Public (Self)-Service: Illegal Trading on Confidential Congressional Information

*Andrew George**

Introduction: Congressional Insider Trading

Senators, according to a recent study, make extraordinary investors.[1] During the five-year period of the study, senators (and their spouses and dependent children) who traded securities beat market averages by more than 10% per year.[2] That is an impressive number, considering that it is *twice* what another study found to be the average trading profits of corporate insiders.[3] Barring a "sixth-investing-sense" among members of Congress, numbers such as these indicate that some members of Congress, across both political parties,[4] are playing the stock market with a "stacked deck"—a deck they bring to the table.[5] In other words, perhaps some members are trading securities on the basis of inside knowledge of upcoming legislative events.

In fact, this behavior seems to be fueling a burgeoning Washington industry: the "political intelligence industry."[6] Beyond trading themselves, members of Congress (or their staffers) may be providing tips to "political intelligence" operatives, who relay them to Wall Street clientele.[7] The recent explosion of hedge funds has sparked the political intelligence indus-

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[1] Allen J. Ziobrowski et al., *Abnormal Returns from the Common Stock Investments of the U. S. Senate*, 39 J. Fin. & Quantitative Analysis 661, 669 (2004).

[2] *Id.* at 661. In addition, many stocks that senators invested in had nearly zero returns for the years both before and after their purchase and sale, suggesting "that Senators knew appropriate times to both buy and sell . . ." *Id.* at 675. Also, senators tended to invest far more heavily in the stocks that proved to be the best performers. *See id.*

[3] *Id.* at 669 (citing Leslie A. Jeng et al., *Estimating Returns to Insider Trading: A Performance Perspective* (Boston Univ., Working Paper, 2001)).

[4] *Id.* at 666, 675.

[5] *See id.* at 676 ("Political power confers many benefits. Among those benefits are privileged access to information, the power to influence legislation, and the power to influence the application of regulatory jurisdiction by administrative agencies. It makes sense that politicians would use such powers for personal gain . . .").

[6] *See id.*

[7] *See* Eamon Javers, *Washington Whispers to Wall Street*, Bus. Wk., Dec. 26, 2005, at 42; Brody Mullins & Kara Scannell, *Hedge Funds Hire Lobbyists to Gather Tips in Washington*, Wall St. J., Dec. 8, 2006, at A1.

try's growth,[8] since deciphering the market implications of congressional decisions bears directly on the inefficiencies off of which hedge funds seek to profit.[9] Hot congressional tips are an admitted part of this profitable business.[10]

These profits come at ordinary investors' expense. Every stock that a legislator or hedge fund buys or sells at the right time is sold or bought at the wrong time by some average American who did not know the full story.[11] Indeed, while senators outperform the market by an average of approximately ten percent per year,[12] the average investing household *underperforms* the market by nearly four percent per year.[13]

Pro-insider trading theories do not vindicate this behavior. Such theories point mainly to innovation incentives created by allowing insiders to profit from their decisions, which arguably can benefit their firm as a whole.[14] But legislators are not supposed to be innovators in firms. Their constituencies are much broader than the groups of interested shareholders within firms. And legislators' financial incentives to trade on inside information can potentially be contrary to voters' interests, as well as the interests of shareholders. It is even possible that the average person who buys or sells at the wrong time because of a legislator's informed decision could also be a voter for that legislator.

It is difficult to imagine a more obvious betrayal of the public trust. It is even more difficult to imagine that such behavior could be completely legal. But that is exactly the conventional wisdom today. Trading on congressional knowledge seems intuitively unfair, but it is almost universally believed to be legal by securities attorneys,[15] legal academics,[16] and even

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[8] *See* Javers, *supra* note 7. Nearly 7000 hedge funds have been started since 2001. *See also* Jenny Anderson & Landon Thomas Jr., *When Midas Disappoints: Weak Results Dim Hedge Funds' Luster*, N.Y. TIMES, Oct. 5, 2006, at C1.

