



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

AUG 10 2016

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Chairman Grassley and Chairman Goodlatte:

I am writing in response to your June 27, 2016, letter regarding the proposal to transition the National Telecommunications and Information Administration's (NTIA) stewardship role related to the Internet Assigned Numbers Authority (IANA) functions. Since 1997, it has been a goal of Democratic and Republican administrations to privatize the domain name system (DNS).¹ The best way to allow people and private enterprise to thrive and protect 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. Completing the privatization is based on sound economic and policy principles, and not political considerations. It is consistent with long-standing and congressionally recognized U.S. policy,² and is neither misguided nor premature.

The global multistakeholder community has now worked over two years to develop a transition proposal, which it delivered to NTIA on March 10, 2016.³ NTIA, working with other U.S. Government agencies, performed a thorough review of the proposal. On June 9, 2016, we

¹ See Clinton, William J., *Memorandum on Electronic Commerce*, 1997 Pub. Papers 898-900 (July 1, 1997), available at: <https://www.gpo.gov/fdsys/pkg/PPP-1997-book2/pdf/PPP-1997-book2-doc-pg898-2.pdf>.

² See S. Con. Res. 50 (112th Congress), "Whereas this and past administrations have made a strong commitment to the multistakeholder model of Internet governance and the promotion of the global benefits of the Internet: Now let it be Resolved by the Senate (the House of Representatives concurring), That it is the sense of Congress that the Secretary of State, in consultation with the Secretary of Commerce, should continue working to implement the position of the United States on Internet governance that clearly articulates the consistent and unequivocal policy of the United States to promote a global Internet free from government control and preserve and advance the successful multistakeholder model that governs the Internet today." Available at: <https://www.congress.gov/bill/112th-congress/senate-concurrent-resolution/50/text>.

³ See NTIA Blog, "Reviewing the IANA Transition Proposal" (March 11, 2016), available at: <https://www.ntia.doc.gov/blog/2016/reviewing-iana-transition-proposal>.

issued our evaluation and concluded that the plan met the criteria established in 2014.⁴ Between now and the September 30, 2016 expiration date of the contract, we are committed to working with Congress to address any questions relating to the transition.

In your letter, you ask a number of questions that appear to reflect a misunderstanding of the stewardship transition proposal. This letter responds to those questions but if you would like additional information or to discuss these matters more fully, we are of course available to meet with you and your staff.

(1) 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?

First, completing the IANA stewardship transition supports free speech and human rights online. Free expression exists and flourishes online not because of perceived U.S. Government oversight over the DNS, or because of any asserted special relationship that the United States has with ICANN. It exists and is protected when stakeholders work together to make decisions. Unilaterally delaying or hindering the transition risks fragmenting the DNS, which would disrupt the interoperability of the Internet. Moreover, it could embolden authoritarian regimes that do not respect freedom of expression and advocate for government-led management of the Internet.

Second, the IANA functions contract is not a tool for protecting Internet freedom today. It simply designates ICANN to perform the technical IANA functions of managing the database of protocol parameters, allocating Internet Protocol (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.

Third, in the post-transition environment the U.S. government will continue to be actively involved in ICANN through the Governmental Advisory Committee (GAC). We will actively support and participate in multistakeholder processes and advocate for a free and open Internet at ICANN and in all relevant venues to protect our mutual interest in free speech and human rights online.⁵

⁴ See NTIA Press Release, "NTIA Finds IANA Stewardship Transition Proposal Meets Criteria to Complete Privatization" (June 9, 2016) available at: <https://www.ntia.doc.gov/press-release/2016/iana-stewardship-transition-proposal-meets-criteria-complete-privatization>.

⁵ 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." 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 and Director of the Office to Monitor and Combat Trafficking in Persons 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. Available at: <http://thehill.com/blogs/pundits-blog/technology/286785-keeping-internet-governance-out-of-the-wrong-hands>.

