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ACTA's Constitutional Problem: The Treaty That Is Not a Treaty (Or An Executive Agreement)

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-DRAFT-
**ACTA’S CONSTITUTIONAL PROBLEM:
THE TREATY THAT IS NOT A TREATY (OR AN
EXECUTIVE AGREEMENT)**

*Sean Flynn*¹

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I. INTRODUCTION

The planned entry of the U.S. into the Anti-Counterfeiting Trade Agreement (ACTA) poses a unique Constitutional problem. The problem is that the President lacks constitutional authority to bind the U.S. to the agreement without congressional consent; but that lack of authority may not prevent the U.S. from being bound to the agreement under international

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law. If the administration succeeds in its plan, ACTA may be a binding international treaty (under international law) that is not a treaty (under U.S. Constitutional law).

There is a growing academic literature documenting and analyzing the recent shift of international law making by the U.S. toward the use of “executive agreements.” The term refers to binding international agreements entered by the President without engaging the treaty clause of the Constitution.² Academics are divided on whether the growth of the practice of entering international treaties by executive agreement is good or bad for local and international democracy and public policy.³ But their focus has been mainly on the particular subset of executive agreements known as Congressional-Executive agreements. In such agreements, Congress either authorizes the President to negotiate the subject matter of the agreement *ex ante*, or it approves the text of the agreement with legislation passing both houses *ex post* (rather the two thirds senate approval required for a treaty). Congress thus retains a key role in consenting to the agreement in question.

There has been much less scholarly attention to the particular subset of executive agreements, known as “sole executive agreements,” represented by ACTA.⁴ Since the early days of the U.S. involvement in ACTA's negotiation, first under President Bush and now under President Obama, the Administration's position has been that it can enter ACTA without any Congressional involvement at all, *ex ante* or *ex post*.⁵ This is a bold claim

² [String cite.]

³ Compare Oona Hathaway (criticizing) and John Yu (celebrating).

⁴ Cite articles specifically on sole exec agreements.

⁵ See <http://www.acslaw.org/node/15774>; http://www.citmedialaw.org/blog/2010/lets-make-deal-will-acta-force-end-executive-agreements?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A%20CitizenMediaLawProject%20%28Citizen%20Media%20Law%20Project%29 On the definition of a “treaty” under international law, see Vienna Convention on the

which has drawn criticism from numerous legal experts.⁶ But, as of this writing, the administration has not articulated a plan for implementing ACTA that includes congressional approval.

This course of action charts new ground. Entering international agreements containing minimum standards on intellectual property legislation has become fairly routine since 1992.⁷ In the majority of these agreements, as with ACTA, the intellectual property provisions were entered with commitments that they would not alter existing U.S. law.⁸ But the agreements were nevertheless submitted for Congressional approval. Thus far, every international minimum standards agreement on intellectual property law has been consented to by Congress, either through *ex ante* authorization, *ex post* consent, or as a treaty.⁹

The reason congressional approval is required for intellectual property agreements is that the power to regulate this subject, along with interstate

Interpretation of Treaties Art. ____ Cf
<http://www.techdirt.com/articles/20101117/12403111915/as-us-insists-acta-is-not-a-treaty-eu-trade-commissioner-admits-it-s-a-treaty.shtml>

⁶ See *Over 75 Law Profs Call for Halt of ACTA*, PIJIP BLOG (Oct. 28, 2010), <http://www.wcl.american.edu/pijip/go/blog-post/over-75-law-profs-call-for-halt-of-acta>; Jack Goldsmith and Lawrence Lessig, *Anti-counterfeiting agreement raises constitutional concerns*, WASH. POST, Mar. 26, 2010 available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/25/AR2010032502403.html>; Eddan Katz & Gwen Hinze, *The Impact of the Anti-Counterfeiting Trade Agreement on the Knowledge Economy: The Accountability of the Office of the U.S. Trade Representative for the Creation of IP Enforcement Norms Through Executive Trade Agreements*, 35 YALE J. INT'L L. 24 (Fall 2009).

⁷ NAFTA

⁸ [filli n news article quoting USTR on FTA provisions being consistent with US law, e.g. Korea, Australia, Peru]. The WTO TRIPS agreement is the major counter example. TRIPS required several alterations of U.S. intellectual property law, including an alteration in how the U.S. calculates patent terms.

⁹ Cf [articles discussing entry into WTO as an executive agreement]; [inside US trade on plans to submit .

and foreign commerce, is an enumerated power of Congress (through legislation in which the President participates) under Article I Section 8 of the Constitution. To make policy in any area expressly delegated to Congress requires Congressional participation. Sole executive agreements are valid only in areas of policy exclusively under the President's control – for example in incidents of his authority as commander in chief or to accept ambassadors from foreign nations.¹⁰ The President does not have sole executive authority to make intellectual property law, and so he cannot bind the U.S. to an intellectual property agreement without congressional approval.

There have been reports that the Administration is embracing the constitutional ambiguity of ACTA by telling Congressional offices, as a justification for their continued inaction, that ACTA will not be a binding agreement in the U.S. without congressional ratification.¹¹ That is only partly true. ACTA cannot bind the U.S. under U.S. law. But under international law the President can create binding treaties by expressing his intent regardless of what U.S. domestic law says about the required ratification process.¹² ACTA's legal status under international law can alter U.S. law even without congressional ratification. Courts may use ACTA to interpret ambiguous commands in domestic law.¹³ It may become a blueprint for future agreements and for domestic and international policy laundering efforts.¹⁴ And until the administration's descriptions of ACTA as an "executive agreement" are rejected by courts, the agreement could have

¹⁰ See Art. II Sec. ___

¹¹ Private communication with James Love, Knowledge Ecology International.

¹² See VCLT art. 27 (stating that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty"). The fact that ACTA will bind intertionally, even if not domestically, may account for the relative paucity of complaints from ACTA negotiating countries about the U.S. driving the drafting of a treaty it does not intend be bound to. Cf <http://keionline.org/node/993>

¹³ See Charming Betsy

¹⁴ [define and cite to policy laundering]

the practical effects of a valid executive agreement, including preemption of state law.

