

August 10, 2016

The Honorable Paul Ryan  
Speaker of the House  
H-232, The Capitol  
Washington, DC 20515

The Honorable Nancy Pelosi  
House Minority Leader  
H-204, The Capitol  
Washington, DC 20515

The Honorable Mitch McConnell  
Senate Majority Leader  
S-230, The Capitol  
Washington, DC 20510

The Honorable Harry Reid  
Senate Minority Leader  
S-221, The Capitol  
Washington, DC 20510

Dear Speaker Ryan, Minority Leader Pelosi, Majority Leader McConnell, Minority Leader Reid:

We write to urge Congress to defend its Power of the Purse—and Internet freedom.

Our Constitution rests on the idea that the “Power of the Purse” belongs to Congress, not the President — because, as Elbridge Gerry put it at the Constitutional Convention of 1787, the House is “more immediately the representatives of the people and ... the people ought to hold the purse-strings.”<sup>1</sup> The House fought to defend this core democratic principle in 2014, when it sued over implementing the Affordable Care Act’s subsidies that weren’t appropriated by Congress.<sup>2</sup> Now, the Administration appears determined to violate clear appropriations prohibiting the transition of the Internet domain system without authorization. If the Administration does not relent, Congress should sue.

Congress twice enacted appropriations riders prohibiting any use of taxpayer funds “to relinquish the responsibility of the National Telecommunications and Information Administration [NTIA] ... with respect to Internet domain name system functions, including responsibility with respect to the authoritative root zone file and the Internet Assigned Numbers Authority [IANA] functions.”<sup>3</sup> In other words, Congress ordered NTIA not to let lapse the government contract under which the IANA function—essentially the Internet’s phone book—has been run by a private California non-profit since 1998.<sup>4</sup> Failure to renew this contract before the end of August would, according to the NTIA, allow the Internet Corporation for Assigned Names and Numbers (ICANN) to take over management of the IANA function. This “Transition” would end the U.S. government’s historic role as a guarantor of Internet governance.

We agree that Internet governance should work from the bottom up, driven by the global community of private sector, civil society and technical stakeholders. But that “multistakeholder” model is fragile. Without robust safeguards, Internet governance could fall under the sway of governments hostile to freedoms protected by the First Amendment. Ominously, governments

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<sup>1</sup> U.S. House of Representatives, *History, Art & Archives: Power of the Purse*, (Aug. 4, 2016, 5:05 PM), <http://goo.gl/hjFLko>.

<sup>2</sup> H.R. Res. 676, 113th Cong. (as passed by House on July 30, 2014), <https://goo.gl/yqUPpq>.

<sup>3</sup> *Most recently in: Military Construction and Veterans Affairs and Related Agencies Appropriations Act Amendments*, Pub. L. No. 114-113 § 539(a) (2016), <http://goo.gl/JHnnci>.

<sup>4</sup> NTIA, *Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers*, Nov. 25, 1998, <https://goo.gl/QfTKnD>.

will gain a formal voting role in ICANN for the first time when the new bylaws are implemented. NTIA has expressed its approval of this expanded role for governments in ICANN.

The multistakeholder model may also be undermined from within. ICANN's new governance structure may prove inadequate, or the community too disunited, to hold the ICANN staff or Board accountable. ICANN has already morphed from the technical coordinating body set up in 1998 into something much more like a government: It has the *de facto* power to tax domain names. It is flush with cash from a flurry of top level domain name applications (*e.g.*, .APP, .SHOP). It is increasingly exercising essentially regulatory powers (*e.g.*, who may use .WINE or .AMAZON). There are good reasons to worry about what it may do with this power absent the incentive for self-restraint created by its contract with the U.S. Indeed, even with the transition at stake, ICANN has demonstrated a troubling willingness to ignore its bylaws and procedures, as demonstrated in the recent ruling in favor of Dot Registry.<sup>5</sup>

The ICANN stakeholders have proposed reforms that they hope will ensure that ICANN will be accountable to them absent the historical contractual relationship with the U.S. government. However, this process is not complete. Critical questions remain unanswered and key issues are not expected to be fully resolved until summer 2017 — including where ICANN will be subject to jurisdiction.

