking under former President George W. Bush. Donahoe is an officer of the Freedom House Board and former U.S. ambassador to the U.N. Human Rights Council under President Obama. Article available at: <http://thehill.com/blogs/pundits-blog/technology/286785-keeping-internet-governance-out-of-the-wrong-hands>.

Extending the contract, as you ask us to do, could actually lead to the loss of Internet freedom we all want to maintain. The potential for serious consequences from extending the contract beyond the time necessary for ICANN to complete implementation of the transition plan is very real and has implications for ICANN, the multistakeholder model, and the credibility of the United States in the global community.

Privatizing the domain name system has been a goal of Democratic and Republican administrations since 1997. Prior to our 2014 announcement to complete the privatization, some governments used NTIA's continued role with the IANA functions to justify their demands that the United Nations, the International Telecommunication Union (ITU) or some other body of governments should take control over the domain name system. Failing to follow through on the transition or unilaterally extending the contract will only embolden those authoritarian regimes that routinely advocate for government-led or intergovernmental management of the Internet via the United Nations. Former Homeland Security Secretary Michael Chertoff and retired Vice Chairman of the Joint Chiefs of Staff James Cartwright recently noted the risks that would come with rejecting or delaying the transition, writing as follows:

To reject or even delay the transition would be a gift to those governments threatened by a free and open Internet. The multistakeholder model is exactly what has allowed policy to keep pace with the Internet's rapid growth. The proposal includes all voices and is built on a foundation of transparency and accountability. It is a quintessentially American policy. When our values of freedom and democracy spread around the world and are shared by others, we are more secure at home and the world is more stable. We support this stewardship transition, as it will pave the way for American values and the free and open Internet around the world.<sup>2</sup>

Additionally, the Global Commission on Internet Governance, comprised of leading experts around the world, called upon the U.S. Government to adopt the proposal and to meet the September 2016 target date for the transition of the IANA functions. In the words of the Global Commission: "Failure to do so will send the wrong message to the international community, increase distrust, and will likely encourage some governments to pursue their own national or even regional Internets."<sup>3</sup>

The global Internet community, comprised of businesses, technical experts, and public interest groups, support this transition and want to see the United States follow through on its long-standing, well-considered commitment to privatize the domain name system.<sup>4</sup> Your letter

---

<sup>2</sup> See article by Michael Chertoff and James Cartwright on "How to Keep the Internet Free and Open," Politico, (June 8, 2016) at: <http://www.politico.com/agenda/story/2016/06/keep-internet-free-and-open-icann-000140>.

<sup>3</sup> See statement by the Global Commission on Internet Governance at: <http://www.broadcastingcable.com/news/washington/ntia-praised-domain-name-sign/157184>.

<sup>4</sup> For example, the Internet Association, Computer & Communications Industry Association and Internet Infrastructure Coalition stated, "The internet economy applauds NTIA for its deliberative and thorough work reviewing the ICANN transition proposals to ensure its principles for a successful transition are met. Our organizations agree that the proposals to transition ICANN from U.S. Government stewardship to a bottom-up, multistakeholder model satisfy NTIA principles and provide the internet with the best path forward for self-governance. It is important that Congress not artificially slow down the transition beyond the September 30 expiration of the current IANA contract." See NTIA Blog "What They are Saying: Reaction to NTIA's Assessment

reaches a different conclusion and appears to be based on a misunderstanding of the transition proposal. We respond to each concern below and of course are willing to meet with you and your staff members to provide more education on the plan at any time.

First, your claim that “ICANN’s proposal significantly increases the power of foreign governments,” is simply not true. The transition proposal does not expand the role of governments vis-à-vis other stakeholders. The bylaws retain the prohibition on government officials serving as voting board members. The role of governments in ICANN policymaking remains advisory. Under the transition plan, governments will continue, through the Governmental Advisory Committee (GAC), to provide input to the Board in the normal course of business. And, as is currently the case, the Board will be able to reject GAC advice. Today, the Board does give special consideration to consensus GAC advice. The proposal codifies this current practice through a bylaw change that limits this Board deference to consensus advice specifically defined as advice to which no one country formally objects. The threshold for rejecting such GAC consensus advice does increase from 50 percent to 60 percent, but given the codification of “consensus” in the bylaws, this standard only applies to advice from governments to which no government, including the United States, has objected. Given that fact, we would want and expect the Board always to accept consensus GAC advice and never reject it, regardless of the threshold.