To avoid this state of affairs, the Administration needs to make clear to our treaty partners that the United States does not consider itself to be bound until ACTA is consented to by Congress or domestic legislation implementing the agreement is passed. Absent that clarification, the U.S. will break new ground – for the first time entering an agreement setting expansive international standards for U.S. intellectual property legislation without Congress’s approval.

This article explains each of these points in more depth. Part II describes the elements of ACTA which usurp congressional authority by setting new international minimum standards on a broad range of domestic intellectual property laws. Part III explains the U.S. Constitutional requirements for U.S. entry into binding international agreements and how the current plan for entering ACTA without congressional consent fails to abide by those norms. Part IV describes the international law on treaty making which would render ACTA a binding international treaty even absent congressional consent. The conclusion describes the limited options available to prevent U.S. entry into ACTA as a binding international treaty which is not a binding treaty under U.S. law.

II. ACTA REGULATES DOMESTIC INTELLECTUAL PROPERTY LEGISLATION

ACTA is a proposed plurilateral international agreement between Australia, Canada, the 27 countries of the European Union (EU), Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and the United States of America. A key aim of the agreement is to define and require adherence of domestic law to “a state-of-the-art international framework” of minimum standards in intellectual property and customs legislation.¹⁵ Although the parties negotiating the agreement are highly

¹⁵ USTR Briefing Paper. See also *Fact Sheet: The Anti-Counterfeiting Trade Agreement (ACTA)*, EUROPEAN COMMISSION (Nov. 2008),

unrepresentative of the world at large,¹⁶ the agreement seeks to establish global minimum standards applicable to developing as well as developed countries.¹⁷

All of the negotiating countries of ACTA are members of the World Trade Organization and therefore signatories to the WTO's agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). Enforcement of intellectual property laws was a central concern of TRIPS, primarily expressed in Part III. ACTA is essentially a re-write of TRIPS Part III "to set a new, higher benchmark for intellectual property rights

http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_140836.11.08.pdf (describing ACTA as "being for the purpose of establishing international standards on intellectual property rights enforcement").

¹⁶ Using Immanuel Wallerstein's "World Systems" typology: all but two of the negotiating countries are part of the high income and highly industrialized "core" of the world system; two, Mexico and Morocco, are part of the second tier of middle income rapidly industrializing countries. The majority of the world's countries and population centers which reside in the periphery of the world system are not represented at all. Cf. IMMANUEL WALLERSTEIN, *THE CAPITALIST WORLD ECONOMY* (1979); Immanuel Wallerstein, *Globalization or the age of transition? A long term view of the trajectory of the world system*, 15 *INT'L SOCIOLOGY* 249-265 (2000).

¹⁷ *Anti-Counterfeiting Trade Agreement*, MINISTRY OF ECONOMIC DEVELOPMENT OF NEW ZEALAND, (2008) http://www.med.govt.nz/templates/ContentTopicSummary___34357.aspx ("The goal of ACTA is to set a new, higher benchmark for intellectual property rights enforcement that countries can join on a voluntary basis.") [hereinafter New Zealand ACTA]; See Proposed U.S. ACTA Multi-Lateral Intellectual Property Trade Agreement, http://wikileaks.org/wiki/G-8_plurilateral_intellectual_property_trade_agreement_discussion_paper (proposing "[s]pecial measures for developing countries in the initial phase"); U.S. TRADE REPRESENTATIVE, SPECIAL 301 REPORT 4 (2008), http://www.ustr.gov/sites/default/files/asset_upload_file553_14869.pdf ("ACTA is envisioned as a leadership effort among countries that will raise the international standard for IPR enforcement").

enforcement.”¹⁸

The final agreement contains 24 single spaced pages, the majority of which create a new minimum “Legal Framework for Enforcement of Intellectual Property Rights.”¹⁹ The Legal framework chapter contains new “TRIPS-plus”²⁰ requirements for minimum legislative enactments covering all intellectual property rights contained in TRIPS.²¹ This includes patents, copyrights and trademarks, industrial designs, geographical indications, layout-designs (topographies) of integrated circuits, pharmaceutical and agricultural test data, sui generis protection of plant varieties, and trade secrets.²² For U.S. law the list is significant not only in its breadth, but because it covers areas like trade secrets and remedies that are often addressed by State as well as Federal law.²³

¹⁸ New Zealand ACTA, *supra* note 5. See James Love, *ACTA and Part III of TRIPS Compared by Frequency of Terms*, KEI (Sept. 10, 2010), <http://keionline.org/node/940> (noting, for example, that TRIPS Part III contains 3,001 words, as compared to 10,383 in the August leaked text of ACTA).

¹⁹ ACTA, Chapter 2.

²⁰ “TRIPS-plus” is an informal term used in international intellectual property discussions to refer to minimum legal standards in national or international laws that exceed the baseline requirements of the TRIPS agreement. *See, e.g.*, Pedro Roffe, *Bilateral agreements and a TRIPS-plus world: the Chile-USA Free Trade Agreement*, QIAP (Oct. 2004), <http://www.quno.org/geneva/pdf/economic/Issues/Bilateral-Agreements-and-TRIPS-plus-English.pdf>. USTR negotiator Stan McCoy has referred to the goal of ACTA as being to create a “[quote from McCoy from his affidavit quoted in Yu, Six Secret Fears]”.

²¹ *See* Anti-Counterfeiting Trade Agreement Informal Predecisional/Deliberative Draft: Oct. 2, 2010, Section B, Art. 1.X: Definitions, PIJIP IP ENFORCEMENT DATABASE, <http://sites.google.com/site/iipenforcement/acta> (follow “Official Text -- October 2, 2010” hyperlink) [hereinafter ACTA Draft – Oct. 2, 2010].

