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# "Capitol" Gains: Insider Trading By Members of Congress

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“Capitol” Gains:  
Insider Trading By Members of Congress

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Law and Morality Spring 2012

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*A government of Laws, not of Men.*

*-John Adams<sup>1</sup>*

## I. Introduction

The implementation of the Security Exchange Acts of 1933 and 1934 as well as the subsequent addition of Security Exchange Commission Rules 10(b)5 and 10(b)5-1 concretized a legal prohibition on “insider trading”. Insider trading refers generally to buying or selling a security, in breach of a legal duty or other relationship of trust and confidence, while in possession of material, nonpublic information about the security<sup>2</sup>.

Simply, this means that if someone comes to possess information that would persuade a reasonable person to trade on a security and that information is not publicly available, they cannot trade on the information if they acquired it by virtue of their position. The salient harm these proscriptions seek to redress is the “fraud on the market” theory, or, the corruption of the integrity of a given market by deceptive practices. Withholding material information therefore, would influence a shareholder to act a certain way and therefore cause pecuniary injury. Aside from the economic consequences of such conduct, the moral reprehensibility of such a practice is self-evident: it is contrary to the objectively fair purposes of the market. Each participant should be subject to the same risk as every other participant.

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<sup>1</sup> Adams, John. *Thoughts on Government*. 1776.

<sup>2</sup> [Insider Trading](#) U.S. Securities and Exchange Commission, accessed February 21, 2012

Although this ban on insider trading was considered illegal, there was no direct, codified ban on the practice until 2000. In 2000, SEC Rule 10(b)5-1 was enacted which definitively prohibited the practice of insider trading. It reads:

The "manipulative and deceptive devices" prohibited by Section 10(b) of the Act and Rule 10b-5 thereunder include, among other things, the purchase or sale of a security of any issuer, on the basis of material nonpublic information about that security or issuer, in breach of a duty of trust or confidence that is owed directly, indirectly, or derivatively, to the issuer of that security or the shareholders of that issuer, or to any other person who is the source of the material nonpublic information.<sup>3</sup>

Strangely, however, the ban on insider trading has not been applied to members of Congress or their staffs. There is no rule explicitly prohibiting or allowing the practice, rather, the notion comes from the requirement that traders must be "in breach of a duty" in order to be subject to its provisions. While Congress is no doubt in possession of inside information as part of their position, to date no court or law expressly provides whether Congress therefore owes this duty. As a result, Congressmen have exploited this void and engaged in the practice without accountability.

This presents its own set of problems remarkably similar to those sought to be prevented by Rules 10(b)5 and 10(b)5-1. If a Congressman, by virtue of his position on a finance committee comes into contact with legislation he knows will affect a certain market, his trading upon that market before the information is publicly disclosed, provides him with a benefit denied to other stockholders. In

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<sup>3</sup> Securities Exchange Commission Rule 10b5-1

practice, this is not different than the company's CEO acting in-kind. Instead, the "duty" that is currently ambiguous with respect to congressmen exists as part and parcel of their duty as elected officials to act in the best interests of their country. The forthwith discussion will explore both the legal and moral deficiencies of the practice as well as the failure of subsequent attempts at remedy to adequately resolve the issue.

## II. Origins

### a. Security Exchange Acts

During the Great Depression, the Security Exchange Acts of 1933 and 1934 were enacted to provide greater regulation and oversight over the financial markets of the United States<sup>45</sup>. The primary purpose of this legislation was to compel corporations selling securities to register those securities and to disclose all material information necessary to make an informed decision on whether to purchase or sell said securities. The idea was to restore and maintain confidence and trust in the markets and to hold accountable those corporations that neglected their duties to their shareholders. In 1942, under the authority granted to them by the 1934 Security Exchange Act, the SEC implemented Rule 10b-5, which states:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

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<sup>4</sup> Securities and Exchange Act of 1933, 15 U.S.C. §77a

<sup>5</sup> Securities and Exchange Act of 1934, 15 U.S.C. §78c

- (a) To employ any device, scheme, or artifice to defraud,
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security<sup>6</sup>.

