

Congress of the United States
Washington, DC 20515

September 8, 2016

The Honorable Loretta E. Lynch
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

The Honorable Penny Pritzker
Secretary
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, D.C. 20230

Dear Madam Attorney General and Madam Secretary:

On August 16, 2016, the National Telecommunications and Information Administration (NTIA) notified the Internet Corporation for Assigned Names and Numbers (ICANN) that, barring any impediment, NTIA intends to allow the Internet Assigned Numbers Authority (IANA) functions contract to expire as of October 1, 2016. As you know, many in Congress have expressed concerns that this irreversible decision could result in a less transparent and accountable Internet governance regime or provide an opportunity for an enhanced role for authoritarian nation-states in Internet governance. Indeed, there remain a number of unresolved matters with regard to accountability, jurisdiction, and antitrust with respect to the proposed transition of the IANA functions to ICANN and the global multi-stakeholder community.

The transition of the IANA functions to the global multi-stakeholder community is a serious, groundbreaking, and potentially unalterable action. As such, we call on the Departments of Justice and Commerce to address these outstanding issues.

As you know, over the last two years, our respective committees have dutifully overseen the work done by the Administration, ICANN, and the Internet community toward a possible transfer of the IANA functions to ICANN. We have closely examined the arguments for and against the proposed transition, including concerns about whether the transition could enhance the role of authoritarian regimes in Internet governance.

In particular, we have heard from witnesses testifying to concerns that important accountability measures have yet to be fully fleshed out, tested, or proven, because they will not have been

implemented prior to September 30, 2016. These accountability measures, known as the “Work Stream 2” accountability improvements, include matters relating to the accountability of ICANN staff, as well as questions regarding the jurisdiction of contracts and dispute settlements.

The accountability of ICANN’s staff and board are particularly important in light of the extraordinary findings of a July 29, 2016 Independent Review Panel investigation, which found that ICANN’s board and legal staff disregarded ICANN’s bylaws and rules with regard to the decision to deny Dot Registry LLC’s (“Dot Registry”) generic Top Level Domain (gTLD) application. Dot Registry applied on behalf of the National Association of Secretaries of State to be the community applicant for the new .inc, .llc, and .llp domains. Perhaps the most troubling aspect of this case is that it appears ICANN’s own general counsel had “devised an elaborate legal ploy to shield his team from scrutiny” and “developed their own opinion that they were not subject to their own organization’s rules.”¹

Given the Independent Review Panel’s findings in this case and the circumstances surrounding additional cases that are currently being investigated by other Independent Review Panels, we have serious concerns about the ability to ensure that ICANN would follow its own bylaws if the Administration were to relinquish the IANA functions contract.

Further, we are concerned that matters left for Work Stream 2 regarding the jurisdiction of contracts and dispute settlements will not be resolved before the proposed October 1, 2016 handoff of the IANA functions to ICANN. The revised bylaws, for example, never specify that ICANN *itself* must remain a California non-profit corporation. As one witness testified at a recent hearing before the Senate Commerce Committee, “there is no bylaw restriction preventing ICANN from shifting its legal jurisdiction of incorporation to Australia, Belgium, China, Iran, Russia, Singapore, Switzerland, or anywhere else.”² The witness further noted that:

Annex 12 of the CCWG-Accountability report specifically includes among the topics of discussion for Work Stream 2: ‘Place and jurisdiction of incorporation and operations, including governance of internal affairs, tax system, human resources, etc.’ and ‘Jurisdiction of places of physical presence.’ These Work Stream 2 topics were included at the insistence of a number of members and participants who object to ICANN remaining a U.S. non-profit corporation.³

¹ *Simply not credible: The extraordinary verdict against the body that hopes to run the Internet.* The Register (Aug. 3, 2016). http://www.theregister.co.uk/2016/08/03/extraordinary_verdict_against_icann/?page=1 (last visited September 1, 2016).

