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March 20, 2000

The Honorable James S. Gilmore, III
Governor of the Commonwealth of Virginia
Chairman, Advisory Commission on Electronic Commerce

Dear Governor Gilmore:

This letter responds to your office's request for our views on two questions regarding the authority of the Advisory Commission on Electronic Commerce ("the Commission") to report the results of its work to Congress. First, does the Commission have authority to issue a report of its work to Congress on the basis of a majority vote of the Commission that is less than two-thirds of its membership? Second, does the Commission have authority to include in its report to Congress policy proposals that have the support of a majority of the Commission that is less than two-thirds of its membership? It is our view that the answer to both questions is yes.¹

Because the Commission's authority was created by and is derived from the Internet Tax Freedom Act of 1998 ("the Act"), our analysis is based primarily upon the provisions of the statute. It is a fundamental principle of interpretation, acknowledged in the Commission's own Operating Rules,² that the language of a statute takes preference over lesser sources of authority. Sections 1102 and 1103 of the Act govern the duties of the Commission with respect to its reporting responsibilities. Section 1102 of the Act established the Commission and directed it to "conduct a thorough study of Federal, State and local, and international taxation and tariff treatment of transactions using the Internet and Internet access and other comparable intrastate,

¹ In stating our views we are aware that responsibility for determining the authority and duties of the Commission resides first and foremost with Congress and next with the Commission itself. To the extent we can be helpful to the Commission as it interprets its authority and duties, we are happy to do so.

² See Operating Rule IV.D ("The Chairman will follow, in order of authority, Public Law 105-277, Title XI [the Act]; these Operating Rules; and Robert's Rules of Order to make any administrative or procedural determinations.").

interstate or international sales activities.” Section 1102(g). Section 1103 of the Act directs the Commission to “transmit to Congress for its consideration a report reflecting the results” of that study. Section 1103 also prohibits the Commission from including in that report a “finding or recommendation” that has not been “agreed to by at least two-thirds of the members of the Commission serving at the time the finding or recommendation is made.” The language of section 1103 clearly distinguishes between a “report reflecting the results” of the Commission’s study, which “the Commission *shall transmit to Congress* for its consideration,” and two categories of work product, a “finding or recommendation,” that cannot be included in that report unless “agreed to” by two-thirds of the Commission. In short, the Act directs the Commission to provide Congress a report, the precise form and contents of which are left to the determination of a majority of the Commission save in this one regard.

The questions your office has asked us to consider arise from the “two-thirds” majority language of section 1103. We do not think that language should be read to relieve the Commission of its statutory obligation to report the results of its study to Congress.³ Nor do we believe that it should be seen as a restriction on the content of that report beyond the very specific bar it creates. Nowhere in the Act did Congress provide that the report of the Commission’s results could be transmitted to Congress only upon the approval of two-thirds of the Commissioners. Section 1103 directs the Commission to “transmit . . . a report reflecting the results” of the Commission’s study, but the Act is silent on the type of vote needed to do so.⁴ It is a cardinal principle of parliamentary law that a body acts by simple majority unless the governing legislative authority provides differently. As explained in *Jefferson’s Manual*, “The voice of the majority decides. For the *lex majoris partis* is the law of all councils, elections, &c., where not otherwise expressly provided.” Thomas Jefferson, *A Manual of Parliamentary Practice for the Use of the Senate of the United States* §[41.13], Senate Doc. 103-8, 102d Cong., 2d Sess. (1993).⁵ In our view, the Commission may fulfill its obligation to transmit a report to Congress on the strength of a simple majority. If the language of section 1103 were to be interpreted such that the

³ We note that the Commission passed a resolution “Support for the Administration’s Position for a Permanent Moratorium on Tariffs” by an 18-1 margin during its New York City meeting on September 15, 1999. Presumably, that resolution will be included in the Commission’s report to Congress as a recommendation.

⁴ Section 1102(f)(1) creates a quorum requirement of nine Members for “conducting the business of the Commission.”