The GAC has the potential to participate in the Empowered Community, but only at a level commensurate with other stakeholders. Notably, the GAC cannot unilaterally exercise the community powers. Moreover, the bylaws expressly prohibit the GAC from participating in the community powers when the issue in contention is a Board action on GAC advice.

The GAC has not yet decided whether it will participate in any exercise of community powers. The current position of the U.S. Government, shared by many other nations, is that the GAC should not participate in any exercise of the community powers. To do so risks converting the GAC’s role from that of an expert body providing public policy advice to the Board into an operational role for which the GAC is not organized and at which the GAC likely could not be effective. Accordingly, absent a unique and extreme set of facts, the U.S. Government presumptively will oppose any invitation to the GAC to join other parts of the ICANN multistakeholder community to exercise any of the community powers.

Second, your claim that “the proposal to insert into ICANN’s bylaws an undefined commitment to respect ‘internationally recognized human rights; would open the door to the regulation of content” does not acknowledge the constraints placed on ICANN in its bylaws. Including a commitment to human rights in the ICANN bylaws does not encourage the organization to go beyond its constituency and limited mission. The plan makes it clear that whatever the commitment to internationally recognized human rights, it will be constrained by the mission and core values set forth in the ICANN bylaws. Accordingly, elaborating on the commitment through Work Stream 2 will not lead to an expansion of ICANN’s mission or scope beyond the stable and secure operation of the domain name system.

---

of the IANA Stewardship Transition Proposal” at: <https://www.ntia.doc.gov/blog/2016/what-they-re-saying-reaction-ntia-s-assessment-iana-stewardship-transition-proposal>.

Third, you claim that “neither Congress nor the administration knows with absolute certainty if the IANA transition would include the transfer of government property.” In fact, there would be no transfer of government property when the IANA functions contract ends.<sup>5</sup> Based on a thorough legal review conducted by Department of Commerce lawyers last year in response to a similar question raised by Congressmen Sensenbrenner and Duffy, we reported that termination of NTIA’s contract with ICANN would not result in the transfer of government property because there is no evidence that the Department ever provided government property to ICANN or that contract termination would cause the transfer of government property to ICANN.<sup>6</sup> Each of NTIA’s contracts with ICANN related to the IANA functions required the contractor to furnish the necessary personnel, material, equipment, services, and facilities to perform the IANA functions. As you note, the Government Accountability Office (GAO) is reviewing this issue. In response to questions from GAO legal counsel, the General Counsel of the Department of Commerce informed GAO on December 15, 2015, that, in the Department’s view, the termination of NTIA’s contract with ICANN would not result in the transfer of U.S. Government property and the authoritative root zone file is not U.S. Government property. NTIA and the Department of Commerce are working closely with GAO on its review and will continue to do so; however, the Department’s views on this question are clear.

Fourth, your concern that ICANN “may consider moving its headquarters outside the United States to escape U.S. law” after the transition does not account for the fact that the stakeholder community has spent the last two years building an accountability regime for ICANN that, at its core, relies on California law and on ICANN to remain a California corporation. Article XVIII of ICANN’s bylaws confirms that “the principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California, United States of America.”<sup>7</sup> ICANN’s Board cannot change this bylaw over the objection of the stakeholder community. In addition, ICANN’s Articles of Incorporation already state that ICANN “is organized under California Nonprofit Public Benefit Corporation Law.”<sup>8</sup> Changes to the Articles of Incorporation now require support of a 75 percent majority of the empowered community.

There is no serious likelihood that Work Stream 2 will make any recommendation on the location of ICANN’s headquarters. The matters to be dealt with in Work Stream 2 relate to other jurisdictional issues, such as what law should apply to contract disputes and in which courts parties can seek to litigate claims against ICANN. Every multinational corporation headquartered in the U.S. faces these questions and ICANN is no exception. The fact that there may be individual stakeholders who cling to the false hope that ICANN might someday move out of the United States is not evidence that ICANN has “deferred to an unspecified point in the future” the question of its headquarters location. ICANN is a California corporation and will remain so.