² *Examining the Multistakeholder Plan for Transitioning the Internet Assigned Number Authority: Hearing Before the Senate Committee on Commerce, Science, and Transportation*, 114th Cong. (May 24, 2016) (statement of Brett D. Schaefer, Jay Kingham Fellow in International Regulatory Affairs, The Heritage Foundation). Available at https://www.commerce.senate.gov/public/_cache/files/16026065-3e2a-4353-b81a-40ee06b9e73c/333F40E78CF95DE8494E608B68F1ED99.brett-schaefer-testimony.pdf (last visited September 1, 2016).

³ *Id.*

The matter of jurisdiction alone raises questions about whether stakeholders will have legal certainty when seeking redress and whether the multi-stakeholder community will be able to maintain sufficient oversight of ICANN. These critically important jurisdictional issues cannot wait for resolution *after* the proposed transition occurs. They must be resolved *before* any transition could be allowed to move forward.

Questions have also been raised about ICANN's antitrust status. A recent Freedom of Information Act response by NTIA indicates that NTIA performed no antitrust analysis with regard to ceding the IANA functions to ICANN, which is troubling.⁴ This is yet another indication that the Administration has not fully considered nor addressed all of the implications of transitioning the IANA functions to the global multi-stakeholder community.

We are aware that ICANN, in response to a Wall Street Journal piece on this issue, has written that "ICANN is not, and never has been exempted from antitrust laws." A 2000 federal appellate court decision, however, concluded that ICANN's predecessor, Network Solutions, Inc., was *immune* from antitrust scrutiny because it was acting under the authority of the federal government.⁵ At a minimum, there should be guidance from the Department of Justice regarding ICANN's post-transition antitrust status, one which goes beyond just consideration of the .com domain and instead examines the totality of ICANN activities potentially affected by the expiration of the IANA functions contract.

Finally, on September 22, 2015, the Government Accountability Office (GAO) was asked to produce an audit report on whether termination of the IANA functions contract constitutes the relinquishment of U.S. government property.⁶ As you are certainly aware, the relinquishment of U.S. government is a power granted exclusively to Congress under Article IV, Section 3 of the Constitution. To date, GAO has not responded, leaving open the question of whether Congress must vote in order to effectuate any possible transfer of the IANA functions. Moreover, we are concerned that the Department of Justice's Office of Legal Counsel has not analyzed this issue nor the other matters raised in this letter. Absent clear legal certainty, moving forward with the transition could have devastating consequences for Internet users.

There is a broad range of important questions on both law and policy that remain outstanding with respect to the proposed transfer of the IANA functions to ICANN and the global multi-stakeholder community. We call on you to address the questions and concerns detailed above

⁴ *NTIA performed no antitrust analysis even as it proceeded with the creation of Internet monopoly*, Americans for Limited Government, (Aug. 26, 2016). https://www.commerce.senate.gov/public/_cache/files/16026065-3e2a-4353-b81a-40ee06b9e73c/333F40E78CF95DE8494E608B68F1ED99.brett-schaefer-testimony.pdf (last visited September, 1, 2016).

⁵ *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573 (2d Cir. 2000).

⁶ Letter regarding The Constitutionality of Relinquishing Oversight of Internet Naming Service from Senator Charles E. Grassley, Senator Ted Cruz, Congressman Bob Goodlatte, and Congressman Darrell Issa to Comptroller General Gene Dodaro, (Sept. 28, 2015). <http://www.grassley.senate.gov/sites/default/files/judiciary/upload/2015-09-22%20CEG%20Cruz%20Goodlatte%20Issa%20to%20GAO%20%28Report%20on%20ICANN%20Oversight%20Transfer%29.pdf>. (last visited September, 6, 2016).

and to reconsider the Administration's current plans to transition the IANA functions on October 1, 2016.

Sincerely,



JOHN THUNE
Chairman
Senate Committee on Commerce,
Science, and Transportation



CHARLES GRASSLEY
Chairman
Senate Committee on the Judiciary



FRED UPTON
Chairman
House Committee on Energy and
Commerce



BOB GOODLATTE
Chairman
House Committee on the Judiciary