A facial reading of the law seems only to yield a mention of “fraud”<sup>7</sup> but as it and the markets evolved, it became better known for its role in prohibiting insider trading. Specifically, the language proscribing trading based on non-public information established the rule against the practice that is familiar today. The language has since been modified by the landmark decision in Chiarella v. United States<sup>8</sup> which narrowed the rule to forbid trading on non-public information *only* by those who owe a fiduciary duty to the shareholders of the company or the company itself. That case held that an employee for a printing company hired by the corporation seeking takeover bids did not owe a duty to the shareholders of that corporation even though the information he received was non-public<sup>9</sup>.

#### i. Classical Insider Trading

There are two categories of insider trading violations, each with its own roster of eligible offenders. The first of these classes involve what are referred to as

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<sup>6</sup> 17 C.F.R. § 240.10b-5

<sup>7</sup> *Ibid.*

<sup>8</sup> Chiarella v. United States, 445 U.S. 222 (1980)

<sup>9</sup> *Id.*



“classical” insiders<sup>10</sup>. “Classical” insiders are those whose duty to the corporation and its shareholders stems from their position within the corporation itself. In most cases, “classical” traders are directors, officers and controlling shareholders of a corporation that use their positions to acquire and subsequently trade on non-public information<sup>11</sup>. Rule 10b-5 and its subsequent interpretations have imposed a duty upon these insiders to “disclose or abstain.”<sup>12</sup> Simply, those insiders with access to material, non-public information must publicize that information or elect not to trade upon it.

Following Chiarella, the Court wasted no time in adapting 10b-5 to the fluidity of the market. In Dirks v. SEC<sup>13</sup>, the Court expanded the application of the “disclose or abstain” rule to encompass those who by virtue of even temporary positions became privy to non-public information. In Dirks, Dirks was an officer that provided investment analysis for a broker-dealer firm. He was approached by an insider from a mutual fund and life insurance conglomerate and notified that the corporation was overstating its assets<sup>14</sup>. Dirks was asked to investigate the alleged fraud and in so doing, interviewed several employees each of whom corroborated the insider’s original allegations. Dirks subsequently offered his findings to the Wall Street Journal, who, fearing retribution for libel, declined to publish the information. Throughout, Dirks was informing his own clients to

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<sup>10</sup> Klein, William, J. Mark Ramseyer, and Stephen Bainbridge. *Business Associations*. Chicago: Foundation Press, 2009.

<sup>11</sup> *Ibid.*

<sup>12</sup> Chiarella v. United States, 445 U.S. 222 (1980)

<sup>13</sup> Dirks v. Securities and Exchange Commission, 525 U.S. 1070

<sup>14</sup> *Id.*

reconsider their investments in the corporation. As a result, the corporation's share value began fluctuating erratically prompting investigation from the SEC. Ultimately, Dirks was found to have violated Rule 10b-5 by disclosing material, non-public information that he had acquired from his conversation from the corporation's insider<sup>15</sup>.

The case ascended to the Supreme Court, where Dirks was acquitted, but the boundaries for what was coined "constructive" and "tipper/tippee" liability were demarcated. According to Dirks, "constructive" insiders were those who, although not direct employees of a company, became privileged to non-public information through special access<sup>16</sup>. This could apply to employees of the accounting firm hired to manage the books of a corporation or of a law firm retained to handle a merger. Dirks held that these sorts of individuals are "insiders" based on their present duty to a corporation and the trust and confidence imbued in them by the corporation: "The classical theory applies not only to officers, directors, and other permanent insiders of a corporation, but also to attorneys, accountants, consultants, and others who temporarily become fiduciaries of a corporation."<sup>17</sup> Dirks stated that the company must actually expect confidentiality from the individual and a special relationship must in fact exist<sup>18</sup>.

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<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> Id.

Tipper-tippee liability is that which occurs from the leaking of non-public information from an insider to an outsider<sup>19</sup>. Dirks held that this relationship is reciprocal and symbiotic. To establish tipper-tippee liability, the tipper must breach his duty in disclosing the information and the tippee must have knowledge or constructive knowledge of both the duty and the breach. Additionally, the tippee must then transmit that information to traders or trade upon it himself and the tipper must receive some pecuniary benefit in the release of said information<sup>20</sup>.