---

<sup>5</sup> The reference to the 2000 GAO report mentioned in your letter regarding U.S. Government property appears to be focused on the authoritative root server which is not part of the IANA functions contract. It is part of a Cooperative Agreement with Verisign.

<sup>6</sup> Letter from NTIA to Congressmen Sensenbrenner and Duffy with enclosure sent June 11, 2015.

<sup>7</sup> See Bylaws for Internet Corporation for Assigned Names and Numbers (ICANN), as adopted by the ICANN Board (May 27, 2016) available at: <https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf>.

<sup>8</sup> See Articles of Incorporation of ICANN (as revised November 21, 1998) available at: <https://www.icann.org/resources/pages/governance/articles-en>.

Fifth, your contention that “this proposal will only further embolden an unaccountable ICANN board, which post-transition will only be beholden to a multi-stakeholder community that has unfortunately shown either an unwillingness or inability to hold the board accountable for its own promises” is not supported by the facts. As you point out, ICANN’s former CEO promised at a 2015 hearing that once the community and the stakeholders present the Board with a consensus proposal, the Board would transmit it to NTIA without change. That is exactly what happened on March 10, 2016. Prior to the chartering organizations’ affirming their support for the plan that week at meetings in Morocco, there was no final plan. Moreover, there was never any promise from the Board that its members would not participate in the process to develop a plan as your letter seems to imply. In fact, ICANN board members are themselves important stakeholders and their participation in the process was not only expected and encouraged, it was necessary for the community as a whole to arrive at a sound, final proposal.

The proposal that Heritage Foundation cites, and that you reference in your letter, was not a final proposal. It did not have the broad support of stakeholders outside of the working group, as was evidenced when the full ICANN community convened in Dublin last fall. Most important, the proposed draft plan proposed such a radical restructuring of ICANN that it might well have failed to satisfy NTIA’s criteria that the proposal had to maintain the security and stability of the domain name system. There is no basis given all these facts to conclude that the Board will not be held accountable post-transition.

At the end of your letter, you provide a list of other concerns that you believe have not been adequately addressed. While your letter does not describe the nature of your concerns, I will also address those issues here.

First, the future operation and security of the U.S. Government-administered legacy top-level domains (TLDs) of .mil and .gov are well-protected. The operation of and responsibility for the .mil and .gov domains are not impacted by the transition. ICANN cannot reassign the .mil, .gov, or the .edu, or .us domains, without the approval of the U.S. Government. However, to ease all concerns, NTIA and ICANN have reaffirmed that the U.S. Government is the sole administrator of .mil, .gov, .edu, and .us and that no change can be made to these domains without the express written approval of the U.S. Government.<sup>9</sup>

Second, your concerns about ICANN’s antitrust status are misplaced. The U.S. Government has conferred no antitrust immunity on ICANN for its new generic top level domain (gTLD) program or any other ICANN policy making functions through the IANA functions contract. ICANN’s new gTLD program and its other policy making functions are not part of the IANA functions services provided through the current contract with the U.S. Department of Commerce. Moreover, as previously noted, NTIA has no oversight role or regulatory authority over ICANN. In its decision to move forward with the transition at this time, the U.S. Government did not identify any significant competitive issues relating to the proposed transition. Nonetheless, post-transition U.S. competition laws would apply to the conduct of ICANN and its constituent groups in their policymaking activities just as they do today and to the same extent as those laws now apply to other private entities.

---

<sup>9</sup> See letters at: <https://www.ntia.doc.gov/page/exchange-letters-us-government-administered-tlds>.

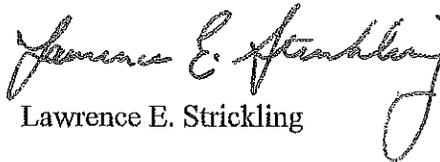
Third, ICANN currently has no authority to impose global taxes and will not have that ability post the transition. The fees that registry and registrars pay ICANN are established in commercially negotiated contracts which are reviewed by the multistakeholder community. In addition, ICANN is not involved in setting the fees Internet users or domain name registrants pay. Domain name registry and registrars in the content of commercial decisions set those prices.