²² *See* James Love, *The October 2, 2010 version of the ACTA text*, KEI (Oct. 7, 2010) <http://keionline.org/node/962> (Noting that “this covers a lot of ground;” “The broad inclusion of all of these intellectual property rights in ACTA creates unintended consequences, as some of the enforcement provisions make no sense outside of the context of copyrights and trademarks.”).

²³ *See* Letter from Forum on Democracy and Trade to Ambassador Kirk, available at

Within this broad field of domestic laws, ACTA regulates a diverse array of liability, remedy and law enforcement legal standards. The areas of law regulated by ACTA include the availability of, and evidentiary standards for, injunctions (including third party injunctions and ex party preliminary injunctions),²⁴ damages (including “pre-established” damages),²⁵ duties to divulge confidential information to the government,²⁶ seizures and destructions of goods (both before and after determinations of violation),²⁷ border searches and detentions, including of “small consignments,”²⁸ criminal liability, including for infringements of copyright that bestow any “indirect economic or commercial advantage,”²⁹ liability for infringement on the internet,³⁰ and liability for acts or products that circumvent technological or digital locks against copying.³¹

The areas of domestic policy regulated by ACTA are broader still. Intellectual property doctrines do not exist for their own sake. They are created and tailored to serve numerous diverse public interests, and are limited by such ends. Establishing legal frameworks on the enforcement of intellectual property impacts domestic policies on health, access to information, free expression, innovation, production of and access to cultural products, competition, consumer protection and a myriad of other domestic policies.³²

pijip.org.

²⁴ See ACTA Draft – Oct. 2, 2010, *supra* note 8 at Section 2, Art. 2.X; 2.5.

²⁵ See *Id.* at Section 2, Art. 2.2.

²⁶ See *Id.* at Section 2, Art. 2.4.

²⁷ See *Id.* at Section 2, Art. 2.3; 2.5(3). Section 3, Art. 2.16.

²⁸ See *Id.* at Section 3: Border Measures. See also Art. 2.10 and 2.11 (requiring destruction of goods after a “determination” of violation by a “competent authority,” which need not be a court or other body following strict due process norms).

²⁹ See *Id.* at Section 4, Art. 2.14.

³⁰ See *Id.* at Section 5.

³¹ See *Id.* at Art. 2.18(5-7).

³² See Bernt Hugenholtz, [statement to ACTA meeting at WCL, June 2010, available

ACTA exports one particular model of how these various interests should be balanced through law. The model is identifiably that of the U.S., E.U. and Japan of the last quarter century. [expand]. Even in those countries in which the ACTA framework is largely enshrined in law, many of the elements are subject to proposals for revision, including in ways that may violate ACTA's terms.³³

ACTA has been drafted under unusual levels of secrecy for a legislative minimum standards agreement. In the normal forums for international intellectual property law making – such as in the World Intellectual Property Organization and in the WTO – draft texts are regularly released during negotiating rounds and civil society groups can be accredited to participate in meetings and workshops. WIPO has recently embarked on the implementation of a “development agenda” in which participation processes are to be expanded. Agenda items adopted by the WIPO General Assembly call for all intellectual property norm-setting activities to: “be inclusive and member-driven; take into account different levels of development; take into consideration a balance between costs and benefits; be a participatory process, which takes into consideration the interests and priorities of all WIPO Member States and the viewpoints of other stakeholders, including accredited inter-governmental organizations (IGOs) and NGOs; and be in line with the principle of neutrality of the WIPO Secretariat.”³⁴ The negotiation of ACTA has taken place through a process that was nearly the opposite of these norms. ACTA was negotiated under a bilateral trade agreement model in which negotiations were held secretly,³⁵ text was not released before or after most negotiating rounds, meetings with stakeholders

at pijip.org].

³³ See Pamual Samualson [article with Terra ___ on stat damages] [Fill in critiques of DMCA in academic articles and by NGOs such as EFF].

³⁴ <http://www.wipo.int/ip-development/en/agenda/recommendations.html>, no. 15.

³⁵ In many cases the city and country of the negotiation was not even released until days before the meeting.

took place only behind closed doors and off the record.³⁶ The locking out of public participation was a deliberate strategy, particularly by the U.S. Officials at USTR hatched a plan, largely implemented, to deal with demands for transparency in ACTA negotiations by in the incoming Obama administration through the creation of a “transparency soup.” The plans included announcing “open door” policies to meet with anyone while saying little or nothing for the public record and actively thwarting the release of negotiating text or holding of public meetings until all decisions were made.³⁷

As the text of ACTA was gradually leaked, and then officially released, during the last year of the negotiation, the substance of ACTA came under broad criticism. In June 2010, nearly 650 international intellectual property experts and public interest organizations from six continents adopted a sharply worded public statement criticizing the proposal as “a threat to numerous public interests,” including to freedom on the internet, basic civil liberties including privacy and free expression, free trade in generic medicines, and to the policy balances between protection and access that lie at heart of all intellectual property doctrines.³⁸ A group of nearly 80 intellectual property law professors later reviewed the final text of the agreement and reported that “it is clear that ACTA would usurp

³⁶ See ACTA Update, WITA (Oct. 29, 2010), <http://www.wita.org/en/cev/1126> (featuring USTR chief ACTA negotiator Kira Alvarez, “appearing off-the-record”).

³⁷ See James Love, *USTR's February 10, 2009 memo on Transparency Soup*, KEI (Sept. 8, 2010), <http://keionline.org/node/929>; Mike Masnick, *Transparency Pea Soup: The USTR Planned From The Beginning How Not To Be Transparent On ACTA*, TECHDIRT (Sept. 10, 2010), <http://www.techdirt.com/articles/20100909/05374310954.shtml>. See also Masnick, *Obama Administration Claims Copyright Treaty Involves State Secrets?!*, TECHDIRT (Mar. 13, 2009), <http://www.techdirt.com/articles/20090313/1456154113.shtml>.

