

United States Senate
WASHINGTON, DC 20510-3703
January 05, 2012

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Mr. Harold Koh
The Legal Adviser
United States Department of State
Washington, D.C. 20520

Dear Mr. Koh:

In light of the United States' signing the Anti-Counterfeit Trade Agreement (ACTA) in October of last year, I'd like to continue to raise concerns I have regarding the Agreement. As you may know, I expressed these reservations in a letter to President Obama in October of last year regarding constitutional issues that I still don't believe have been resolved.

As you can see from my initial letter to President Obama, my concern has to do with the Administration's claim that it has the authority to enter ACTA as a "sole executive agreement" with no formal congressional authorization or approval necessary. As I articulated in my letter to the President, I believe that the subject matter of ACTA – foreign commerce and intellectual property – falls under the Article I powers of Congress as stipulated by the United States Constitution. Even if ACTA does not change U.S. law, the fact of the matter is that the executive branch lacks the constitutional authority to *enter* a binding international agreement such as ACTA unless there is explicit congressional approval.

While it is understood that ACTA cannot alter U.S. law without congressional action and that ACTA in no way limits Congress' authority to change U.S. law to be inconsistent with ACTA, I still fail to see how the Administration's entry into ACTA is constitutionally legal. Furthermore, in the Administration's response to me they do not explicitly say whether ACTA is binding or not. Given your role as legal advisor at the State Department, can you please explain the Department of State's legal opinion on the following:

- 1) If ACTA is entered by the President without Congressional consent, what will be the nature of the agreement and its legal implications under U.S. and international law? For example, is it the Department of State's opinion that ACTA will be equivalent to a non-binding "memorandum of understanding," like some of the intellectual property agreements cited by USTR in the attached letter? Can ACTA be a valid and binding "sole executive agreement" under the U.S. Constitution, even though the regulation of intellectual property is not a sole executive function under the Constitution? Or must ACTA, to be binding, be a form of Congressional-executive agreement by virtue of ex ante or ex post congressional approval?

- 2) What is the nature of the international legal obligations that ACTA would create? Would the U.S. be in violation of the agreement if the Congress changed federal law in a way not consistent with the agreement, for example by ridding our law of statutory damages for online copyright infringement? What would be the implications of such a violation?
- 3) What are the constitutional limits on the President binding the U.S. to legislative minimum standard agreements over matters delegated to Congress under Article I Section 8 of the Constitution? Is the President free to bind the U.S. to any international agreement he chooses merely because he deems them to be consistent with U.S. law? (It is worth noting that many experts believe that ACTA is not, in fact, consistent with current U.S. law.)

Thank you for your attention to this important matter. I look forward to your response.

Sincerely,

A handwritten signature in dark ink that reads "Ron Wyden". The signature is fluid and cursive, with the first letters of "Ron" and "Wyden" being capitalized and prominent.

Ron Wyden
United States Senator