## ii. Misappropriation Theory

The second propagated theory of insider trading is referred to as “misappropriation” theory. Misappropriation theory, concretized in United States v. O’Hagan and codified in Rule 10(b)(5)-2, extends liability to those who owe “fiduciary-like” duties to the source of the non-public information they possess. The Court held that criminal liability under § 10(b) of Securities Exchange Act may be predicated on this theory, which permits imposition of liability on person who trades in securities for personal profit using material, confidential information without disclosing such use to source of information, in breach of fiduciary duty to that source. O’Hagan involved an attorney whose firm was hired to assist with the tender offer and merger of a particular company. Although O’Hagan was not assigned to the team selected to handle the merger, he used his access to the firm-wide database to acquire information regarding the transaction. He subsequently

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<sup>19</sup> Klein, William, J. Mark Ramseyer, and Stephen Bainbridge. *Business Associations*. Chicago: Foundation Press, 2009.

<sup>20</sup> Dirks, 525 U.S. 1070

traded upon that information without disclosing his intent to the source and was convicted of insider trading<sup>21</sup>. Succinctly, O’Hagan:

Could be found guilty of securities fraud in violation of Rule 10b-5 under misappropriation theory; defendant had duty to his law firm, and to tender offeror as firm’s client, to disclose use of information in connection with his personal purchase and sale of target corporation’s stock, and *failure to make such disclosure was “deceptive device” used in connection with purchase of securities within meaning of § 10(b) of Securities Exchange Act. Securities Exchange Act of 1934*<sup>22</sup> (emphasis added)

Indeed, the precipitous issue regarding misappropriation theory is the “deceit” or “deceptive device” employed by which to take advantage of the information. The Court referred to this as “feigning fidelity” to the source of the information while dissembling the true purpose of profiting from the corporation’s trust: “[T]he deception essential to the misappropriation theory involves feigning fidelity to the source of information, if the fiduciary discloses to the source that he plans to trade on the nonpublic information, there is no “deceptive device” and thus no § 10(b) violation [exists].<sup>23</sup>” Again, the principles of honesty and trustworthiness pervade the purposes of securities regulation.

Characteristic of our laws, insider trading regulations have been trimmed and tailored to form nearly bright-line rules. The current state of the law then is characterized by a handful of salient principles: the existence of a direct or indirect duty between trader and corporation, the breach of that duty by trading upon or revealing of that information and the substance of that information being that which would induce a reasonable investor to trade.

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<sup>21</sup> United States v. O’Hagan 521 U.S. 642

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

One glaring void in these laws however, is the quaint exemption for members of Congress. Congressman and Senators are permitted to engage in insider trading without any legal repercussions. The exemption is subtle and no casual reading of the rule or the surrounding case law would lend themselves to reveal the exception. Simply, the loophole exists because the law does not attach a duty of confidentiality – per the rule – to congressmen, towards Congress<sup>24</sup>. A common demonstration of the loophole is as follows: Congressman B learns that Chairman of the Appropriations Committee has granted a multi-million dollar defense contract to Company X in a Defense Appropriations bill. This is non-public information *and* it will most assuredly drive Company X's stock up. Congressman B is free to trade on this information. This is not illegal by the current law<sup>25</sup>. The iniquity and injustice of this legal abyss as well as the corruption it has proliferated is undeniable. The proposed legislation – and its limitations - offered to correct this abomination will be discussed shortly.

### c. Necessarily an Evil?

Although it may appear a global truth that insider trading is an unnecessary evil properly proscribed by law, there are those that would dispute the vilification of the practice. Chief among these critics is Milton Friedman, celebrated Nobel laureate and professor of economics. Friedman, along with his peers, believed that

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<sup>24</sup> "Public Citizen on the STOCK Act." Public Citizen. <http://action.citizen.org/campaign> (accessed March 1, 2012).

<sup>25</sup> Slaughter, Louise. "STOCK Act." Rep. Louise M. Slaughter. <http://www.louise.house.gov/index.php> (accessed March 1, 2012).

insider trading laws should be repealed because it actually benefits investors by forcing more information into the market, sooner<sup>26</sup>. Friedman also was known to have stated: "You want more insider trading, not less. You want to give the people most likely to have knowledge about deficiencies of the company an incentive to make the public aware of that."<sup>27</sup> Because the act of buying and selling was information itself, Friedman did not feel it was necessary to disclose a trade upon inside information.