³⁸ *Text of Urgent ACTA Communique, International Experts Find That Pending Anti-Counterfeiting Trade Agreement Threatens Public Interests*, PROGRAM ON INFORMATION JUSTICE AND INTELLECTUAL PROPERTY (June 23, 2010) <http://www.wcl.american.edu/pijip/go/acta-communique>.

congressional authority over intellectual property policy in a number of ways.” The letter specifically noted

Some of ACTA’s provisions fail to explicitly incorporate current congressional policy, particularly in the areas of damages and injunctions.³⁹ Other sections lock in substantive law that may not be well-adapted to the present context, much less the future.⁴⁰ And in other areas, the agreement may complicate legislative efforts to solve widely recognized policy dilemmas, including in the area of orphan works, patent reform, secondary copyright liability and the creation of incentives for innovation in areas where the patent system may not be adequate.⁴¹ The agreement is also likely to affect courts’ interpretation of U.S. law.⁴²

According to the negotiating parties, the drafting of ACTA is now completed. A meeting was held in Australia in which the final text was submitted for “legal verification of the drafting,” and the agreement, as of this writing, is “now ready to be submitted to the participants’ respective

³⁹ See Letter from Senator Bernard Sanders and Senator Sherrod Brown to David Kappos, Director of Patent and Trademark Office (Oct. 19, 2010), *available at* http://keionline.org/sites/default/files/senator_sanders_brown_kappos_19oct2010.pdf (requesting analysis on the potential implications of ACTA on areas of U.S. law that appear in conflict with the facial language of the agreement, including in reference to sovereign immunity); Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (limitations of patent remedies against medical providers under 35 U.S.C. § 287 (c), and for non-disclosed patents on biologic products 35 U.S.C. § 271(e)(6)(B)-(C), for non-willful trademark violation, 15 U.S.C. § 114 (2), and in certain cases of infringement in the digital environment, 17 U.S.C. § 512).

⁴⁰ See ACTA Draft – Oct. 2, 2010, *supra* note 18 at art. 2.14.1 (extending criminal copyright liability for any violations that bestow an “indirect” economic advantage).

⁴¹ See Shawn Bentley Orphan Works Act of 2008, S.2913, 110th Cong. (as passed by Senate, Sept. 26, 2008; World Health Assembly Res. 61.21, Global strategy and plan of action on public health, innovation and intellectual property, 61st Sess., May 19-24, 2008 (May 24, 2008); ACTA Draft – Oct. 2, 2010 Draft, *supra* note 18 at art. 2.14(1,4) (applying broad conception of aid-and-abet liability).

⁴² See *generally* Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) (holding that U.S. statutes should be interpreted to avoid conflicts with international law).

authorities to undertake relevant domestic processes.”⁴³

And that is where this story begins.

In many of the countries negotiating the agreement, including the EU, the normal procedures for entering a treaty, including consent by the legislative branch, will be used.⁴⁴ But not in the U.S. The USTR has stated repeatedly that ACTA will enter into force in the U.S. as an executive agreement that does not require any congressional role.⁴⁵ Thus, USTR argues, the agreement will be binding on the U.S. once Ambassador Kirk, as the U.S. negotiating representative, agrees to it. Congress will not receive the opportunity to review and amend the agreement before it goes into effect, as it would in any traditional international agreement binding on the U.S.⁴⁶ If USTR succeeds in this bold plan, it will dramatically expand presidential power to make internationally binding law without congressional consent.

III. ACTA IS NOT A BINDING TREATY (OR AN EXECUTIVE AGREEMENT) UNDER U.S. LAW

The process that has been described by USTR for entering ACTA – including not submitting it to Congress for ratification – is insufficient to bind the U.S. to the agreement under U.S. law. The definition of a “finely wrought” system for the creation of binding law is a core subject of the Constitution.⁴⁷ The Supremacy Clause describes the “supreme Law of the

⁴³ <http://www.ustr.gov/about-us/press-office/press-releases/2010/november/us-participants-finalize-anti-counterfeiting-trad>

⁴⁴ See *European Parliament resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations*, EUROPEAN PARLIAMENT (Mar. 10, 2010) <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0058&language=EN&ring=P7-RC-2010-0154> (asserting that “as a result of the entry into force of the Lisbon Treaty, [the EU Parliament] will have to give its consent to the ACTA Treaty text prior to its entry into force in the EU”).

⁴⁵ See Katz & Hinze, *supra* note 2.

⁴⁶ See [cite]

⁴⁷ See *INS v. Chadha*, 462 U.S. 919 (1983) at 951.

Land” as being made up of the “Constitution,” “Laws of the United States which shall be made in Pursuance thereof,” and “Treaties.” These are the forms, and *only* forms, of binding federal law.

There are three types of international agreement that can bind the U.S. under Constitutional standards: traditional treaties, confirmed by two thirds of the senate; executive agreements entered under congressionally delegated (ex ante) authority or approved in legislation after the fact; and sole executive agreements entered under the President’s own authority. ACTA is none of these.

A. Treaties Bind the U.S. Only With Senate Consent

The first and most obvious place to find the power to bind the U.S. to an international agreement is through the treaty power. Article II gives the President the power to “make” treaties. But such agreements become part of the supreme law of the United States only with the consent of a two thirds vote of the Senate.⁴⁸

The USTR is not claiming that it has any intent to ask the Senate to approve ACTA as a treaty. So its lawmaking power must lie in recognition of ACTA as one of two types of executive agreements that bind as “Laws of the United States.”

B. Congressional-Executive Agreements Bind Only by Virtue of Underlying Legislative Grants

So-called “congressional-executive” agreements become binding law by virtue of having complied with Article I’s lawmaking process. Since Congress has the expressly delegated Article I power to regulate foreign commerce, it can implement legal changes to international trade laws through statute as well as treaty.⁴⁹ In a congressional-executive agreement,

⁴⁸ U.S. CONST. art. II, § 2.

⁴⁹ See John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements* 56 (2000) available at <http://works.bepress.com/johnyoo/24> (noting, e.g., that a statute reducing tariffs or changing customs laws would be no less a

Congress passes through both houses, and the President signs, legislation either delegating *ex ante* authority to enter agreements or approving of the agreement itself *ex post*.