In conclusion, we all agree that Internet freedom and a global interoperable Internet that is secure and resilient for future generations is paramount for U.S. global policy. Free expression exists and flourishes online not because of perceived U.S. government oversight over the DNS system, or because of any asserted special relationship that the United States has with ICANN. Global stakeholders active in the operation and governance of the Internet understand these facts, which is why civil society leaders and others support the proposal and agree that the IANA transition is the best way to ensure the continued functionality of the global Internet.

I also want to assure you that even after a transition, the United States Government would play an active leadership role in advocating for a free and open Internet within ICANN and in all other international venues. I look forward to working with you as we identify, advocate, and implement the policies that will truly support a free and open Internet.

If you have any questions or need more information about matters described in this letter, please feel free to contact me or NTIA's Director of Congressional Affairs, Jim Wasilewski at (202) 482-1830.

Sincerely,



Lawrence E. Strickling



**UNITED STATES DEPARTMENT OF COMMERCE**  
**The Assistant Secretary for Communications**  
**and Information**  
Washington, D.C. 20230

JUL 18 2016

The Honorable James Lankford  
United States Senate  
Washington, DC 20510

Dear Senator Lankford:

I am writing in response to your May 19, 2016 letter regarding the Internet Assigned Numbers Authority (IANA) Functions Stewardship Transition Proposal developed by the global multistakeholder community and delivered to NTIA on March 10, 2016.

At the outset, we share your goal of protecting Internet freedom. One of our criteria for evaluating the transition proposal is whether it maintains the openness of the Internet. After months of exhaustive review by agencies of the federal government, NTIA concluded on June 9 that the transition met this standard as well as the other criteria NTIA established for the transition.

This conclusion is based in large part on the fact that the best way to preserve Internet freedom is to depend on the community of stakeholders who own and operate, transact business, and exchange information over the myriad of networks that comprise the Internet. Free expression is protected by the open, decentralized nature of the Internet, the neutral manner in which the technical aspects of the Internet are managed and the commitment of the stakeholder community to maintain openness. As you point out, Freedom House recently reported that “Internet freedom around the world has declined for the fifth consecutive year...” Notably, its prescription for defending Internet freedom is to encourage the U.S. Government to “complet[e] the transition to a fully privatized Domain Name System.”<sup>1</sup>

What will not be effective to protect Internet freedom is to continue the IANA functions contract. That contract is too limited in scope to be a tool for protecting Internet freedom. It simply designates ICANN to perform the technical IANA functions of managing the database of protocol parameters, allocating IP numbers and processing changes to the root zone file. It does not grant NTIA any authority over ICANN’s day-to-day operations or the organization’s accountability to the stakeholder community. The transition proposal contains a series of enhancements to ICANN’s accountability that go beyond any authority that NTIA or the U.S. Government has today. For example, the U.S. Government has no ability to reject an ICANN budget or to remove an ICANN board member – two of the new enumerated community powers.

---

<sup>1</sup> See article by Mark P. Lagon and Eileen Donahoe on “Keeping internet governance out of the wrong hands,” *The Hill*, (July 7, 2016). Lagon is president of Freedom House and served as U.S. ambassador to Combat Human Trafficking under former President George W. Bush. Donahoe is an officer of the Freedom House Board and former U.S. ambassador to the U.N. Human Rights Council under President Obama. Article available at: <http://thehill.com/blogs/pundits-blog/technology/286785-keeping-internet-governance-out-of-the-wrong-hands>.

Extending the contract, as you ask us to do, could actually lead to the loss of Internet freedom we all want to maintain. The potential for serious consequences from extending the contract beyond the time necessary for ICANN to complete implementation of the transition plan is very real and has implications for ICANN, the multistakeholder model, and the credibility of the United States in the global community.