Also unresolved is a matter of U.S. national security: The Administration has failed to ensure U.S. ownership and control of .MIL and .GOV in perpetuity. Both are vital national assets.

Congress expected such issues to be settled before any Transition occurs. That's why it enacted the FY2015 appropriations rider—after the White House abruptly announced its intention to end the current contract with ICANN and “transition key Internet domain name functions to the global multi-stakeholder community.”<sup>6</sup> In January 2015, NTIA Administrator Larry Strickling acknowledged that this rider:

does restrict NTIA from using appropriated dollars to relinquish our stewardship during fiscal year 2015 with respect to Internet domain name system functions. We take that seriously. Accordingly, we will not use appropriated funds to terminate the IANA functions contract with ICANN prior to the contract's current expiration date of September 30, 2015.<sup>7</sup>

Congress extended this prohibition through FY2016.<sup>8</sup> Yet, in June, NTIA issued a 172-page report finding that the package of reforms proposed by ICANN to its governance structure “meets the criteria necessary to complete the long-promised privatization of the IANA functions.”<sup>9</sup>

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<sup>5</sup> See Chris Williams, *Simply not credible: The extraordinary verdict against the body that hopes to run the internet Independent review tears into ICANN board and staff*, August 3, 2016, <http://goo.gl/AvaFdr>. Independent Review ruling available at <https://goo.gl/Fq73PG>.

<sup>6</sup> Press Release, *NTIA Announces Intent to Transition Key Internet Domain Name Functions*, March 14, 2014, <https://goo.gl/Dzp211>.

<sup>7</sup> Lawrence E. Strickling, Assist. Sec'y of Commerce for Comm'ns and Info., Address at State of the Net Conference, Wash., DC, Jan. 27, 2015, transcript available at <https://goo.gl/25kLev>.

<sup>8</sup> Pub. L. No. 114-113. 2016.

<sup>9</sup> Office of Nat. Telecomm. and Info. Admin., U.S. Dep't of Commerce, *IANA Stewardship Transition Proposal Assessment Report*, (June 2016) <https://goo.gl/mngQzb>.

NTIA is not merely reviewing proposed reforms. It is, by its own admission, doing so as part of a drawn-out process resulting in the decision to let the IANA contract lapse — *precisely what Congress forbade NTIA to do*. Sen. Grassley and Rep. Goodlatte summarized the matter:

[NTIA] “utilized a number of resources and tools” to review and assess the IANA stewardship proposal. Further NTIA states that it utilized the DNS Interagency Working Group, comprised of 15 government agencies, to “engage U.S. federal government agencies on matters related to the IANA Stewardship Transition, including proposal review and assessment.” As we are sure you are aware, it is a violation of federal law for an officer or employee of the United States Government “to make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.” It is troubling that NTIA appears to have taken these actions in violation of this prohibition.<sup>10</sup>

Sen. Grassley and Rep. Goodlatte are correct: if NTIA allows the contract to lapse, it will have violated federal law.<sup>11</sup> The decision to abandon an 18-year contractual relationship governing the Internet has obviously consumed significant NTIA resources, both to fund outside experts<sup>12</sup> and to pay for time spent on the issue and on NTIA employees making a decision about whether to extend the contract. Again, Administrator Strickling himself acknowledged that the rider “does restrict NTIA from using appropriated dollars to relinquish our stewardship.... [of IANA].”

Congress should make clear that it will sue to enforce the funding prohibition. As it did in 2014, the House needs to vote to authorize Speaker Ryan to sue to defend its Article I powers<sup>13</sup> — not only the Power of the Purse but also the sole right to dispose of federal property, which the IANA function may well be.<sup>14</sup> A federal court could issue a writ of *mandamus*, ordering NTIA to exercise the option to renew the contract, or a declaratory judgment that, if the IANA contract terminates, the IANA function contract rights revert to NTIA, not to ICANN. Such a ruling could effectively unwind the Transition.