[9] *See* Javers, *supra* note 7. *See also* Editorial, *Hedge Funds and Insider Trading*, N.Y. TIMES, Jan. 22, 2007, at A18.

[10] *See* Javers, *supra* note 7. However, the majority of political intelligence is innocuous trend analysis. *See id.* (Leslie Alperstein, founder of Washington Analysts, explained, "If we only dealt in [hot tips], I wouldn't be living in Potomac . . . It doesn't happen often enough.").

[11] Proponents of insider trading regulation make a similar argument. *See generally* Sanford J. Grossman & Oliver D. Hart, *Corporate Financial Structure and Managerial Incentives*, *in* THE ECONOMICS OF INFORMATION AND UNCERTAINTY 107 (John J. McCall ed., 1982).

[12] *See* Ziobrowski, *supra* note 1, at 669.

[13] Brad M. Barber & Terrance Odean, *Trading is Hazardous to Your Wealth: The Common Stock Investment Performance of Individual Investors*, 55 J. FIN. 773, 799 (2000).

[14] *See* HENRY MANNE, INSIDER TRADING AND THE STOCK MARKET 138 (1966).

[15] Thomas Newkirk, a former SEC enforcement official, stated that "[i]f a congressman learns that his committee is about to do something that would affect a company, he can go trade on that because he is not obligated to keep that information confidential . . . He is not breaching a duty of confidentiality to anybody . . ." Brody Mullins, *Bill Seeks to Ban Insider Trading by Lawmakers and Their Aides*, WALL ST. J., Mar. 28, 2006, at A1.

[16] Professor Stephen Bainbridge states that "[e]ffective regulation of problematic Congressional trading thus requires a broader prohibition than the securities law definition of insider trading." *Insiders on the Hill*, TCSDAILY, Mar. 30, 2006, http://www.tcsdaily.com/article.aspx?id=033006D. *See also* Ziobrowski, *supra* note 1, at 676 ("Current law does not prohibit Senators from trading stock on the basis of information acquired in the course of performing their normal Senatorial functions.").

members of Congress.[17] While no comprehensive legal analysis of this issue has ever been undertaken, conventional wisdom holds that a lawmaker or a legislative staffer who trades securities or provides a tip for trading securities on the basis of inside congressional information breaks no law. Some concerned lawmakers are so convinced that this activity is currently legal that in 2006 they introduced the "Stop Trading on Congressional Knowledge Act" (S.T.O.C.K. Act),[18] targeting members of Congress and their staffers who trade securities on the basis of confidential material information obtained in the course of their work.[19] This Essay will argue, however, that under the "misappropriation theory" of insider trading, trading on material nonpublic congressional information is *already* decidedly illegal.

The misappropriation theory, under SEC Rule 10b-5,[20] prohibits the breach, by a corporate outsider, of a duty of confidentiality to a source of nonpublic material information, in connection with a securities transaction.[21] It is designed to protect securities markets from abuses by corporate outsiders who have "access to confidential information that will affect the corporation's security price when revealed, but who owe no fiduciary or other duty to that corporation's shareholders."[22] There are two reasons why many commentators feel that legislators and staffers who trade or tip are not subject to liability under this theory. First, some claim that legislators and staffers possess no duty of confidentiality.[23] Second, others say that congressional information is always "public."[24] Parts I and II of this Essay will respectively prove, however, that both of these premises are incorrect. Part III will then call for the enforcement of existing insider trading laws against congressional insider trading.

I. Duties Violated by Legislators and Staffers

It is widely believed that legislators and staffers violate no duty under the misappropriation theory in trading or tipping on knowledge learned at work. Yet this seems wrong from the outset because members of Congress are bound by various duties inherent to their office. They are governed by ethical rules designed to prevent abuses of power and informal norms in maintaining (to a degree) each other's confidences. It therefore should seem

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[17] *See* Press Release, Rep. Louise M. Slaughter (D), Ranking Member, House Rules Committee, STOCK Act Fact Check (Mar. 31, 2006) (on file with author) [hereinafter Press Release].