⁵ “The position of *Jefferson’s Manual* is unchallenged as the first to define and interpret parliamentary principles for our democratic republic and to offer a basic pattern of rules and a measure of uniformity for legislative processes of the United States.” *Robert’s Rules of Order, Newly Revised* xxxii, xxxiii (Sarah Corbin Robert et al. eds, 9th ed., 1990). The Commission has recognized the authority of Robert’s Rules of Order in its own Operating Rules. See Operating Rules IV and IV.D.

Commission could not issue a report without two-thirds majority support, it would create a condition inconsistent with fundamental principles of accountability that have been the hallmark of congressional advisory commissions. We think it the better view of the Act and the history of advisory commissions that Congress established this Commission and gave it the charge to study certain topics with the usual expectation that the Commission would report back to Congress the results of its federally funded study.

The Act regulates the content of the Commission's report in only one way. It may not include a "finding or recommendation" without the support of a two-thirds majority. Otherwise, the Commission is free to determine, by majority vote, how it can best report to Congress the results of its work. For example, the report could appropriately include in its report a description of each vote taken on the policy proposals presented to the Commission regardless of whether the proposal achieved two-thirds support. The Commission could also highlight certain votes that it considered to be more significant. By the same token, the Commission would be well within the Act's authority if it determined to transmit a report that explains the results of its work by identifying policy proposals that could only garner majority support. To be sure, those proposals will not carry the weight of a two-thirds majority "finding or recommendation," and the Commission cannot hold them out as being of equal authority. Still, we find nothing in the Act that bars the Commission from including such majority views in its report. Indeed, the Commission's Operating Rules, an expression of the Commission's views of its statutory authority and responsibilities, provide that, if requested by a Commissioner, the report will separately include the unique and perhaps solitary views of that Commissioner even though those views have not been approved by two-thirds of the Commissioners. *See* Operating Rule IV.A ("At the request of any Commissioner, the report will separately include that Commissioner's views."). It seems an unnatural reading of the reporting requirement of the Act if it allowed the Commission to include in its report views that have the support of no more than a single Commissioner, but excluded the views of a majority of the Commissioners simply because their majority was less than two-thirds.

We cannot find in the language of the Act any sense that failure to reach a supermajority determination on a "finding or recommendation" would relieve the Commission of its responsibility to otherwise report the "results of the study" Congress has ordered. In our view, it would be extraordinary for Congress to create and fund an advisory commission on an issue of national significance and allow that commission to escape its reporting responsibility because it could not reach a two-thirds majority. Such an unusual restriction on the ability of a democratic body to act would require a far more direct expression of congressional intent than is provided in the two-thirds majority language of section 1103.

Finally, the Majority Leader of the Senate has recently written to the Commission and specifically requested the Commission to inform the Congress of the results of its work, even on those proposals for which there may not be a two-thirds majority. Given that the Commission is a creation of Congress and exists to advise and serve Congress, it is our view that the perspectives

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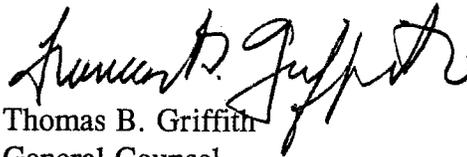
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of congressional leaders should figure prominently in the Commission's interpretation of its duties under the Act.

We would be happy to answer any questions you or other Members of the Commission might have about our views.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Thomas B. Griffith". The signature is written in a cursive style with a large, looping initial "T".

Thomas B. Griffith

General Counsel

Advisory Commission on Electronic Commerce



Office of the Speaker
United States House of Representatives
Washington, DC 20515

March 17, 2000

Governor James S. Gilmore, III
Governor of Virginia & Chairman
Advisory Commission on Electronic Commerce
State Capitol
Richmond, Virginia 23219

Dear Governor Gilmore:

The Advisory Commission on Electronic Commerce will meet in Dallas on March 20-21 to draw some conclusions on the future of Internet taxes. Please extend my appreciation to all commissioners for their service. I also thank you for your exemplary service as Chairman. Congress has been well served by the fair and comprehensive debate facilitated by the Commission, and the body of research you have compiled will inform Internet tax policy in the new economy for many years to come.