- (2) *What contingency plans has NTIA put into place to deal with the possibility that foreign, totalitarian governments might make demands on ICANN that would limit an open and free Internet, or move to transfer control of the Internet to an organization such as the International Telecommunications Union (ITU)?*

The transition plan directly addresses the concern that authoritarian governments might attempt to limit a free and open Internet or seek to transfer control of ICANN to an intergovernmental organization, such as the ITU. NTIA specifically stated in 2014 that it would not accept a proposal that replaced our role with a government-led or intergovernmental organization solution.⁶ Our June 9 report found that the proposal met this and the other firm criteria.⁷ In the development of the IANA stewardship transition proposal, the multistakeholder community specifically considered the potential of capture of ICANN processes by one or several groups of stakeholders, including governments. The community's new powers to challenge Board decisions and enforce decisions in court protect against any one party or group of interests from inappropriately influencing ICANN. In conducting the review of the transition proposal, NTIA also retained an expert panel of corporate governance experts who reviewed the ICANN Accountability proposal, including assessing any risk of capture. In their assessment, the experts find the prospects for a takeover of ICANN by a single government, a group of governments, or one or more economic actors to be extremely remote.⁸

It is not accurate to suggest that the transition proposal significantly expands the role of governments vis-à-vis other stakeholders. The ICANN bylaws retain the prohibition on government officials serving as voting board members. In addition, governments remain advisory 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 can 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 defined in the bylaws as advice to which no government formally objects. The changed threshold for rejecting GAC consensus advice from 50 percent to 60 percent only applies to advice to which no government, including the United States, has objected. Further, any potential participation by the GAC in the new Empowered Community will be 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.

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

⁶ See NTIA Announces Intent to Transition Key Internet Domain Name Functions (March 14, 2014), available at: <http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>.

⁷ See IANA Stewardship Transition Proposal Assessment Report (June 9, 2016) and Attachments, available at: <https://www.ntia.doc.gov/report/2016/iana-stewardship-transition-proposal-assessment-report>.

⁸ *Ibid.* See Attachment 6.

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.⁹

- (3) *Has NTIA requested that the Department of Justice's Office of Legal Counsel (OLC) analyze the U.S. Government's property interest in the root zone file? Will NTIA commit to postpone any transition in the absence of a determination by the Government Accountability Office (GAO) and OLC relating to this property issue?*

The Department of Commerce has addressed questions regarding U.S. Government property appropriately and sufficiently. In response to a 2015 letter from Congressmen Sensenbrenner and Duffy, the Department of Commerce Office of General Counsel conducted a thorough legal review and advised NTIA that the termination of the IANA functions contract would not result in the transfer of U.S. Government property. That June 2015 letter is enclosed.¹⁰

Additionally, in response to questions from GAO legal counsel, the General Counsel of the Department of Commerce informed GAO in December 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 have worked closely with GAO on its review since December 2015, and we expect that GAO will provide its opinion in a timely manner. However, the Department does not anticipate any reason to postpone the transition to address these questions further.

- (4) *Why did NTIA proceed in utilizing funds in furtherance of the transition in light of the clear prohibition created by the FY 2016 Omnibus spending bill? Did NTIA inform*

⁹ 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>.

¹⁰ Letter from NTIA to Congressmen Sensenbrenner and Duffy with enclosure sent June 11, 2015 ("...[T]he termination of NTIA's contract with ICANN would not result in the transfer of United States Government property because there is no evidence that (1) the Department has transferred Government property, including intellectual property owned by the Government, to ICANN; (2) ICANN possesses Government property, including intellectual property owned by the Government, created under the IANA functions contract; or (3) the termination of the contract would cause Government property, including intellectual property owned by the Government, to be transferred to ICANN.")

other members of the DNS Interagency Working Group of the transition-related appropriations provision in the FY 2016 Omnibus spending bill?