[18] H.R. 5015, 109th Cong. (2006).

[19] *See* Press Release, *supra* note 17.

[20] Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2000); Rule 10b-5, 17 C.F.R § 240.10b-5 (2007).

[21] United States v. O'Hagan, 521 U.S. 642, 652 (1997).

[22] *Id.* at 652–53 (quoting Dirks v. SEC, 463 U.S. 646, 655 (1983)). This differs from "classical" insider trading, which involves corporate insiders, as opposed to outsiders. *See* Chiarella v. United States, 445 U.S. 222, 226–35 (1980).

[23] *See* Press Release, *supra* note 17.

[24] Javers, *supra* note 7 ("The intelligence operatives say that Congress, where decisions are made publicly, is fair game.").

odd that the legal standard for existence of a duty could so easily fail to validate the duties that govern legislators and staffers.

There are, in fact, three types of legal duties that can apply to legislators and staffers under the misappropriation theory. The first is a fiduciary duty, which can be predicated upon common law relationships such as "attorney and client, executor and heir, guardian and ward, principal and agent, trustee and trust beneficiary, and senior corporate official and shareholder."[25] The second and third types of duties are those of similar "trust and confidence" to fiduciary duties.[26] The second is a duty arising out of an agreement to maintain information in confidence.[27] Such an agreement must be express but need not be written,[28] and may exist between an individual and a larger group.[29] The third type of duty exists where the parties "have a history, pattern, or practice of sharing confidences, such that the recipient of the information knows or reasonably should know that the person communicating the material nonpublic information expects that the recipient will maintain its confidentiality."[30]

This third type of duty raises a threshold question about the nature of congressional information: is there such a thing as a "reasonable expectation of confidentiality" in Congress? Many would say "there is nothing classified in Washington today."[31] But even if there does not exist an ironclad expectation of privacy with regard to congressional information, it does not follow that there is an insufficient expectation of privacy to meet SEC requirements.

The "it's Washington" defense, which claims that nothing in Washington is confidential, is, at its heart, a rhetorical one. There is no certainty that congressional secrets will be kept, but that is true for all secrets. Corporate secrets are also frequently leaked, yet employees who use these secrets to their advantage are prosecuted under insider trading laws. Why should legislators be considered any differently?

The fact that discovered leaks are met with outrage speaks to the expectation that some congressional information will be kept confidential.[32] Under SEC rules, only an expectation, not a guarantee, of confidentiality is required, and that prescribes an analysis based on the specific "facts and

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[25] *See* United States v. Chestman, 947 F.2d 551, 567–68 (2d Cir. 1991).

[26] Jared L. Kopel, *Issues Relating to the Misappropriation Theory*, *in* 6 SECURITIES LAW TECHNIQUES § 80.04[1][c] (2007). It is an open legal question whether Rule 10b5-2 is actually within the SEC's authority under §10(b) of the Securities Exchange Act of 1934. *See id.*

[27] *See id.*

[28] *See* Final Rule: Selective Disclosure and Insider Trading, Exchange Act Release No. 33-7881, 65 Fed. Reg. 51,716, at 51,720 n.28 (Aug. 24, 2000) [hereinafter Final Rule].

[29] *See id.* at 51,720 n.29.

[30] *See id.* at 51,730.

[31] Interview by Amanda B. Carpenter with Senator Pat Roberts, U.S. Senator, in Washington, D.C. (June 2006), *available at* http://www.freerepublic.com/focus/f-news/1685248/posts (Aug. 17, 2006).

[32] *See* Jonathan Weisman, *GOP Leaders Urge Probe in Prisons Leak*, WASH. POST, Nov. 9, 2005, at A1.

circumstances" surrounding the relationship.[33] In other words, confidentiality is a case-specific question that can probably be satisfied in many cases, meaning that there is no "congressional write-off" of duties formed by histories, patterns, or practices of confidentiality.