As the Commission approaches its final meeting in Dallas, please emphasize the importance of sound policy proposals for the individual taxpayers of America. Congress will rely upon the Commission to provide its best judgment on whether the Internet should be taxed. Clearly, the American people have a great stake in the work of your Commission. Since Congress will give serious consideration to your final report, allow me to offer some friendly advice before you conclude your work.

I understand that some members of the Commission are deeply polarized. That is not surprising in light of the gravity of the issues referred to the Commission. If the issues had been easy, no study commission would have been necessary.

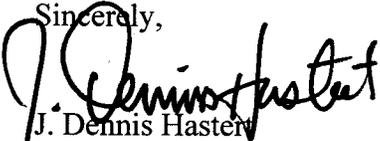
I thought it might be helpful to share with you the experience of Congress' Medicare Commission. Like the Commission on Electronic Commerce, the Medicare Commission was required by statute to obtain two-thirds votes in order to make a formal recommendation to the Congress. And, like your commission, the Medicare Commission studied a controversial issue.

In the case of the Medicare Commission, representatives of the Clinton-Gore Administration voted against constructive reform proposals and stopped them from obtaining the statutorily prescribed two-thirds vote requirement. Those reform proposals had clear support from a majority of the members of that commission, and if it were not for the Clinton-Gore Administration's philosophical objections to reform, a two-thirds

vote would have been achievable. Nevertheless, the Medicare Commission reported to Congress those ideas that had obtained majority support, and Congress has closely reviewed those proposals.

Should your Commission find itself in a similar posture on one or more issues, I ask that you report to Congress those ideas that obtain majority support so that Congress can consider them along with the dynamics of the vote. Congress has a job to do on behalf of the American people. We will not allow three negative votes by this Administration to deter us from pushing constructive legislation based on the sound ideas generated by a commission created to advise Congress.

I thank you for your leadership on the future of electronic commerce, and hope you will let me know if I can be of any assistance.

Sincerely,

J. Dennis Hastert
Speaker of the House of Representatives

United States Senate

OFFICE OF THE MAJORITY LEADER
WASHINGTON, DC 20510-7010

March 16, 2000

The Honorable James S. Gilmore, III
Governor of Virginia
State Capitol
Richmond, Virginia 23219

Dear Jim:

Thank you for your call last week and for the update on the Advisory Commission on Electronic Commerce. I have been following the Commission's work closely, and I hope that you will extend my appreciation to all of the Commissioners for their time and effort in the consideration of taxation and ecommerce. Based on our conversation and my observation of the Commission's work, I would like to offer a suggestion.

As the Commission approaches its final meeting in Dallas, I hope that you as Chairman will continue to emphasize the importance of sound policy proposals. Congress will rely upon the Commission to provide its best judgment on whether the Internet should be taxed.

I support your proposal, and hope that the commission will take your position. I also understand that building consensus among people of widely varying viewpoints is a challenging task. In the final days of the Commission, you will face difficult trade-offs between what you believe is the best policy, and the formal requirements of the statute that created the Commission. I hope you will not sacrifice your best judgment just for the sake of unanimity.

The best judgment is not always a consensus judgment. The statute that created the Commission set a high bar for agreeing to a formal "finding" or a "recommendation." It may be impossible to obtain a two-thirds vote in favor of bold policy proposals that reduce tax burdens on American consumers and businesses. It would be a mistake for a majority of the Commission to sacrifice its best judgment just to reach the arbitrary standard of a two-thirds super-majority.

As a member of the United States Senate, I do not expect each policy proposal from the Commission to obtain a two-thirds super-majority. Instead, I hope that the Commission's report will inform us of proposals that garner at least majority support, even if those proposals fail to achieve the two-thirds vote necessary to become formal findings or recommendations.

I would rather see from the Commission a clear and unambiguous policy proposal that achieved majority support, than a vague super-majority recommendation that can be interpreted in many different ways here on Capitol Hill. I will consider seriously any proposal that receives support from a majority of the Commission, especially if that proposal is bold and innovative. The strength of your ideas will be persuasive, not the vote count.

Again, thank you for your call last week, and please extend my appreciation to the Commission for its work. Good luck next week in Dallas. With best wishes, I am

Respectfully yours,



Trent Lott