



AMERICANS FOR LIMITED GOVERNMENT

10332 MAIN STREET, BOX 326 · FAIRFAX, VA 22030 · PHONE: 703.383.0880 · FAX: 703.383.5288 · WWW.GETLIBERTY.ORG

United States Senate
Washington, DC 20510

June 30, 2014

To the Members of the U.S. Senate,

In an April 2, 2014 letter to Assistant Secretary of Commerce Larry Strickling,¹ head of the National Telecommunications and Information Administration (NTIA), 35 Senators sought “clarification regarding the recent announcement that NTIA intends to relinquish responsibility of the Internet Assigned Numbers Authority (IANA) functions to the global multistakeholder community.”

In part, the letter questions the legal basis for the Commerce Department to perform the transition of vital Internet names and numbers functions, citing a 2000 report by the then-U.S. General Accounting Office, which stated, “it is unclear if the Department has the requisite authority” to transfer control of the IANA functions to a private entity.² The Senate letter requests “the Administration’s legal views and analysis on whether the United States Government can transition the IANA functions to another entity without an Act of Congress.”

Yet, to date, the White House has failed to produce the legal basis for transferring the IANA functions without Congress, despite numerous requests. As revealed in March by the Wall Street Journal’s L. Gordon Crovitz: “a spokesman for the Commerce Department’s National Telecommunications and Information Administration said the agency reviewed this legal issue and concluded the administration can act without Congress but refused to share a copy of the legal analysis.”³

The Crovitz report prompted Americans for Limited Government to file a Freedom of Information Act (FOIA) request⁴ with the NTIA requesting the legal basis for its plans to transition control over Internet governance to some as of yet unnamed international body. The FOIA request includes “All records relating to legal and policy analysis developed by or provided to the National Telecommunications and Information Administration that support its decision to ‘transition key internet domain name functions,’ including any analysis showing whether the NTIA has the legal authority to perform the transition.”

The Department’s interim response to the FOIA request,⁵ which was referenced in the Wall Street Journal on June 29 by Crovitz,⁶ still failed to produce the legal analysis. It may turn up at a later date, but by then it will likely be too late for Congress to do much about it. With similar urgency in mind, on May 30, the House of Representatives by a 229 to 178 vote denied funding to the Obama administration to

¹ <http://www.thune.senate.gov/public/index.cfm/2014/4/thune-rubio-demand-answers-from-administration-on-internet-transition>

² <http://www.gao.gov/new.items/og00033r.pdf>

³ <http://online.wsj.com/news/articles/SB10001424052702303802104579453263393882136>

⁴ <http://getliberty.org/wp-content/uploads/2014/03/DOC-NTIA-FOIA-re-ICANN-03-27-14.pdf>

⁵ http://getliberty.org/wp-content/uploads/2014/06/DOC-NTIA_FOIA-Responsive-Docs-Set1.pdf

⁶ <http://online.wsj.com/articles/gordon-crovitz-au-revoir-to-the-open-internet-1404076280>

perform the transition in an amendment offered by Rep. Sean Duffy (R-Wis.) to the Department of Commerce appropriations bill.

The Senate should take up the Duffy amendment as it considers the Commerce appropriations bill, particularly since when ICANN's contract ends in September 2015, if FY 2015 funding for the Commerce Department is already in place, it will certainly be too late to stop the administration — even if there never was any legal basis for the administration to perform the transition in the first place. And, to the extent that the administration might ever produce such a legal argument, it will likely be a dubious one.

Article IV of the Constitution states, “The Congress shall have power to dispose of ... property belonging to the United States.” That should include the Internet functions, as under the Commerce Department's current contract with the Internet Corporation of Assigned Names and Numbers (ICANN)⁷ it states, “All deliverables under this contract become the property of the U.S. Government.”

Those deliverables include “technical requirements for each corresponding IANA function,” “performance standards in collaboration with all interested and affected parties ... for each of the IANA functions,” and “a fully automated root zone management system ... [that] must, at a minimum, include a secure (encrypted) system for customer communications; an automated provisioning protocol allowing customers to manage their interactions with the root zone management system; an online database of change requests and subsequent actions whereby each customer can see a record of their historic requests and maintain visibility into the progress of their current requests; and a test system, which customers can use to meet the technical requirements for a change request; an internal interface for secure communications between the IANA Functions Operator; the Administrator, and the Root Zone Maintainer,” among other items.

The IANA functions themselves revert to the Commerce Department upon termination of the contract: “the Government may terminate the contract for default.”⁸ The contract even provides for the possibility of IANA being performed by another entity: “In the event the Government selects a successor contractor, the Contractor shall have a plan in place for transitioning each of the IANA functions to ensure an orderly transition while maintaining continuity and security of operations.”⁹

The Obama administration thus lacks the requisite legal authority to transition the IANA functions to a private entity, and has thus far failed to produce its justification for doing so without a vote in Congress despite multiple requests from the U.S. Senate, the Wall Street Journal, and a Freedom of Information Act request by Americans for Limited Government. Yet, it seeks the very funding for FY 2015 that will enable Internet governance to be transferred overseas, never to return, and without any of the anti-censorship First Amendment protections currently afforded under Commerce Department stewardship of the functions. The Senate should immediately take up the House amendment to Commerce Appropriations and defund this ill-conceived, legally unfounded, and unconstitutional transfer of U.S. government property before it is too late.

⁷ http://www.ntia.doc.gov/files/ntia/publications/sf_26_pg_1-2-final_award_and_sacs.pdf, pp. 31.

⁸ *Id.*, pp. 48.

⁹ *Id.*, pp. 13.

Sincerely,

A handwritten signature in cursive script that reads "Nathan Paul Mehrens". The signature is written in black ink and is positioned below the word "Sincerely,".

Nathan Mehrens
President
Americans for Limited Government