All three types of duties can be violated either by failing to disclose legitimately *obtained* material nonpublic information prior to trading or tipping, or by using deception to obtain material nonpublic information and later trading or tipping upon it.[34] Classically, duties only ran between corporate insiders and shareholders,[35] but under the misappropriation theory, the duty element binds fiduciaries and those with similar obligations to the source of the information.[36] It also binds recipients of tips ("tippees"). When a person breaches a duty by passing a tip (acting as a "tipper"), the tippee inherits the tipper's duty if the tippee knew or should have known that the tip was originally obtained in violation of a duty.[37] So the question under the duty element is the same regardless of whether the duty ran to the actual defendant in a case: did the original recipient of the information breach a duty? This Essay will now show how, for both staffers and legislators, the answer to this question can be "yes."

A. Congressional Staffers Who Trade or Tip Upon Confidential Information Learned in the Course of Their Employment

Of all parties who could trade or tip upon confidential congressional information, legislative staffers are the most likely to violate the law. An example of this may have recently occurred where a staffer working for then-Senate Majority Leader Bill Frist allegedly tipped a political intelligence operative regarding Senator Frist's plans to bring an asbestos reform bill to the floor for a vote.[38] The intelligence operative may have relayed this information to hedge fund clients, who in turn could have traded (and caused a spike) in related securities in advance of Senator Frist's public announcement.[39]

Staffers who engage in this behavior breach traditional fiduciary duties arising out of principal/agent relationships with the legislators or with higher ranking staffers who are their employers and exercise control over the staffers.[40] Staffers also almost certainly break duties arising out of ethical rules

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[33] *See* Final Rule, *supra* note 28, at 51,730.

[34] *See* Chiarella v. United States, 445 U.S. 222, 228 (1980); SEC v. Rocklage, 470 F.3d 1, 6 (1st Cir. 2006).

[35] United States v. O'Hagan, 521 U.S. 642, 652 (1997). In other words, the tippee must act with scienter. *Id.* at 665–66.

[36] *Id.* at 664.

[37] United States v. Libera, 989 F.2d 596, 600 (2d Cir. 1993); SEC v. Musella, 578 F. Supp. 425, 438–39 (S.D.N.Y. 1984).

[38] *See* Javers, *supra* note 7.

[39] *See id.*

[40] This is particularly true in the Senate, where a 1992 Amendment to Rule 29(5) of the Standing Rules of the Senate was passed with the intention that senators would commit themselves "to preventing future leaks of confidential Senate information *by making clear to mem-*

as well as duties arising from history, pattern, or practice. It is difficult to imagine how a congressman's office could function without such a history, pattern, or practice of sharing confidences with at least some staffers and to some degree. This fact does not change where staffers encounter confidential information without their superiors' knowledge, because the superiors' trust places the staffers in the position to be exposed to the confidential information in the first place. The staffers' actions betray that trust and therefore violate a duty.

In fact, the resulting violation would not change even if a superior meant for a staffer to trade or tip. Such a case would pose a compelling political situation, but the implications for the duty analysis would be fairly minimal, because the staffer would inherit his superior's breach of duty. The superior would be a tipper and the staffer a tippee, who, if he knew that the tip had been obtained through a violation of a duty of trust and confidence, would be just as guilty as his superior, if he traded on the information or passed it on to a future trader.[41]

B. Legislators Who Trade or Tip upon Information Learned in the Course of Confidential Legislative Business

Legislators who trade or tip upon information learned in the course of confidential legislative business are only slightly less certain to violate duties than their staffers. They are likely to violate both duties listed in Rule 10b5-2: duties arising out of agreements to maintain information in confidence and duties arising out of histories, patterns, or practices of keeping information confidential.