Section 539 of Public Law 114-113 prohibits the use of appropriated funds to “relinquish the responsibility of the National Telecommunications and Information Administration, during fiscal year 2016, with respect to Internet domain name system functions.”¹¹ We have complied with this provision and did inform other members of the DNS Interagency Working Group of the language. It is important to note that Section 539 does not prohibit the use of funds to engage in preparatory activities related to the potential future transition, including evaluation of the transition plan. Indeed, the Senate Committee on Appropriations previously directed NTIA “to conduct a thorough review and analysis of any proposed transition”¹² and to provide quarterly reports on the process.¹³ NTIA has been transparent and regularly provided Congress with updates on its activities regarding the Internet DNS, including its plans to assess the transition proposal. NTIA and other stakeholders have testified at multiple congressional hearings about the proposed transition, including describing NTIA’s preparatory activities. For example, as a part of conducting a thorough review and analysis of the proposal, NTIA sought expert assistance on corporate governance.¹⁴ NTIA’s activities have been consistent with the directives in the congressional reports noted above, and NTIA has also been responsive to calls from members of Congress to provide transparency and scrutiny of the proposal and preparatory activities over the past two years.¹⁵

(5) *How will this proposal require ICANN’s commitment to maintaining and enforcing the Public Interest Commitments, now and in the future?*

As you note in your letter, the revised bylaws required by the proposal make it clear that the Public Interest Commitments (PICs) and the registry contracts that contain them are deemed within ICANN’s mission. Any changes to the bylaws in the future can only be done with support of ICANN’s stakeholders and/or can be challenged through the use of the new community powers. In a recent letter dated June 30, 2016 from the Chairman of ICANN’s Board to the President of the Intellectual Property Constituency, ICANN again commits to enforce the PICs contained in the Registry Agreements.¹⁶

¹¹ See P.L. 114-113, Section 539, available at: <https://www.congress.gov/114/plaws/publ113/PLAW-114publ113.pdf>.

¹² S. Rep. No. 113-181 “directs NTIA to conduct a thorough review and analysis of any proposed transition.” available at: <https://www.congress.gov/113/crpt/srpt181/CRPT-113srpt181.pdf>.

¹³ *Id.* Similarly, S. Rep. No. 114-66 states that “[t]he Committee understands NTIA’s plans to transition the agency’s technical stewardship of the Internet Assigned Numbers Authority [IANA] and that NTIA is currently awaiting the delivery of a transition plan that it can evaluate” and “directs NTIA to continue quarterly reports to the Committee on all aspects of the transition process.” Available at: <https://www.congress.gov/114/crpt/srpt66/CRPT-114srpt66.pdf>. NTIA’s quarterly reports and other publications can be found at: <https://www.ntia.doc.gov/category/domain-name-system>.

¹⁴ See IANA Stewardship Transition Proposal Assessment Report (June 9, 2016) Attachment 6, available at: <https://www.ntia.doc.gov/report/2016/iana-stewardship-transition-proposal-assessment-report>.

¹⁵ *E.g.*, H. Rep. No. 114-175, available at: <https://www.congress.gov/114/crpt/hrpt175/CRPT-114hrpt175.pdf>.

¹⁶ See Letter from ICANN Board Chairman Dr. Steven D. Crocker to President of the Intellectual property Constituency (June 30, 2016), available at: <https://www.icann.org/en/system/files/correspondence/crocker-to-shatan-30jun16-en.pdf>.

(6) *Is NTIA opposed to Congress requiring an affirmative, up-or-down vote for the IANA functions transition to be completed? Why or why not?*

NTIA has and will continue to work closely with Congress and to address questions regarding the transition. We do not see any reason to delay or prevent NTIA from transitioning its stewardship role of the Internet DNS, a commitment the U.S. Government made more than a decade ago.

I hope this response resolves your concerns. As I mentioned above, NTIA is available to discuss these responses or provide more information about the IANA Stewardship Transition Proposal Assessment Report. Please feel free to contact my Director of Congressional Affairs, Jim Wasilewski, at (202) 482-1830 if you have any follow up.

Sincerely,

Lawrence E. Strickling
Lawrence E. Strickling *jvw*