

**Congress of the United States**  
**Washington, DC 20515**

September 21, 2016

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

Dear Attorney General Lynch:

The National Telecommunications and Information Administration (NTIA) has indicated that it intends to transfer key Internet domain name functions, known as the Internet Assigned Number Authority (IANA) functions, to a global multi-stakeholder community at the end of Fiscal Year 2016. As you are aware, when announcing this proposed transition on March, 2014, the NTIA specified that such a proposal must have broad community support and 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. Further, NTIA affirmed 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>

We’re sure you would agree that the openness, security, and stability of the Internet are of paramount importance to all Internet users, and yet a number of outstanding issues related to this proposed transition have yet to be answered, threatening these very values. These include how the transfer will effect free speech and the openness of the Internet, if U.S. control of the .mil and .gov domains will be compromised, if the transfer will open the Internet to undue influence from foreign nations, if the transfer will lead to the improper conveyance of United States government property, or if the transfer affects any existing antitrust immunity and increases the likelihood of significant antitrust litigation. Further, a recent Declaration by the Internet Corporation for Assigned Names and Numbers’ (ICANN) Independent Review Panel calls into question the credibility of ICANN’s ability to carry out basic duties of board self-governance.<sup>2</sup> This document reveals that ICANN’s Board Governance Committee has “failed several transparency obligations,”<sup>3</sup> engaged in the “cavalier treatment”<sup>4</sup> of constituent

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<sup>1</sup> National Telecommunications and Information Administration, U.S. Department of Commerce, “NTIA Announces Intent to Transition Key Internet Domain Name Functions,” (March 14, 2014) *available at* <https://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>.

<sup>2</sup> Dot Registry, LLC. V. Internet Association Corporation for Assigned Names and Numbers (ICANN), ICDR Case No. 01-14-001-5004, Declaration of the Independent Review Panel, International Centre for Dispute Resolution (July 29, 2016) *available at* <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>3</sup> *Id.* at 40.

requests, and failed to undertake an examination of whether ICANN staff or contractors complied with their obligations under the Articles and Bylaws of incorporation (finding that this failure is “itself a failure by the Board to comply with its obligations under the Articles and Bylaws.”).<sup>5</sup> These failures raise serious concerns about the ability ICANN to exercise proper corporate oversight and call into question ICANN’s organizational maturity.

Simply put, with so many unanswered questions and from what available evidence we do have, this transition is not in the best interest of a free, open, and secure Internet – nor is it in the best interest of the United States. Ending the United States contractual relationship with ICANN is dangerous and it is bad policy.

According to NTIA, the Department of Justice (DOJ) has participated in a “DNS Interagency Working Group” of U.S. government agencies who have been tasked with developing a methodology to assess whether or not the NTIA’s criteria are met. Specifically, the DNS Interagency Working Group has convened at least monthly to “coordinate and develop policies and positions related to DNS issues” and engage on “matters related to the IANA Stewardship Transition, including proposal review and assessment.”<sup>6</sup> NTIA recently announced that it expects the transition proposal will meet the agency criteria set forth in 2014, presumably with the support of the DNS Interagency Working Group, and plans to allow NTIA’s contract with ICANN to lapse.

As a key agency participant in the discussion surrounding the transfer of the IANA functions, we are interested in DOJ’s substantive input concerning the decision to transfer the IANA functions and to allow the federal government’s contract with ICANN to lapse. With so many outstanding questions remaining, especially in areas in which DOJ would seem to have direct subject matter expertise, we believe it is important to understand what input and contributions the Attorney General and the DOJ made in blessing this transfer and in answering many of the specific questions that were raised by other agency participants during the process.

We are deeply troubled that DOJ’s Office of Legal Counsel (OLC) has not provided a formal legal opinion concerning these issues, including the constitutional questions. As you know, OLC provides authoritative legal advice to the President and all Executive Branch agencies, including legal advice on all constitutional questions. It is quite frankly shocking that the Commerce Department would fail to seek such an opinion before proceeding down this path.