To find such a duty-by-agreement, we need look no further than the Code of Ethics for Government Service ("Code of Government Ethics"). Paragraph Eight of the Code ("Paragraph Eight") states that "any person involved in Government service should never . . . use information received confidentially in the performance of governmental duties for making private profit."[42] This Paragraph creates an agreement because it is binding upon all members of the Federal Government as a condition of employment, "including officeholders."[43] It prohibits exactly the type of behavior examined in this Essay.

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bers of our own staffs that such conduct will not be tolerated and . . . [is] prohibited by the rules of the Senate." 138 CONG. REC. S17835, S17836 (Oct. 8, 1992) (statement of Sen. Mitchell) (emphasis added).

[41] *See infra* text accompanying notes 71–72.

[42] H.R. Con. Res. 175, 85th Cong. (1958).

[43] *See id.* The Code of Government Ethics was adopted by the House and concurred with by the Senate. Although it was adopted merely as a concurrent resolution (as opposed to a statute) to express the "sense of Congress" and technically expired with the adjournment of the 85th Congress, the House Committee on Standards of Official Conduct continues to view the Code of Government Ethics as an expression of traditional standards of conduct. *See* House Comm. on Standards of Official Conduct, In the Matter of a Complaint Against Rep. Robert L. F. Sikes, H.R. Rep. No. 94-1364, at 3 (1976) [hereinafter Sikes Complaint].

Paragraph Eight has actually been used to reprimand a member of Congress for behavior approximating insider trading. In 1976, the House Committee on Standards of Official Conduct submitted a formal complaint against Florida Representative Robert Sikes on charges including the purchase of stock in the privately-held First Navy Bank, whose establishment he was also actively promoting at a Naval Air Station.[44] The Committee's response to this allegation was that "[w]e have . . . serious concern about [this] investment . . . If an opinion had been requested of this Committee in advance about the propriety of the investment, it would have been disapproved."[45]

The House currently points to Sikes as *the* example of the use of congressional office for personal gain.[46] Although some observers appear to believe that because Paragraph Eight is an ethical rule, and not a law, it cannot provide a basis for applying the misappropriation theory,[47] there is simply no reason why this need be the case under SEC Rule 10b5-2(b)(1), because the Rule seeks an *agreement*, not a law.

Senators (and their staffers) are also bound by an agreement to maintain confidentiality under the Standing Rules of the Senate. Like Paragraph Eight, Rule 29(5) of the Standing Rules of the Senate ("Rule 29(5)") appears to prohibit the behavior in question. It provides:

> Any Senator, officer, or employee of the Senate who shall disclose the secret or confidential business or proceedings of the Senate, including the business and proceedings of the committees, subcommittees, and offices of the Senate, shall be liable, if a Senator, to suffer expulsion from the body; and if an officer or employee, to dismissal from the service of the Senate, and to punishment for contempt.[48]

No indication is given that Rule 29(5) is constrained to matters of national security, although one might be tempted to argue from these passages that Rule 29(5) applies only to executive and treaty related communications.[49] An examination of the terms "secret and confidential," however, reveals that this is not the case.

As an initial matter, later interpretations of the terms "secret and confidential" give the phrase wide application. One interpretation states that in Rule 29(5), the terms "refer to all information the Senate treats as confidential, including information received in closed session, information obtained in the confidential phases of investigations, and classified national security information."[50] Also, in 1989, Senator J.J. Exon stated that "the word confi-

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[44] Sikes Complaint, *supra* note 43, at 3.
[45] *Id.* at 4.
[46] *See* House Ethics Manual, H.R. Doc. No. 102-077, at 155–57 (1992).
[47] *See* Press Release, *supra* note 17.
[48] S. Doc. No. 106-15 (2006).
[49] *Id.*
[50] 138 CONG. REC. S17835, S17836 (Oct. 8, 1992) (statement of Sen. Mitchell) (emphasis added).