There is academic debate as to the extent to which Congress *should* delegate so much authority to the President to make law through congressional-executive agreements, particularly through the vague and open ended delegations of *ex ante* authority that has become common in modern times.⁵⁰ But it is generally accepted that our positive law recognizes such agreements as binding proclamations of law.⁵¹ And even the strong executive camp recognizes that congressional participation through a congressional-executive agreement is the bare constitutional minimum for the legal validity of any agreement on a matter relating to an Article I, Section 8 power.⁵²

The USTR does not claim that Congress has authorized the negotiation of ACTA through an *ex ante* statutory grant of authority. And it has stated that it does not plan to ask the U.S. Congress to approve ACTA *ex post*. It must therefore rely on the validity of ACTA as a sole executive agreement.

statement of binding law in the U.S. than a treaty doing the same) [hereinafter YOO ARTICLE]. [pages reference working paper version. Paper published in 99 Mich. L. Rev. 757].

⁵⁰ Compare Yoo Article, *supra* note 35 at 4 (supporting congressional-executive agreements as a means to “preserve Congress’s constitutional powers over matters such as international commerce”) with Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 146 (2009) (criticizing the growth of congressional-executive agreements as “inconsistent with basic democratic principles”).

⁵¹ See Cong. Research Serv., S. Prt. 106-71, *Treaties and Other International Agreements: The Role of the United States Senate* (Jan. 2001) [hereinafter Senate Report]. *But see* Laurence Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221 (1995) (arguing congressional-executive agreements violate the Treaty Clause).

⁵² Yoo Article, *supra* note 35 at 56 (“Not only are congressional-executive agreements acceptable, but in areas of Congress’s Article I, Section 8 powers, they are – in a sense – constitutionally required.”). *See also* Section III(C) & (D) below.

C. Sole Executive Agreements Bind Only in Matters Delegated to the Unilateral Power of the President

In a “sole executive agreement,” the President binds the U.S. to an international agreement unilaterally – with no formal *ex ante* or *ex post* authorization by Congress. This is the form of agreement represented by ACTA. But this claim is highly dubious because of the “strict legal limits [that] govern the kinds of agreements that presidents may enter into” without some form of Congressional consent.⁵³

Because sole executive agreements “lack an underlying legal basis in the form of a statute or treaty,”⁵⁴ they can be made by the president only within the restrictive set of circumstances in which the President has independent Constitutional authority.⁵⁵ “The President cannot make an international agreement that exceeds his own constitutional authority without Congress’s assent.”⁵⁶

Most binding domestic law must flow from the shared responsibilities described in Article I. Article II, however, provides for the exercise of certain powers by the President unilaterally. Such acts, performed within the bounds of Constitutionally delegated power, “have as much legal

⁵³ Hathaway, *Presidential Power over International Law*, *supra* note 36 at 146.

⁵⁴ Senate Report, *supra* note 37, at 88.

⁵⁵ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(4) (1986) (The President may enter a binding international agreement without congressional assent only for a “matter that falls within his independent powers under the Constitution.”); *see* *Youngstown Sheet & Tube*, 343 U.S. 579, 635 (admonishing that when the President acts pursuant to an “express or implied authorization of Congress, his authority is at its maximum”; but “in absence of either a constitutional grant or denial of authority, he can only rely upon his own independent powers”).

⁵⁶ Statement of Professor Oona A. Hathaway, Yale Law School, Before the House Committee on Foreign Affairs, Subcommittee on Middle East and South Asia and the Subcommittee on International Organizations, Human Rights and Oversight (Mar. 4, 2008), <http://www.internationalrelations.house.gov/110/hat030408.htm>.

validity and obligation as if they proceeded from the legislature.”⁵⁷ For Supremacy clause purposes, “[s]ole executive agreements validly concluded pursuant to one or more of the President’s independent powers under Article II of the Constitution may be accorded status as Supreme Law of the Land.”⁵⁸ Thus, if ACTA is a validly executed sole executive agreement, then ACTA would preempt contrary state law,⁵⁹ and may even supersede an existing federal statute.⁶⁰

The authority to enter sole executive agreements can be most easily and commonly found in the parts of the Constitution that grant the President independent power to act without Congressional participation. Thus, many executive agreements are uncontroversial extensions of the President’s independent authority to act as Commander in Chief of the Army and Navy,⁶¹ to “receive ambassadors” from (and thereby recognize) foreign nations,⁶² or to issue pardons.⁶³ There are also a large number of (often

⁵⁷ *Pink v. United States*, 315 U.S. 203, 230 (1942) (citing *The Federalist* No. 64 (Jay) (describing the equal legal validity of “[a]ll Constitutional acts of power, whether in the executive or in the judicial department”).

⁵⁸ Senate Report, *supra* note 37, at 92.

⁵⁹ *See Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396 (2003) (Preemption of state law could be a real concern over the areas of intellectual property law, particularly trade secret law, administered primarily through state common law).

⁶⁰ *See* Senate Report, *supra* note 37, at 95 (analyzing case law and finding that “the question as to the effect of a Presidential agreement upon a prior conflicting act of Congress has apparently not yet been completely settled”) (internal quotation and citation removed); *see also* Restatement at Sec. 115, Reporter’s Note 5 (explaining arguments that because a sole executive agreement “is Federal law,” and all valid Federal laws are of equal weight, a sole executive agreement could be interpreted “to supersede a statute”). *But see* *United States v. Guy Capps, Inc.*, 204 F. 2d 655, 659-660 (4th Cir. 1953), *aff’d on other grounds*, 348 U.S. 296 (1955) (“whatever the power of the executive with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress”).

⁶¹ U.S. CONST. art. II, § 2.