Congress should also renew the funding prohibition for FY2017 so that it has time to properly conduct its own assessment of whether ICANN is ready for the Transition.

We acknowledge that the Administration's actions have raised expectations that the Transition is imminent and there will be some frustration in the ICANN community if the IANA contract is renewed again (as it was last summer). But far greater disruption would result if a U.S. court forced the reversal of the Transition after the fact. Rushing the Transition could also prove more disruptive than delaying it—for instance, by delegitimizing ICANN if its new governance

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<sup>10</sup> Letter from Sen. Chuck Grassley (R-IA) and U.S. Rep. Bob Goodlatte (R-VA), June 27, 2016, <https://goo.gl/C4iej3>.

<sup>11</sup> 31 USC § 1341(a)(1)(A). *See also* 31 U.S.C § 1350 (fines up to \$5,000 and prison terms up to 2 years).

<sup>12</sup> For instance, ICANN entered into a sole-source contract with Harvard’s Berkman Center to perform an “independent review and assessment of a non-profit corporate governance structure designed for a multistakeholder setting.” Notice of Intent, Internet Assigned Numbers Authority (IANA) Stewardship Transition, Nat. Inst. Standards and Tech, March, 30, 2016, <https://goo.gl/F8Fy57>.

<sup>13</sup> H.R. Res. 676, 113th Cong. (as passed by House on July 30, 2014), <https://goo.gl/yqUPPg>.

<sup>14</sup> Congress has asked the Government Accountability Office whether the IANA function constitutes government property. If so, only Congress can authorize its transfer under the Constitution, Art I., § 10, Cl. 4. A report is expected imminently.

structure proves too weak or fractious, or if ICANN becomes more vulnerable to antitrust lawsuits due to the expiration of its contractual relationship with the U.S. government.

Suing to enforce the appropriations rider and extending it through FY2017 are amply justified by the extraordinary importance of the Constitutional principle at stake. Members of both parties should be able to unite around defending the Power of the Purse, the most fundamental Constitutional power of the American People's elected representatives. If enacted legislation is no longer considered binding, a fundamental check on Executive power will have been lost. Legislators also have a solemn responsibility to future generations to ensure that the future of the Internet is not placed at risk by prematurely ending U.S. oversight. We urge you act promptly.

Sincerely,

### **Organizations**

TechFreedom  
Alaska Policy Forum  
American Commitment  
Americans for Limited Government  
Americans for Tax Reform  
Bluegrass Institute for Public Policy Solutions  
Center for Individual Freedom  
Center for Financial Privacy & Human Rights  
Center for Freedom and Prosperity  
Center for Security Policy  
Citizen Outreach  
Civitas Institute  
Competitive Enterprise Institute  
Frontiers of Freedom  
Heartland Institute  
Heritage Action for America  
Maine Heritage Policy Center  
Media Research Center  
Protect Internet Freedom  
Rio Grande Foundation  
Rutherford Institute  
Taxpayers Protection Alliance  
Tea Party Patriots  
Traditional Values Coalition  
Wyoming Liberty Group

### **Individuals**

*Affiliations provided for identification only & do not constitute institutional endorsement*

Allen Roth, President, Secure America Now  
Ali Akbar, President, National Bloggers Club  
Prof. Anthony Caso, Chapman University, Dale E. Fowler School of Law  
Esther Dyson, First Chairman of ICANN (1998-2000) & founder, EDventure Holdings  
Michael Ledeen, Freedom Scholar, Foundation for Defense of Democracies  
Cliff May, Foundation for Defense of Democracies  
Sidney Powell, Former AUSA and Appellate section chief  
Prof. Ronald Rotunda, Chapman University, Dale E. Fowler School of Law  
Brett Schaefer, Heritage Foundation  
Berin Szóka, TechFreedom  
Judith K. Warner, Former Senior Vice President, Stephen Winchell & Associates