Privatizing the domain name system has been a goal of Democratic and Republican administrations since 1997. Prior to our 2014 announcement to complete the privatization, some governments used NTIA's continued role with the IANA functions to justify their demands that the United Nations, the International Telecommunication Union (ITU) or some other body of governments should take control over the domain name system. Failing to follow through on the transition or unilaterally extending the contract will only embolden those authoritarian regimes that routinely advocate for government-led or intergovernmental management of the Internet via the United Nations. Former Homeland Security Secretary Michael Chertoff and retired Vice Chairman of the Joint Chiefs of Staff James Cartwright recently noted the risks that would come with rejecting or delaying the transition, writing as follows:

To reject or even delay the transition would be a gift to those governments threatened by a free and open Internet. The multistakeholder model is exactly what has allowed policy to keep pace with the Internet's rapid growth. The proposal includes all voices and is built on a foundation of transparency and accountability. It is a quintessentially American policy. When our values of freedom and democracy spread around the world and are shared by others, we are more secure at home and the world is more stable. We support this stewardship transition, as it will pave the way for American values and the free and open Internet around the world.<sup>2</sup>

Additionally, the Global Commission on Internet Governance, comprised of leading experts around the world, called upon the U.S. Government to adopt the proposal and to meet the September 2016 target date for the transition of the IANA functions. In the words of the Global Commission: "Failure to do so will send the wrong message to the international community, increase distrust, and will likely encourage some governments to pursue their own national or even regional Internets."<sup>3</sup>

The global Internet community, comprised of businesses, technical experts, and public interest groups, support this transition and want to see the United States follow through on its long-standing, well-considered commitment to privatize the domain name system.<sup>4</sup> Your letter

---

<sup>2</sup> See article by Michael Chertoff and James Cartwright on "How to Keep the Internet Free and Open," Politico, (June 8, 2016) at: <http://www.politico.com/agenda/story/2016/06/keep-internet-free-and-open-icann-000140>.

<sup>3</sup> See statement by the Global Commission on Internet Governance at: <http://www.broadcastingcable.com/news/washington/ntia-praised-domain-name-sign/157184>.

<sup>4</sup> For example, the Internet Association, Computer & Communications Industry Association and Internet Infrastructure Coalition stated, "The internet economy applauds NTIA for its deliberative and thorough work reviewing the ICANN transition proposals to ensure its principles for a successful transition are met. Our organizations agree that the proposals to transition ICANN from U.S. Government stewardship to a bottom-up, multistakeholder model satisfy NTIA principles and provide the internet with the best path forward for self-governance. It is important that Congress not artificially slow down the transition beyond the September 30 expiration of the current IANA contract." See NTIA Blog "What They are Saying: Reaction to NTIA's Assessment

reaches a different conclusion and appears to be based on a misunderstanding of the transition proposal. We respond to each concern below and of course are willing to meet with you and your staff members to provide more education on the plan at any time.

First, your claim that “ICANN’s proposal significantly increases the power of foreign governments,” is simply not true. The transition proposal does not expand the role of governments vis-à-vis other stakeholders. The bylaws retain the prohibition on government officials serving as voting board members. The role of governments in ICANN policymaking remains advisory. Under the transition plan, governments will continue, through the Governmental Advisory Committee (GAC), to provide input to the Board in the normal course of business. And, as is currently the case, the Board will be able to reject GAC advice. Today, the Board does give special consideration to consensus GAC advice. The proposal codifies this current practice through a bylaw change that limits this Board deference to consensus advice specifically defined as advice to which no one country formally objects. The threshold for rejecting such GAC consensus advice does increase from 50 percent to 60 percent, but given the codification of “consensus” in the bylaws, this standard only applies to advice from governments to which no government, including the United States, has objected. Given that fact, we would want and expect the Board always to accept consensus GAC advice and never reject it, regardless of the threshold.

The GAC has the potential to participate in the Empowered Community, but only at a level commensurate with other stakeholders. Notably, the GAC cannot unilaterally exercise the community powers. Moreover, the bylaws expressly prohibit the GAC from participating in the community powers when the issue in contention is a Board action on GAC advice.

The GAC has not yet decided whether it will participate in any exercise of community powers. The current position of the U.S. Government, shared by many other nations, is that the GAC should not participate in any exercise of the community powers. To do so risks converting the GAC’s role from that of an expert body providing public policy advice to the Board into an operational role for which the GAC is not organized and at which the GAC likely could not be effective. Accordingly, absent a unique and extreme set of facts, the U.S. Government presumptively will oppose any invitation to the GAC to join other parts of the ICANN multistakeholder community to exercise any of the community powers.