⁶² U.S. CONST. art. II, § 3.

mundane)⁶⁴ executive agreements grounded in the President's general power "to take Care that the Laws be faithfully executed."⁶⁵ In a small number of other borderline cases, long historical practice of acquiescence by Congress has been used to justify sole executive action to settle foreign claims that otherwise implicate congressional powers.⁶⁶

None of the settled cases apply to ACTA. If the agreement was composed only of the kind of coordination and information exchange between customs offices contained in part ___, perhaps the agreement could be justified as an incident to the President's executive power to manage agencies in their implementation of law. But the information sharing and international cooperation mandates of ACTA make up just a couple of ACTA's pages.⁶⁷ The majority of ACTA is composed of specific provisions on intellectual property remedies that the *legislation* of each country must adhere to. This cannot be justified as an implementation of mere executive

⁶³ U.S. CONST. art. II, § 2. See Hathaway, *Presidential Power over International Law*, *supra* note 36 (citing "defense" as the area of foreign policy with the most executive agreements); Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1581-82 (2007) (describing the "vast majority" of sole executive agreements as "unobjectionable . . . means of exercising their independent statutory authority or constitutional powers, such as the power to receive ambassadors, to issue pardons, or to command the military forces") (citing examples).

⁶⁴ Hathaway, *Presidential Power over International Law*, *supra* note 36 at 149.

⁶⁵ U.S. CONST. art. II, § 3. See Hathaway, *Presidential Power Over International Law*, *supra* note 36 at 149-153 & n. 29 (finding 375 sole executive agreements between 1990 and 2000 on matters including "Agreed Minutes" and "Implementing Procedures"). Cf. Van Alstine 319 n. 61, 352, n. 285 (citing over 15,000 executive agreements between 1946 and 2004).

⁶⁶ See *Pink v. United States*, 315 U.S. 203 (1942); SENATE REPORT, *supra* note 37 at 90; Clark, *supra* note 49 at 1582, 1615 & 1660 (noting examples including receiving ambassadors, issuing pardons, settling claims of American nationals against foreign governments, and conducting military exercises).

⁶⁷ See Chapter Three, Enforcement Practices and Chapter Four, International Cooperation, ACTA PP. 17-20.

power. “In the framework of our Constitution, the President’s power to see to it that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”⁶⁸ Thus, the USTR must be locating the power to bind U.S. legislation to ACTA’s dictates to some unenumerated power.

Claims to unenumerated powers to conduct foreign affairs without congressional participation reached its zenith in the George W. Bush administration.⁶⁹ Those in favor of strong executive power argue that extensive unenumerated powers in matters of foreign affairs should vest in the sole discretion of the executive.⁷⁰ But “uncertainties and the sources of controversy about the constitutional blueprint lie in what the Constitution *does not say*.”⁷¹ Even the adherents to the strong executive theory accept that the President cannot use a sole executive agreement to usurp lawmaking functions from Congress in any area expressly delegated to Congress by Article I.⁷² And that is the source of the constitutional problem with ACTA.

D. ACTA Implicates Article I Powers

ACTA does not deal with issues that lie in the unenumerated lacunae of

⁶⁸ *Youngstown*, 343 U.S. at 587.

⁶⁹ See *VanAlstine at 312, n. 8*; Curtis Bradley & Martin Flaherty, *Exec. Power Essentialism & Foreign Affairs*, 102 MICH L. REV. 545, 548 (2004).

⁷⁰ See Memorandum from John Yoo to John Bellinger, 13 (Nov. 15, 2001) (“the executive exercises *all* unenumerated powers related to treaty making”); see also John Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1677-78 (2002); *Van Alstine*, 54 UCLA L. Rev at 337-340 (describing the strong claim that Article II’s “vesting clause” grants plenary powers to the President over foreign affairs).

⁷¹ See *Henkin at 753* (emphasis added).

⁷² See YOO ARTICLE, *supra* note 35 at 56-58; Saikrishna Prakash & Michael D. Ramsey, *The Exec. Power over Foreign Affairs*, 111 YALE L. J. 231, 253 (2001). See also *Van Alstine*, 342-43 (“[E]ven the strong claim to implied executive powers acknowledges, as it must, that the president’s Article II powers are ‘residual’ only. Whatever their general scope, they are qualified by, and otherwise must yield to, the more specific allocations of power elsewhere in Article II and in Article I.”).

the Constitution. As described above in Part ___, ACTA is a wide ranging international agreement mandating statutory minimum standards in areas of federal and state law. ACTA standards would place restraints on the development of rules that stem from the Constitution itself, such as in the evidentiary standards required for property seizures and criminal prosecution. It would affect state common law, where many trade secret obligations reside. And primarily it would affect the evolution of federal law, including the large federal statutory enactments on patents, copyrights and trademarks.

As an agreement setting minimum legislative standards for intellectual property law and the regulation of IP-protected goods on the internet and in international trade, ACTA directly implicates Congress's Article I, Section 8 powers. These include, most specifically, those to "regulate Commerce with foreign Nations" and "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Indeed, the only mention of "piracies" and "counterfeiting" in the Constitution are in Article I, Section 8, although the Founders were not speaking of copyright and trademark infringement.⁷³

There is no residuum of power in these areas that the executive can claim, even under the broadest theories of the strong executive camp. Thus John Yoo, one of the leaders of the strong executive camp, explains:

In order to respect the Constitution's grant of plenary power to Congress, the political branches must use a statute to implement, at the domestic level, any international agreement that involves economic affairs. Otherwise, the mere presence of an international agreement would allow the treaty-makers to assume the legislative powers so carefully lodged in Article I for Congress. . . . Congressional-executive agreements preserve Congress's Article I, Section 8

⁷³ U.S. CONST. art. I, § 8, cl. 8 gives Congress power "To define and punish Piracies and Felonies committed on the high Seas," "To provide for the Punishment of counterfeiting the Securities and current Coin of the United States."

authority over matters such as international and interstate commerce, intellectual property, criminal law, and appropriations, by requiring that regardless of the form of the international agreement, Congress's participation is needed to implement obligations over those areas.⁷⁴

E. USTR's Justifications do not Establish ACTA's Constitutional Basis as a Sole Executive Agreement

The USTR has made three assertions justifying entering ACTA as a sole executive agreement despite the lack of plenary authority of the President over its subject matter. USTR has argued: (1) the agreement will be consistent with existing U.S. law; (2) the President has "plenary" powers over foreign affairs; and (3) the President is authorized by virtue of the Trade Act of 1974. None of these arguments establishes an adequate constitutional basis for sole executive action on ACTA.