dential does not necessarily correspond to the standard levels of classification in the national security sense as we know them."[51] Likewise, Senate Rule 26(5)(b) provides that certain topics, when discussed at committee meetings, will be considered "confidential."[52] These include "information relating to the trade secrets of financial or commercial information pertaining specifically to a given person."[53]

The protection of financial or commercial information was specifically discussed during a debate on the Fairness in Asbestos Injury Resolution (FAIR) Act, when Senator Dick Durbin entered an exhibit, without objection, stating the following:

> All Senators and their staff can view a list [of the names and anticipated tier assignments of companies on both sides of the asbestos relief fund created by the Act] compiled now. This list is confidential because it includes confidential information from businesses . . . In issuing the subpoenas and making telephone calls, my office informed companies that the information obtained would be held confidential pursuant to Rule 29 . . .[54]

In addition, there are two differences between Rule 29 as passed in 1868 and the current Rule: the 1868 version did not include language extending Rule 29(5) to employees of the Senate, nor did it extend to the confidential business of "the committees, subcommittees, and offices of the Senate."[55] These changes were enacted in part because "a breach of [this] confidentiality is destructive of mutual trust and respect, reflects poorly on the institution, and may seriously harm the privacy and other interests of individuals and organizations . . ."[56] As a result, Rule 29(5) appears intended to address precisely the sort of conduct at issue here in the Senate.

Beyond these agreements, legislators are also vulnerable to the third method of forming a duty: a duty arising out of a history, pattern, or practice of sharing confidences, where the recipient knows or reasonably should know that the source expects information to be kept confidential.[57] And although this type of duty prescribes an ad hoc inquiry,[58] there is evidence that such a duty does in fact bind legislators. Discussions surrounding the 1992 Amendment to Rule 29(5) strongly indicate the presence of such a duty. There, one Senator stated:

> [C]andid discussions among Members depend upon a trust that is based, in part, on a willingness of all Members to abide by the practices of the Senate . . . The unilateral decision by a Member or

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[51] 139 Cong. Rec. S14583, S14586 (Oct. 28, 1993) (statement of Sen. Exon).
[52] S. Doc. No. 106-15 (2006).
[53] *See id.*
[54] 152 Cong. Rec. S879, S886 (Aug. 3, 2006) (statement of Sen. Durbin) (exhibit 1).
[55] Rule 29(5). S. Doc. No. 106-51 (2006).
[56] S. Res. 363, 102d Cong. (1992).
[57] *See* 17 C.F.R. § 240.10b5-2(b)(2) (2000).
[58] *See* Final Rule, *supra* note 28, at 51,733.

> employee to release confidential committee information is inconsistent with the Senate's practice of making such decisions openly and collectively. Arrogation of this responsibility by individuals can destroy mutual trust among Members and be harmful to this institution.[59]

This language alone provides strong evidence that histories, patterns, or practices of maintaining confidences can be readily found in the Senate, though some senators no doubt have closer relationships than others. The question would therefore be whether the confided-in Senator knew that he was expected not to disclose the information he had received. Surely, there are countless scenarios where the answer could be "yes."

Members of the House are equally likely to form duties resulting from histories, patterns, or practices of maintaining confidences. The House analogue to Senator Mitchell's statements is an internal set of guidelines concerning what information is considered confidential.[60] Its definition of confidential information includes: information, the "inappropriate disclosure" of which would "adversely reflect on the credibility of the House or office"; information relating to "specific legislative action taken or considered by the office"; information "provided to the House in confidence or with restrictions on its use (i.e., trade secrets, commercial or financial information) from an individual, private entity, or state or federal entity"; and "intra-house" communications.[61] Representatives may never see this document, so it arguably should not be seen as forming a duty by "agreement." Yet it strongly suggests that a fact-specific inquiry could find histories, patterns, or practices of maintaining confidences between Representatives.