Second, your claim that “the proposal to insert into ICANN’s bylaws an undefined commitment to respect ‘internationally recognized human rights; would open the door to the regulation of content” does not acknowledge the constraints placed on ICANN in its bylaws. Including a commitment to human rights in the ICANN bylaws does not encourage the organization to go beyond its constituency and limited mission. The plan makes it clear that whatever the commitment to internationally recognized human rights, it will be constrained by the mission and core values set forth in the ICANN bylaws. Accordingly, elaborating on the commitment through Work Stream 2 will not lead to an expansion of ICANN’s mission or scope beyond the stable and secure operation of the domain name system.

---

of the IANA Stewardship Transition Proposal” at: <https://www.ntia.doc.gov/blog/2016/what-they-re-saying-reaction-ntia-s-assessment-iana-stewardship-transition-proposal>.

Third, you claim that “neither Congress nor the administration knows with absolute certainty if the IANA transition would include the transfer of government property.” In fact, there would be no transfer of government property when the IANA functions contract ends.<sup>5</sup> Based on a thorough legal review conducted by Department of Commerce lawyers last year in response to a similar question raised by Congressmen Sensenbrenner and Duffy, we reported that termination of NTIA’s contract with ICANN would not result in the transfer of government property because there is no evidence that the Department ever provided government property to ICANN or that contract termination would cause the transfer of government property to ICANN.<sup>6</sup> Each of NTIA’s contracts with ICANN related to the IANA functions required the contractor to furnish the necessary personnel, material, equipment, services, and facilities to perform the IANA functions. As you note, the Government Accountability Office (GAO) is reviewing this issue. In response to questions from GAO legal counsel, the General Counsel of the Department of Commerce informed GAO on December 15, 2015, that, in the Department’s view, the termination of NTIA’s contract with ICANN would not result in the transfer of U.S. Government property and the authoritative root zone file is not U.S. Government property. NTIA and the Department of Commerce are working closely with GAO on its review and will continue to do so; however, the Department’s views on this question are clear.

Fourth, your concern that ICANN “may consider moving its headquarters outside the United States to escape U.S. law” after the transition does not account for the fact that the stakeholder community has spent the last two years building an accountability regime for ICANN that, at its core, relies on California law and on ICANN to remain a California corporation. Article XVIII of ICANN’s bylaws confirms that “the principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California, United States of America.”<sup>7</sup> ICANN’s Board cannot change this bylaw over the objection of the stakeholder community. In addition, ICANN’s Articles of Incorporation already state that ICANN “is organized under California Nonprofit Public Benefit Corporation Law.”<sup>8</sup> Changes to the Articles of Incorporation now require support of a 75 percent majority of the empowered community.

There is no serious likelihood that Work Stream 2 will make any recommendation on the location of ICANN’s headquarters. The matters to be dealt with in Work Stream 2 relate to other jurisdictional issues, such as what law should apply to contract disputes and in which courts parties can seek to litigate claims against ICANN. Every multinational corporation headquartered in the U.S. faces these questions and ICANN is no exception. The fact that there may be individual stakeholders who cling to the false hope that ICANN might someday move out of the United States is not evidence that ICANN has “deferred to an unspecified point in the future” the question of its headquarters location. ICANN is a California corporation and will remain so.

---

<sup>5</sup> The reference to the 2000 GAO report mentioned in your letter regarding U.S. Government property appears to be focused on the authoritative root server which is not part of the IANA functions contract. It is part of a Cooperative Agreement with Verisign.

<sup>6</sup> Letter from NTIA to Congressmen Sensenbrenner and Duffy with enclosure sent June 11, 2015.

<sup>7</sup> See Bylaws for Internet Corporation for Assigned Names and Numbers (ICANN), as adopted by the ICANN Board (May 27, 2016) available at: <https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf>.

<sup>8</sup> See Articles of Incorporation of ICANN (as revised November 21, 1998) available at: <https://www.icann.org/resources/pages/governance/articles-en>.