The first argument is wrong as a matter of both fact and law. Factually, it is not true that ACTA has been crafted in a way to avoid usurpations of congressional authority. As noted in the letter of 80 Law Professors to President Obama, ACTA fails "to explicitly incorporate current congressional policy," including through provisions that appear to conflict with U.S. limitations and exceptions of copyright and trademark law damages and injunctions.⁷⁵ ACTA, USTR officials say, is consistent with U.S. law because the Administration has reviewed the agreement and not seen any problems, and if it is not correct, then ACTA's Article 1.2, leaving

⁷⁴ Yoo Article, *supra* note 35 at 56.

⁷⁵ See Letter from Senator Bernard Sanders and Senator Sherrod Brown to David Kappos, Director of Patent and Trademark Office (Oct. 19, 2010), *available at* http://keionline.org/sites/default/files/senator_sanders_brown_kappos_19oct2010.pdf (requesting analysis on the potential implications of ACTA on areas of U.S. law that appear in conflict with the facial language of the agreement, including in reference to sovereign immunity); *Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999), non-willful trademark violation, 15 U.S.C. § 114 (2), and in certain cases of infringement in the digital environment, 17 U.S.C. § 512).

each member “free to determine the appropriate method of implementing” ACTA, saves any problem.⁷⁶ Regardless of the merits of USTR’s position on the substance of the issue,⁷⁷ the position misses the point. For the question of whether ACTA binds U.S., the issue of its compliance with present U.S. law is irrelevant. The President does not have authority to enter international agreements in Congress’s arena of enumerated powers without congressional consent regardless of whether the agreement’s provisions conform to the contours of existing domestic law. The reason is obvious – the agreements would restrain Congress’s power to alter current law. The President cannot so tie Congress’s hands through unilateral action any more than the Congress can pass legislation without the President’s signature. It is Congress, not the executive, which is entitled to reach the decision of whether the agreement does in fact comply with the current sense of the legislative branch of what the law is and should be.

USTR’s second argument – that the President has “plenary” power to enter into international intellectual property agreements – is similarly misplaced. Here, USTR is drawing on a host of Supreme Court statements that the President sometimes acts as the “sole” or “exclusive” representative of the United States in the arena of foreign affairs.⁷⁸ Indeed, the specific source of USTR’s rhetoric appears to be the oft cited *dicta* of the Supreme Court in the *Curtiss-Wright* case, referring to the “very delicate, plenary,

⁷⁶ James Love, *USTR’s implausible claim that ACTA Article 1.2 is an all purpose loophole, and the ramifications if true*, KEI (Oct. 22, 2010), <http://keionline.org/node/990>.

⁷⁷ For a critique, see *Id.*

⁷⁸ See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (describing the President as the “sole organ” in foreign affairs); *N.Y. Times Co. v. United States*, 403 U.S. 713, 741 (1971) (“[I]t is beyond cavil that the President has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as Commander in Chief.”); *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (discussing the “conduct of diplomatic and foreign affairs, for which the President is exclusively responsible”); *Chicago & S. Air Lines v. Waterman Corp.*, 333 U.S. 103, 109 (1948) (describing the President as “the Nation’s organ in foreign affairs”).

and exclusive power of the President as the sole organ of the federal government in the field of international relations.”⁷⁹

Properly set in their context, the descriptions of the President as the “sole” and “plenary” voice in foreign affairs are undoubtedly true. The relevant distinction is between the role of the President as the voice and negotiator of the U.S. in foreign negotiations, which the executive practices unilaterally, and President’s ability to bind the U.S. to internationally constructed laws and policies, in which the “constitutional power over foreign affairs is shared by Congress and the President.”⁸⁰

The President and his appointees are the sole voice of the U.S. in international affairs. The President appoints the U.S. representatives to international law making institutions including the United Nations, the World Trade Organization and the World Intellectual Property Organization. In these capacities, and under the President’s power to “make” treaties and represent the U.S., the executive branch regularly engages in the creation of international law and policy.⁸¹ But such external agreements do not bind U.S. domestic law except in the strictly limited areas where the President has sole Constitutional authority.⁸² Because

⁷⁹ *Curtiss-Wright Exp. Corp.*, 299 U.S. at 320.

⁸⁰ *Itel Containers Intern. Corp. v. Huddleston*, 507 U.S. 60, 85 (1993); see also *Regan v. Wald*, 468 U.S. 222, 262 (1984) (Powell, J., dissenting) (“It is the responsibility of the President and Congress to determine the course of the Nation’s foreign affairs.”); *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (discussing “the field of foreign affairs which the Constitution entrusts to the President and the Congress”); *United States v. Minnesota*, 270 U.S. 181, 201 (1926) (“Under the Constitution the treaty-making power resides in the President and Senate, and when through their action a treaty is made and proclaimed it becomes a law of the United States.”).

⁸¹ *Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 414 (2003) (“Nor is there any question generally that that there is executive authority to decide what [international] policy should be.”).

⁸² See *Youngstown*, at 635-36 & n.2 (Jackson Concurring) (the President may “act in external affairs without Congressional Authority”); *Alston* at 345 (“[T]he president

ACTA involves international legal obligations on Article 1, section 8 congressional powers, the President cannot bind the U.S. to the agreement absent congressional consent.