II. Congressional Information Is Not Always "Public"

Besides lack of duty, the other reason given to assert the legality of trading on confidential congressional information is that there is, in fact, no such thing as "confidential" congressional information because congressional information is always "public." Indeed, insider trading charges can only be based on nonpublic information. But the notion that the public/nonpublic distinction has anything to do with whether information is derived from a "public" or civic organization, *i.e.*, Congress, is inconsistent with insider trading law.

In fact, the misappropriation theory's confidentiality analysis asks the same question of all traders regardless of the source of the inside information. It concerns whether information was "impounded" (taken into ac-

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[59] 138 Cong. Rec. S17835, S17836 (Oct. 8, 1992) (statement of Sen. Mitchell).

[60] The United States House of Representatives Information Security Publication, Guidelines for Determining Information Sensitivity, www.house.gov/cao-opp/PDFSolicitations/HISPUB008.pdf.

[61] *See id.*

count) into a stock's price at the time of the trade.[62] Therefore, the claim that Congressional information is always public[63] mistakes a rhetorical argument for a legal one. Seemingly, this argument would apply to any government body. Yet in *United States v. Robert A. Rough*,[64] the SEC brought insider trading charges against a Federal Reserve officer for leaking information regarding the New York Fed's discount rate recommendations releases. Likewise, while a CSPAN broadcast is public, Congress also conducts some business behind closed doors, business the market learns about later. Until the market finds out, that information is nonpublic.

III. The Search for Enforcement

Trading on confidential congressional information is neither legal nor is it a victimless crime. Further, as this Essay demonstrates, there are laws currently on the books that are capable of prosecuting this behavior.[65] So the question becomes, does the SEC know what it is capable of, and if it does, why is it not taking enforcement action? It is difficult to answer this question with certainty, but it seems that the SEC may be punting on this issue, since it considered, and rejected, investigating senators for this activity in the wake of the Allen Ziobrowski's study exposing profitable congressional trading.[66]

The SEC did not give as its reason a lack of legal recourse against this behavior,[67] and, correctly, it did not claim that its reluctance results from general congressional immunity to these claims. Congressional immunity is limited to acts that are "clearly a part of the legislative process,"[68] and trading or tipping on congressional information cannot seriously be considered "conduct . . . within the 'sphere of legitimate legislative activity.'"[69]

Instead, the SEC claimed it decided "not to press the issue"[70] because it would be very hard to win such cases without substantial, detailed knowledge of what legislators knew and without proof that information was used

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[62] *See* United States v. Cusimano, 123 F.3d 83, 89 (2d Cir. 1997).

[63] *See* Javers, *supra* note 7; Mullins & Scannell, *supra* note 7.

[64] Indictment, (Crim. No. 88-425) (D.N.J. Dec. 8, 1988).

[65] There are also laws sanctioning private actions against this behavior, so perhaps it is simply a matter of time before an enterprising group of investors files a class-action suit to recover the money lost when they bought on the same day that a legislator or hedge fund sold on the basis of confidential congressional knowledge. *See* Securities Exchange Act of 1934 § 20(A), 15 U.S.C. § 78t-1 (2000) (providing a private right of action for contemporaneous trading).

[66] *See* Joseph N. DiStefano, *Senators' Stock Picks Bring Profit, Scrutiny*, Philadelphia Inquirer, Nov. 7, 2004, at E1.

[67] *See id.*

[68] United States v. Brewster, 408 U.S. 501, 515–16 (1972).

[69] Gravel v. United States, 408 U.S. 606, 624 (1972) (quoting Tenney v. Brandhove, 341 U.S. 367, 376 (1951)) (emphasis added).

[70] *See* DiStefano, *supra* note 66.

for trading.[71] Certainly, this is one of many practical difficulties that could arise in congressional insider trading investigations. Another difficulty is that legislators might feel little incentive to cooperate with investigations because of loyalties to their staffers or to fellow legislators. Such stonewalling, however, could also be politically detrimental.

