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April 23, 2015

The Honorable Lawrence E. Strickling  
Assistant Secretary for Communications and Information  
U.S. Department of Commerce  
1401 Constitution Ave., N.W.  
Washington, D.C. 20230

Dear Assistant Secretary Strickling:

In March 2014, the Department of Commerce (DOC) announced that it would transfer the Internet Assigned Name Authority (IANA) function to a yet-to-be-created international, multistakeholder organization. It directed the Internet Corporation for Assigned Names and Numbers (ICANN) to develop a proposal to transition the role of the National Telecommunications and Information Administration (NTIA) to the new organization. We are writing to express our concern about the legality of the proposed transfer.

In its announcement, the DOC did not mention the need to seek congressional approval for a final transfer, and to my knowledge, the Administration has yet to acknowledge or address the issue. In a 2000 study, the Office of the General Counsel at the Government Accountability Office (GAO) questioned whether the DOC has the legal authority to transfer control of the authoritative root server. The GAO wrote:

It is also unclear whether such a transition will involve a transfer of government property to a private entity. If so, the transfer would have to be consistent with federal property laws. It may be difficult to determine the government's property interests connected with the root server system since the government's involvement in the development of the Internet stems from government contracts and other agreements and the language and practices under them over a 30 year period. The Department has not determined whether the transition will entail the transfer of such property and so it is unclear if the Department has the requisite authority to effect such a transfer.

Indeed, the GAO drew its conclusion directly from a response from the DOC's general counsel regarding the legal authority to transfer control of the authoritative root server to another entity. In its response to the GAO, the DOC stated that it had yet to develop a legal position:

In the absence of such plans, we have not devoted the possibly substantial staff resources that would be necessary to develop a legal opinion as to whether legislation would be necessary to do so. In the absence of the underlying legal analysis, we decline to speculate about such an important issue.

In a footnote to your April 28, 2014 letter to Chairman Darrell Issa about the proposed transition you assert that "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” and that “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.” Section F.5 of the Department’s current contract with ICANN aside, and assuming no deliverables under the current contract would be transferred, we are not completely convinced that a property analysis is not needed.

It is our understanding that the IANA functions can be broadly grouped into three categories: (1) the coordination and allocation of the global pool of Internet Protocol numbers; (2) the management of Internet protocol numbering systems in conjunction with Internet standards, and (3) management of the domain name system authoritative root zone file. Thus, one of the IANA functions deals directly with the authoritative root zone. Under the IANA functions contract, the Department of Commerce has policy authority over the IANA functions. Section C.8.2 of the current IANA functions contract says “This contract does not authorize [ICANN] to make material changes in the policies and procedures developed by the relevant entities associated with the performance of the IANA functions. [ICANN] shall not change or implement the established methods associated with the performance of the IANA functions without prior approval of the [Contracting Officer].”

Though you stated the NTIA’s contract with ICANN was not “an assertion of ‘control’ over the Internet DNS,” it is clear that the DOC controls the Internet DNS. The intended purpose to transition to the private sector in NTIA’s Statement of Policy does not relieve NTIA of its constitutional duty to seek congressional approval if government property is involved.

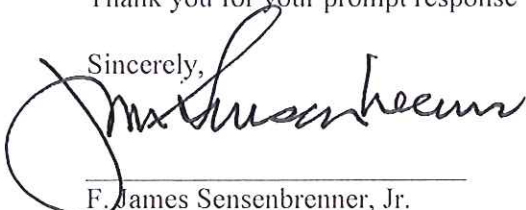
It is therefore unclear whether the Administration has the authority to effect this transfer without congressional approval. Ceding control to a new international governance structure will undoubtedly have worldwide ramifications. The network is a central transport of economic and political exchange. Any transfer of governance authority would come with serious commercial, diplomatic, and national security risks. Although we understand that a transfer will not take place in FY15, our concerns extend beyond this fiscal year. If the proposed transfer happens, it should be done in compliance with the law and with congressional evaluation.

Given the importance and potential impact of this undertaking, it is important that Congress, the public, and the Administration fully understand all the issues at hand. Therefore, please respond to the following questions.

1. Given that the DOC now plans to transfer NTIA’s authority, have you made a determination of the federal government’s property interests in NTIA’s policy authority over the authoritative root servers?
2. If not, do you plan to make a determination before any such transfer to ensure that it’s consistent with federal property laws?
3. In the absence of a determination of the government’s property interests, do you plan to seek Congress’ consent prior to transfer?

Thank you for your prompt response to this matter.

Sincerely,



F. James Sensenbrenner, Jr.  
Member of Congress



Sean P. Duffy  
Member of Congress