NTIA has acknowledged widespread concerns related to the potential loss of control of U.S. governmentally administered domain names such as .mil and .gov. In an attempt to allay

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<sup>4</sup> *Id.* at 44.

<sup>5</sup> *Id.* at 47.

<sup>6</sup> National Telecommunications and Information Administration, U.S. Department of Commerce, *IANA Stewardship Transition Proposal Assessment Report* 14 (June 2016) available at [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).

these concerns, NTIA has stated that the operation of these Top Level Domains (TLDs) are not impacted by the transition and that “per the policies, procedures, and practices in place, .mil and .gov cannot be transferred without explicit agreement from the current administrators of those domains – namely, the U.S. government.”<sup>7</sup> Yet, the only mechanism NTIA has enacted to affirm that the United States is, and will remain, the administrator of .gov and .mil TLDs is through the exchange of non-binding letters with ICANN. As such, the only true assurance the United States has regarding the important .mil and .gov TLDs comes from a non-legally binding, two paragraph letter from ICANN CEO Goran Marby that calls on ICANN to honor and maintain its commitments with respect to the U.S. governmentally administered TLDs. These assurances are certainly are not legally binding and could lead to the loss of the TLDs despite the declarations of NTIA and ICANN.

As you are likely aware, concerns continue to exist regarding whether or not the administration has the constitutional authority to conduct the IANA transition without the authorization of Congress because of the United States property interests in the root zone file – or other similar components of the Internet that were created and financed by the United States. Under Article IV, Section 3 of the Constitution, Congress has the exclusive power “to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.”

Additionally, should NTIA end its contract with ICANN, any antitrust protections that ICANN currently enjoys as an organization operating under government control would end. ICANN may then be vulnerable to a dramatic increase in antitrust suits and could be compelled to seek the protection of other governmental or quasi-governmental entities to limit this exposure. Should ICANN seek a new antitrust shield in this manner, ICANN could be subject to limitations on political freedoms that come from groups such as the United Nations International Telecommunications Union.

With these issues in mind, please provide answers to the following questions:

- With regard to the security of the .mil, .gov, and U.S. governmentally administered TLDs, does the Attorney General and the Justice Department believe that the mere exchange of letters between NTIA and ICANN is preferable to a binding legal agreement? If so why? Please provide the Department’s rationale?
- Did the DOJ advise NTIA regarding this resolution of government administered TLDs?
- Should ICANN delegate U.S. government administered TLDs, contrary to current assurances, what action will the DOJ take?

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<sup>7</sup> National Telecommunications and Information Administration, U.S. Department of Commerce, “Q and A on IANA Stewardship Transition,” (August 16, 2016) available at <https://www.ntia.doc.gov/other-publication/2016/q-and-iana-stewardship-transition-0>.

- With the lack of certainty over the disposition of government property in the IANA transfer, has NTIA ever referred this issue to DOJ for analysis or has DOJ ever conducted an analysis of this question on its own? If so, what are its findings?
- Does the Attorney General believe that there is no possibility that NTIA's planned transition of the IANA functions may potentially relinquish ownership of United States property? What analysis did you conduct to come to this conclusion?
- As a member of the DNS Interagency Working Group or otherwise, has the DOJ conducted a review of the antitrust implications of NTIA's termination of its contract with ICANN? If so, please provide a copy of this review. If not, why not?

This unalterable action poses serious ramifications for the security and openness of the Internet. As a member of the DNS Interagency Working Group, we'd like to know what role that you and the DOJ played in this transition. We appreciate your timely responses to these important questions no later than September 27, 2016.

Sincerely,



Charles E. Grassley  
Chairman  
Senate Committee on the Judiciary



Bob Goodlatte  
Chairman  
House Committee on the Judiciary

CC:  
The Honorable Shaun Donovan  
Director, Office of Management and Budget