Another potential problem for investigators is that accused tippers may admit to leaking information but claim to have leaked for political, not trading purposes. These tippers could claim to have believed that they were talking to generic lobbyists, not lobbyists who represent hedge funds. Such claims would go directly to the question of scienter and whether the accused knew or should have known the purpose for which the information would be used. Of course, if a legislator knew of a lobbyist's hedge fund clientele, then the legislator's ignorance could be dismissed outright. But even if the legislator was ignorant of the lobbyist's affiliations, as reports of the political intelligence industry become more widely known,[72] it may become increasingly difficult for legislators to evade culpability by claiming not to know to whom they were talking when hedge fund lobbyists are clearly in their midst.[73]

Despite these barriers to enforcement, the SEC's excuse of practical difficulty is an odd one, considering that the SEC "routinely"[74] conquers similar obstacles via use of the subpoena power.[75] The SEC also rarely hesitates to push doctrinal limits[76] and to pursue misappropriation claims vigorously.[77] If insider trading laws, specifically the misappropriation theory, are so vital to protecting the integrity of securities markets,[78] then what could be a greater threat to the integrity of our markets than the proliferation of an entire industry in the United States Capitol based in part on actions that are illegal under insider trading laws? If insider trading is harmful, then it must be at least as harmful when people at the highest levels of government partake in it.

Seemingly, this behavior goes to the heart of the SEC's mission "to protect investors" and to "maintain fair, orderly, and efficient markets."[79]

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[71] *Id.*

[72] *See* Mullins & Scannell, *supra* note 7.

[73] *Id.*

[74] Securities Litigation Watch, *SEC Considered, Rejected Insider Trading Investigation of U.S. Senators*, Nov. 10, 2004, http://slw.riskmetrics.com/2004/11/.

[75] *See id.*

[76] Recall that it has never been judicially resolved whether Rules 10b5-1 or 10b5-2 fall within the SEC's legitimate statutory authority. *See* Kopel, *supra* note 26. In addition, that the SEC substantially reduced *O'Hagan*'s seemingly clear disclosure "safe harbor" in *SEC v. Rocklage*. *See* 470 F.3d 1, 9–10 (1st. Cir. 2006).

[77] *Illegal Insider Trading: How Widespread is the Problem and is there Adequate Criminal Enforcement?: Hearing Before the S. Comm. On the Judiciary*, 109th Cong. (2006) (statement of Linda Thomsen, Director of Enforcement, SEC).

[78] *See id.*

[79] The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation, http://www.sec.gov/about/whatwedo.shtml (last visited Aug. 20, 2007).

One can only imagine the deterrent value of a single investigation of one member of Congress or political intelligence operative, let alone a civil enforcement action or a criminal prosecution.[80] Such a scoop would provide these laws with visibility to rival any case, including the one against Martha Stewart (who, it is often forgotten, was never criminally convicted of insider trading).

It remains unclear why the SEC, which is otherwise so vigilant against insider trading, is so meek when insider trading occurs in Congress. Perhaps most tellingly, it has been noted that "the SEC may have little incentive to tangle with the Senate, given their relationship. Senators approve members of the SEC's governing body, as well as the agency's budget."[81] If this is the reason that the SEC will not enforce its perfectly capable laws, then what makes legislators so confident that new laws would solve the problem? Such new laws (e.g., the S.T.O.C.K. Act) might serve as a wake-up call to the SEC, as well as a confirmation of its authority to act against this behavior. Yet no matter how specific that authority is made, if the SEC refuses to act upon it, the question will remain how many a legislator, staffer, political intelligence operative, hedge fund, or otherwise lucky tippee will be enriched by the SEC's poverty of will?

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[80] This is already happening in Canada, where a finance department bureaucrat was recently indicted for trading in advance of public policy announcements. *See* Beppi Crosariol, *Political Insider Trading on the Radar*, GLOBE AND MAIL, Feb. 28, 2007, at B10.

[81] *See* DiStefano, *supra* note 66.