Finally, USTR evokes the Trade Act of 1974 as an example of *ex ante* authorization for the President to negotiate trade agreements. This would be a cogent argument if fast track legislation was still in place. Fast track legislation was a delegation of Congress's authority to regulate international trade to the executive branch under circumscribed rules (including a final up or down vote). But that legislation lapsed. The Trade Act of 1974 does not delegate power to the President to bind the U.S. to trade agreements absent congressional consent. ACTA, no less than the Trans-Pacific Partnership now being negotiated or the Korea, Panama and Peru free trade agreements the administration is seeking to bind the U.S. to, must be approved by Congress as a regulation of foreign commerce regardless of whether it complies with current law.

IV. ACTA IS A BINDING TREATY UNDER INTERNATIONAL LAW

Although the President cannot make domestic law without Congress, he can make international law unilaterally.⁸³ And although that law cannot bind U.S. domestic law without congressional participation, it can bind the U.S. in the international sphere.⁸⁴ Non compliance with domestic ratification processes not prevent an agreement from creating binding

requires the consent of Congress as a whole, or two-thirds of the Senate for treaties, to transform this external policy into domestic law”).

⁸³ See *E.g.*, Vienna Convention on the Law of Treaties, art. 7, *opened for signature* May 23, 1969 (entered into force January 27, 1980), 1155 U.N.T.S. 331 [hereinafter VCLT] (providing that every state has the capacity to conclude international agreements and heads of state are presumptively authorized to represent a state for purposes of concluding an international agreement); *accord* Restatement (Third) of Foreign Relations § 311 (1987) [hereinafter R(3)F]; Van Alstin n. 62 (“Under international law, the president, except in extreme circumstances, has the authority to bind the United States even where he exceeds his domestic Authority”).

⁸⁴ See Art.26 VCLT.

international legal obligations. A state generally “may not invoke a violation of its internal law to vitiate its consent to be bound” internationally.⁸⁵

As an international agreement between the negotiating parties, ACTA binds all signatories to abide by the framework of this international legal instrument.⁸⁶ Parties to an international agreement with binding obligations must not derogate from its obligations and must perform them in good faith. This doctrine of *pacta sunt servanda* (“agreements must be kept”) lies at the core of the law of international agreements and is embodied in the VCLT Art. 26 and in R(3)F § 321.⁸⁷ The doctrine of *pacta sunt servanda* implies the existence of international obligations that must be performed in good faith despite restrictions imposed by domestic law.⁸⁸ Accordingly, even though ACTA may not be enforceable domestically, it is nonetheless a binding international agreement and the parties must perform its obligations under ACTA in good faith.

The existence of a binding obligation in international law leaves parties

⁸⁵ Vienna Convention Article 46 (noting that the violation of internal law must be “manifest” and concern “a rule of fundamental importance” to evade obligations under international law); *accord* Restatement (Third) of Foreign Relations, § 311 (3).

⁸⁶ See ACTA November Draft, *supra* note X at art. 1.2.1 (stating that “[e]ach Party shall give effect to the provisions of this Agreement”); R(3)F, *supra* note X at § 301(1) (defining “international agreement” as “an agreement between two or more states . . . that is intended to be legally binding and is governed by international law.”); 44B Am. Jur. 2d *International Law* (2010) [hereinafter Am Jur] (an “international agreement is a part of international law and creates obligations binding between the parties under international law”).

⁸⁷ See VCLT, *supra* note X at art. 26 (emphasizing that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith”); R(3)F, *supra* note X at § 321.

⁸⁸ See VCLT, *supra* note X at art. 27 (stating that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”); R(3)F, *supra* note X at § 321 Comment a (explaining that “international obligations survive restrictions imposed by domestic law”).

free to decide how they implement the obligations in domestic law, a point reflected in ACTA Section A, Article 1.2(1). If the U.S. decides that it does not need to take any action to implement ACTA into its law, because ACTA does not change the domestic law, then it is up to the other contracting parties to identify and enforce any discrepancies between ACTA and U.S. law.

Absent a dispute-resolution mechanism, ACTA lacks a forum for enforcement. But that does not mean the agreement lacks binding effect. “[U]nder international law, a state that has violated a legal obligation to another state is required to terminate the violation and ordinarily make reparation, including in appropriate circumstances restitution or compensation for loss or injury.”⁸⁹ In order to resolve disputes, “a state may bring a claim against another state for a violation of an international obligation . . . either through diplomatic channels” or through an agreed procedure.⁹⁰ A party viewing the U.S. in breach of its international obligations from ACTA may resort to countermeasures under customary international law.⁹¹ Under these measures, other parties may punish violations with ACTA through trade sanctions or other measures against U.S. commerce, provided such sanctions are proportional in relation to the breach.⁹² Another party could also litigate a case against the U.S. in the International Court of Justice,⁹³ but that would require the US to submit to ICJ jurisdiction.⁹⁴

There are other implications of the U.S. signing ACTA as binding international law. For example, the State Department and USTR would

⁸⁹ R(3)F, *supra* note X at § 901.

⁹⁰ *Id.* at § 902(1).

⁹¹ See ILC Draft Articles on State Responsibility

⁹² This is similar to the standard used in WTO dispute settlement. *See* [WTO Gambling case].

⁹³ Cite to jurisdiction of ICJ.

⁹⁴ Thanks and attribution are due to Henning

presumably review and craft subsequent international agreements, including those intended to bind U.S. law, for compliance with ACTA. ACTA provisions, once included in a free trade agreement or other agreement approved by Congress, would then have the force of domestic law. Courts would be required to interpret ambiguities in U.S. law to comply with more specific mandates in ACTA.⁹⁵ And pressure from industry and the administration may be brought to bear on Congress on the states to alter their law, or refrain from future alterations, to comply with ACTA's mandates.

CONCLUSION

To avoid binding the U.S. to ACTA internationally without congressional consent, 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. Without such a statement, an executive signature of ACTA could create a binding international treaty that is not considered binding under domestic law.

“Only the U.S. Congress can change U.S. law,” USTR admits.⁹⁶

⁹⁵ Charming Betsy.

⁹⁶ Office of the United States Trade Representative www.ustr.gov August 4, 2008