Fifth, your contention that “this proposal will only further embolden an unaccountable ICANN board, which post-transition will only be beholden to a multi-stakeholder community that has unfortunately shown either an unwillingness or inability to hold the board accountable for its own promises” is not supported by the facts. As you point out, ICANN’s former CEO promised at a 2015 hearing that once the community and the stakeholders present the Board with a consensus proposal, the Board would transmit it to NTIA without change. That is exactly what happened on March 10, 2016. Prior to the chartering organizations’ affirming their support for the plan that week at meetings in Morocco, there was no final plan. Moreover, there was never any promise from the Board that its members would not participate in the process to develop a plan as your letter seems to imply. In fact, ICANN board members are themselves important stakeholders and their participation in the process was not only expected and encouraged, it was necessary for the community as a whole to arrive at a sound, final proposal.

The proposal that Heritage Foundation cites, and that you reference in your letter, was not a final proposal. It did not have the broad support of stakeholders outside of the working group, as was evidenced when the full ICANN community convened in Dublin last fall. Most important, the proposed draft plan proposed such a radical restructuring of ICANN that it might well have failed to satisfy NTIA’s criteria that the proposal had to maintain the security and stability of the domain name system. There is no basis given all these facts to conclude that the Board will not be held accountable post-transition.

At the end of your letter, you provide a list of other concerns that you believe have not been adequately addressed. While your letter does not describe the nature of your concerns, I will also address those issues here.

First, the future operation and security of the U.S. Government-administered legacy top-level domains (TLDs) of .mil and .gov are well-protected. The operation of and responsibility for the .mil and .gov domains are not impacted by the transition. ICANN cannot reassign the .mil, .gov, or the .edu, or .us domains, without the approval of the U.S. Government. However, to ease all concerns, NTIA and ICANN have reaffirmed that the U.S. Government is the sole administrator of .mil, .gov, .edu, and .us and that no change can be made to these domains without the express written approval of the U.S. Government.<sup>9</sup>

Second, your concerns about ICANN’s antitrust status are misplaced. The U.S. Government has conferred no antitrust immunity on ICANN for its new generic top level domain (gTLD) program or any other ICANN policy making functions through the IANA functions contract. ICANN’s new gTLD program and its other policy making functions are not part of the IANA functions services provided through the current contract with the U.S. Department of Commerce. Moreover, as previously noted, NTIA has no oversight role or regulatory authority over ICANN. In its decision to move forward with the transition at this time, the U.S. Government did not identify any significant competitive issues relating to the proposed transition. Nonetheless, post-transition U.S. competition laws would apply to the conduct of ICANN and its constituent groups in their policymaking activities just as they do today and to the same extent as those laws now apply to other private entities.

---

<sup>9</sup> See letters at: <https://www.ntia.doc.gov/page/exchange-letters-us-government-administered-tlds>.

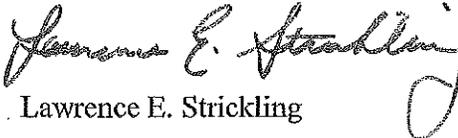
Third, ICANN currently has no authority to impose global taxes and will not have that ability post the transition. The fees that registry and registrars pay ICANN are established in commercially negotiated contracts which are reviewed by the multistakeholder community. In addition, ICANN is not involved in setting the fees Internet users or domain name registrants pay. Domain name registry and registrars in the content of commercial decisions set those prices.

In conclusion, we all agree that Internet freedom and a global interoperable Internet that is secure and resilient for future generations is paramount for U.S. global policy. Free expression exists and flourishes online not because of perceived U.S. government oversight over the DNS system, or because of any asserted special relationship that the United States has with ICANN. Global stakeholders active in the operation and governance of the Internet understand these facts, which is why civil society leaders and others support the proposal and agree that the IANA transition is the best way to ensure the continued functionality of the global Internet.

I also want to assure you that even after a transition, the United States Government would play an active leadership role in advocating for a free and open Internet within ICANN and in all other international venues. I look forward to working with you as we identify, advocate, and implement the policies that will truly support a free and open Internet.

If you have any questions or need more information about matters described in this letter, please feel free to contact me or NTIA's Director of Congressional Affairs, Jim Wasilewski at (202) 482-1830.

Sincerely,

  
Lawrence E. Strickling