

Statement on Senator Wyden's Letter on ACTA and the Constitution

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Today, Senator Wyden released a [letter to President Obama](#) challenging USTR's claimed authority to bind the United States to a new international agreement on intellectual property without Congressional consent. Congressional opposition to USTR's bold plan to usurp congressional authority over the approval of this important international trade agreement is justly deserved and long overdue.

The letter gets the legal analysis exactly right. If ACTA is entered by the President of the United States as a "sole executive agreement," as USTR has long planned, that action would breach clear constitutional requirements that Congress approve binding international trade agreements. But ACTA may nonetheless be binding under international law. This state of affairs would open the possibility of international sanctions for future choices of Congress to change US law in a way not permitted by an agreement that Congress never approved.

Hopefully, Senator Wyden's letter will alert the administration to the serious constitutional issue facing it and compel it to engage its constitutional and international law experts, for example those at the Department of Justice's Office of Legal Counsel and the Department of State's Office of the General Counsel, to ensure that the USTR does not disregard this country's constitutional mandates in its fervor to hastily enter a broad ranging and controversial agreement restraining US policy options.

Why does Congress Need to Approve ACTA?

Under the U.S. Constitution, most policy-making, including international policy-making, must be made through coordinated action of the legislative and executive branches. Although the Constitution gives the President the authority to "make" treaties, most international agreements can only go into effect with congressional approval in the form of consent of two thirds of the Senate or passage of legislation through a majority of both houses of Congress. This is true for any agreement under Congress's plenary authority under Article I of the Constitution, including Congress's power to regulate foreign commerce (i.e. trade) and to protect intellectual property.^[1]

Won't Congress's failure to approve ACTA make it non-binding?

No. It is true that without congressional consent ACTA cannot change existing U.S. statutes. Only Congress, with the signature of the president, can change current U.S. law. But it is international law, not U.S. law, that determines whether an international agreement is binding. The main test under international law is whether the chief executive of the country, in our case – the President, has expressed its consent to be bound to the agreement.^[2] If the President does so, in this case by depositing an instrument of consent with Japan, then ACTA will bind the U.S. under international law. Other countries could challenge U.S. law for a failure to comply with ACTA, either because current law does not comply with the agreement or because some future change approved by Congress brings the U.S. out of compliance.

Is ACTA a valid sole executive agreement?

No. Under U.S. law, ACTA cannot be entered as a sole executive agreement. There is a recognized class of “sole executive agreements” that constitute binding international agreements without congressional consent. But these agreements are valid only for matters delegated by Article II of the Constitution to the sole province of the President. ^[3] Such powers include, for example, the president's authority as commander in chief of the armed services^[4] which may allow sole executive agreements on the placement of troops in foreign nations. Likewise, the presidential power to receive ambassadors from foreign countries^[5] has been interpreted to allow sole executive agreements recognizing foreign nations. But the President does not have sole executive authority to make intellectual property or trade policy. These matters are clearly delegated to Congress under Article I section 8 of the Constitution.

But isn't it true that ACTA can be implemented without Congress if it does not change current US law?

Yes. An agreement, once binding, may be implemented without congressional legislation. The USTR often raises this fact in response to questions about whether ACTA can evade Congressional approval. But this answer about implementing ACTA sidesteps the question of whether the President can bind the U.S. to the agreement in the first place. The President is not free to bind the U.S. to any international agreement he chooses merely because he deems them to be consistent with U.S. law. To do so would allow the President to bind the U.S. to not change its law, even though changes in law are the province of Congress, not the President alone. It is worth noting that many experts believe that ACTA is not, in fact, consistent with current U.S. law.^[6] But the President lacks the power to bind the U.S. to the agreement even it was consistent with current U.S. law.

Is Congress free to change U.S. law in a way that is inconsistent with ACTA?

Yes. There is nothing in any international agreement that technically restrains the ability of Congress (with the President) to change U.S. law in a way out of compliance with the agreement. But doing so would breach binding international obligations.

ACTA appears to lack an enforcement procedure. Doesn't that make any non-compliance with the agreement unenforceable?

No. Although the lack of an enforcement procedure in ACTA makes its enforcement more difficult and perhaps unlikely, international law recognizes the authority to enforce all binding agreements.^[7] Countries that believe that the U.S. is violating its obligations could impose trade sanctions on the U.S. and could approach international forums such as the international court of justice.

Has ACTA's Constitutional problem been raised by legal experts?

Yes. Dozens of legal experts from across the political spectrum, including the former Assistant Attorney General for the Office of Legal Counsel in the George W. Bush Administration, have pointed out the flaw in USTR's reasoning in public editorials, articles and submissions to the USTR.^[8] Thus far, the administration has not issued a public explanation of its authority to enter ACTA as a sole executive agreement that rebuts the arguments made by these experts.

How should the President respond to Senator Wyden's letter?

To avoid this problematic state of affairs in which the administration binds the US to an international agreement it has no constitutional authority to enter, the President could:

- Immediately instruct USTR to refrain from entering the ACTA agreement, including by prohibiting USTR from depositing an instrument of assent with the repository nation (Japan) until such time as he receives adequate counsel from the administration's top legal authorities;
- Instruct the White House Counsel to work with the Department of Justice's Office of Legal Counsel and the Department of State's Office of General Counsel to review the analysis contained in Senator Wyden's letter and advise him on the proper course of action with respect to ACTA to avoid binding the US to the agreement with Congressional consent;
- Share the legal analysis of the administration with Congress and the public to dispel the widespread perception that the Administration is avoiding constitutional processes with respect to this agreement.

If the Administration is intent on expressing its assent of ACTA without Congressional consent, then it should do so in a manner that prevents the expression of any intent to be bound to it under international law. He could make clear, for instance, that with respect to the U.S. ACTA is little more than a non-binding memorandum of understanding. Thus, for example, thirty law professors that described the constitutional problem with ACTA in a formal [submission to USTR](#) advised:

“To avoid binding the U.S. to an unconstitutionally entered treaty, the Administration needs to make clear in its signing of ACTA that the United States does not consider itself to be bound until the agreement is consented to by Congress or domestic legislation implementing the agreement is passed.”

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