



May 6, 2014

The Honorable Fred Upton  
Chairman, Committee on Energy and Commerce  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

This letter provides the Administration's views on H.R. 4342, the Domain Openness Through Continued Oversight Matters (DOTCOM) Act of 2014, as reported by the Subcommittee on Communications and Technology. The Administration opposes the bill, as described further below.

The bill, as currently drafted, would prohibit the National Telecommunications and Information Administration (NTIA) from taking final action to transition key Internet domain name functions to the global multistakeholder community until such time as the Government Accountability Office (GAO) completes a report to Congress. Among other things, GAO would be required to assess the advantages and disadvantages of the transition itself, the criteria and process under which NTIA would evaluate any transition proposal, each proposal itself, and national security considerations with a transition.

Congress is well within its right to request a GAO report on any subject of its choosing – which it can do at any time without legislation. The Administration welcomes the input of GAO or any other stakeholder that wishes to participate in the multistakeholder process convened by the Internet Corporation for Assigned Names and Numbers (ICANN). The Administration, however, opposes legislation substituting the judgment of the GAO or any government entity for the multistakeholder process, or legislation that prohibits NTIA action to continue its long-held policy of transitioning management of the Internet Domain Name System (DNS) to the private sector until the GAO completes a report.

### **The Bill Interferes with NTIA's 16-Year Policy to Privatize the Domain Name System**

The Administration opposes the bill because it attempts to interfere with NTIA's ability to take the steps necessary to finalize implementation of the transition of key Internet domain name functions to the global multistakeholder community. In 1998, NTIA issued a Statement of Policy that first expressed the policy of the U.S. Government for the private sector to manage the DNS.<sup>1</sup> As set forth in the Internet DNS White Paper, NTIA's role with respect to the technical functions of the Internet DNS was intended to be temporary until such time as the Internet community could manage these functions itself. NTIA's announcement marks the final phase of the privatization process begun 16 years ago. NTIA's action is fully consistent with the 2012 resolution, H.Con.Res. 127, that called on the United States to continue to support a global

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<sup>1</sup> Statement of Policy, Management of Internet Names and Addresses, 63 Fed. Reg. 31741 (1998).

Internet free from government control and to preserve and advance the successful multistakeholder model that governs the Internet.

NTIA is dedicated to maintaining an open, resilient, and secure Internet that remains a valuable tool for economic growth, innovation, and the free flow of information, goods, and services online. We believe that the multistakeholder model of Internet governance – a system in which the private sector, working with engineers, civil society organizations, and governments, work together to develop consensus – provides the best mechanism for ensuring these goals. The transition of the U.S. role to the global multistakeholder community benefits American interests. The continued growth and innovation of the Internet depends on building trust among all users worldwide and strengthening the engagement of all stakeholders. Taking this action is a strong measure to prevent authoritarian regimes from expanding their restrictive policies beyond their own borders at a time when we expect some countries to once again attempt to insert themselves in the middle of decisions impacting the Internet. Interference with this process and any indication of lack of support for the multistakeholder process risk emboldening authoritarian regimes.

### **The Bill Incorrectly Suggests that NTIA Has a “Responsibility” to Manage the DNS**

There is *no one party*, including the U.S. Government, that controls the Internet. The bill suggests, incorrectly, that NTIA has an affirmative obligation to manage the DNS, such that any transition would require NTIA to “relinquish responsibility.” Congress has never chosen to legislate specifically in this area, nor has Congress designated a specific agency to be responsible for managing the Internet DNS. In 2000, NTIA did not contract with ICANN to procure the Internet Assigned Numbers Authority (IANA) functions services as an assertion of “control” over the Internet DNS. Rather NTIA contracted with ICANN as a temporary measure to carry out the government’s policy to allow the private sector to take leadership for management of the Internet DNS. Thus, NTIA has no legal or statutory responsibility to manage the Internet DNS. NTIA has fulfilled its stewardship role during the transition to private sector management of the Internet DNS under its general authority to coordinate the telecommunications activities of the Executive Branch.<sup>2</sup> Just as federal agencies can enter into contracts they need to fulfill their missions without specific legislative authority, federal agencies can discontinue obtaining such services when they no longer need them. As NTIA made clear at the time of its Statement of Policy, it intended only to procure the IANA functions services until such time as the transition to private sector management of the Internet DNS was complete. The GAO concurred with this view as early as 2000.<sup>3</sup>

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<sup>2</sup> 47 U.S.C. § 902(b)(2)(H).

<sup>3</sup> The 2000 Government Accountability Office (GAO) report concluded that the Department of Commerce has the authority to contract with ICANN for the performance of the IANA functions. GAO Report, *Department of Commerce: Relationship with the Internet Corporation for Assigned Names and Numbers*, GAO/OGC-00-33R, at 15, 17-19 (July 7, 2000). GAO’s discussion about the need for legislative authority to transfer government property does not concern the provision of the IANA functions under contract since no government property or assets are involved in the contract. Rather, GAO raised the issue of legislative authority solely in relationship to the transfer of policy control over the authoritative root server, which is managed under a cooperative agreement with another private sector entity. GAO Report at 25-30.

### **The Bill Interferes with NTIA's Authority to Manage its Existing Legal Agreements**

The bill would interfere with NTIA's ability to manage its existing legal agreements with ICANN for the performance of the IANA functions and with VeriSign for related root zone management functions. The existing IANA contract expires on September 30, 2015, which NTIA has the option to extend for up to four additional years if necessary. NTIA has stated that the businesses, civil society organizations, and technical experts of the Internet must present a plan that ensures the uninterrupted, stable functioning of the Internet and preserves its openness before any transition can take place. Until such time, there will be no change in NTIA's current role. By, in effect, requiring NTIA to extend its existing contract option, the bill would impose improper constraints on the exercise of the agency's discretion to determine the continuing need for the IANA contract. Rather than allowing NTIA to manage its legal agreements, Congress would be imposing new constraints and obligations on NTIA and its agreement partners, ICANN and VeriSign. The bill also raises potential constitutional concerns under the anti-aggrandizement principle,<sup>4</sup> because it would give the Comptroller General, an agent of the Legislative Branch, the power to delay executive action for up to a year after ICANN submits a proposal to NTIA.

### **The Bill is At Odds with the Multistakeholder Model**

NTIA has called upon ICANN to convene a multistakeholder process to develop a transition plan for NTIA's role in the IANA functions. NTIA established a clear framework to ensure a successful transition. While NTIA's role is largely a clerical one, NTIA specified that the transition proposal must meet four requirements. First, the transition proposal must support and enhance the multistakeholder model. Specifically, the process used to develop the proposal should be open, transparent, bottom-up, and garner broad, international stakeholder consensus support. ICANN is already working collaboratively with the other Internet technical organizations, including the Internet Society, the Internet Engineering Task Force, the Internet Architecture Board, and the Regional Internet Registries towards this objective. Second, the transition proposal must maintain the security, stability, and resiliency of the Internet DNS. Third, the transition proposal must meet the needs and expectations of the global customers and partners of the IANA services. Fourth, the transition proposal must maintain the openness of the Internet. The neutral and judgment-free administration of the technical DNS and IANA functions has created an environment in which the technical architecture has not been used to interfere with the exercise of free expression or the free flow of information. Any transition of the NTIA role must maintain this neutral and judgment-free administration, thereby maintaining the global interoperability of the Internet. In addition, NTIA explicitly stated that it would not

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<sup>4</sup> The anti-aggrandizement principle "forbids Congress, directly or through an agent subject to removal by Congress, from intervening in the decision making necessary to execute the law." *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 131 (1996); see *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986) (striking down provision of Gramm-Rudman Deficit Reduction Act that gave Comptroller General post-enactment power to effect spending reductions).

accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization alternative.<sup>5</sup>

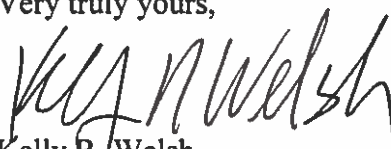
While stakeholders work through the ICANN-convened process to develop a transition proposal, there will be no change in NTIA's current role. We have not set a deadline for the community to complete a plan. We have noted that the existing contract expires on September 30, 2015, but have made clear that we have the option to extend the contract for up to four more years if necessary. Before any transition takes place, the businesses, civil society organizations, and technical experts of the Internet must present a plan that ensures the uninterrupted, stable functioning of the Internet and preserves its openness. Until such time, there will be no change in NTIA's current role.

The bill sends the wrong signal to the global Internet community about the United States' continued support for the global multistakeholder governance model. The bill is facially at odds with the longstanding U.S. support for the multistakeholder model of Internet governance previously expressed through bipartisan resolutions unanimously adopted by the U.S. Senate and House of Representatives (S.Con.Res. 50 and H.Con.Res. 127). By conditioning the transfer of the IANA functions on the judgment of the GAO, the bill reinforces the misapprehension that the U.S. Government "controls" the Internet and risks undermining the multistakeholder model that several Administrations and the U.S. Congress have repeatedly endorsed.

While international support continues to grow for the multistakeholder model, authoritarian regimes are attempting to provide an alternate Internet governance model that would enhance the role of governments in controlling the Internet. The timing of this bill would be particularly damaging for supporters of the multistakeholder model. By signaling a lack of confidence in the multistakeholder model, this legislation adversely impacts the ability of the United States and its allies to counter attempts by authoritarian regimes to obtain a greater role in Internet governance.

We appreciate the opportunity to present these view on H.R. 4342. The Office of Management and Budget has advised that there is no objection to the transmittal of these views from the standpoint of the Administration's program. For the reasons above, the Administration opposes the bill. If you have any further questions, please call me, or Margaret Cummisky, Assistant Secretary for Legislative and Intergovernmental Affairs, at (202) 482-3663.

Very truly yours,

  
Kelly R. Welsh

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<sup>5</sup> For further details regarding NTIA's conditions, see Testimony of NTIA Assistant Secretary Strickling (Apr. 10, 2014), available at <http://www.ntia.doc.gov/speechtestimony/2014/testimony-assistant-secretary-strickling-hearing-should-department-commerce-rel>.

cc: The Honorable Henry A. Waxman  
Ranking Member

The Honorable Greg Walden  
Chairman, Subcommittee on Communications and Technology

The Honorable Anna G. Eshoo  
Ranking Member, Subcommittee on Communications and Technology