Other adherents to this idea have argued that insider trading is a victimless crime and thus should not be scrutinized to the degree that it is. Notably, when the longest prison sentence for insider trading was passed upon Raj Rajartnam last year, his lawyers argued "Insider trading does not cause the kinds of measurable losses to identifiable victims that conventional fraud causes [do]."<sup>28</sup> Following suit, John Carney, a Senior Economics Analyst for CNBC, proffers that because no victims can be identified there are no victims and because there are no victims, there is no crime<sup>29</sup>. More severely, advocates of the legalization philosophy believe that insider trading laws amount to unconstitutional censorship and are violative of first amendment free speech protections<sup>30</sup>. This argument rests on the

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<sup>26</sup> Larry Harris, *Trading & Exchanges*, Oxford Press, Oxford, 2003. Chapter 29 "Insider Trading" p. 591-597

<sup>27</sup> *Id.*

<sup>28</sup> Lattman, Peter. "In Galleon Case, Prison Term is Seen as Test." *New York Times*.

<http://dealbook.nytimes.com/2011/09/19/in-galleon-insider-case-prison-term-is-seen-as-test//index.php> (accessed March 1, 2012)

<sup>29</sup> Carney, John. "Raj's Sentence Is Too Long." *CNBC*. <http://www.cnbc.com/id/44894853> (accessed March 3, 2012).

<sup>30</sup> McGee, Robert and Walter Block. "Information, Privilege, Opportunity and Insider Trading." *Northern Illinois University Law Review* 10 (1989): 2-35.

perception that a law punishing an individual for communicating information – regardless of its content – is tantamount to government sanctioned silencing<sup>31</sup>.

Attempts at justification in this manner serve only to demonstrate the pedantic, detached and often argumentative nature of the academic community – “pretenders to profound knowledge, ignorant of the most useful of all sciences: the science of human nature.<sup>32</sup>” In what appears to be a position that is at best disingenuous and at worst dangerous, these “scholars” irresponsibly disregard the human element that is inexorably woven into our society, our laws and our behaviors. Indeed, it is the human element that academics tend to discard in fabricating their theories. Theories that, when removed from the vacuum from which they were created and implemented into the ever-vacillating and frequently unpredictable reality of society, find little traction.

The concept that insider trading creates no victims and should therefore be relieved of the legal prohibition it carries disregards several other laws that could also be considered “victimless” and yet remain illegal. In fact, many other crimes involving “possession”, of firearms, narcotics and other such contraband have no direct or identifiable victims but are ferociously – and successfully – prosecuted when it is proven that such possession risks a subsequent unlawful purpose. The law is feckless if it waits for victims to appear before taking action. While possessing drugs, weapons or other dangerous substances is not inherently dangerous, the law responsibly removes the threat proactively. Similarly, insider

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<sup>31</sup> *Id.*

<sup>32</sup> McCullough, *John Adams* at 436

trading is a *per se* deceitful behavior - it involves the intentional concealment of beneficial or deleterious information from the public to benefit an individual or group of individuals. Like the gun toting gang-member or the dope-slinging degenerate, the dishonest businessman's penchant for unscrupulous behavior portends the probability that other such frauds may occur. In reality, the insider trading laws are more lenient than the aforesaid possession statutes - *possession* of inside information is not illegal, only the transaction of it.

Friedman's assessment of insider trading relies on the assumption that those in possession of potentially damaging information will be willing to disseminate that information. In so doing, Friedman ignores "the science of human nature" and a fundamental human flaw: greed. Triumph in business feeds on the concept of individual gain; it has forged the mightiest global conglomerates and produced some of the wealthiest people in the world. The legendary philosopher Ayn Rand quite clearly recognized this necessity: "Man -every man- is an end in itself, not the means to the ends of others. Must exist by itself and for itself, without sacrifice for others nor sacrificing others to himself. The pursuit of self-interest, rational self and his own happiness is the highest moral purpose of his life."<sup>33</sup> Following suit, an individual in possession of information that could benefit him greatly if concealed or himself and others if revealed, will naturally gravitate toward the former. Evidence of this preference is readily observable in capitalist society.

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<sup>33</sup> Rand, Ayn. *Virtue of Selfishness*. 1964.



Power differentials, wealth inequality and *laissez-faire* policy are the pillars upon which the financial viability of a capitalist nation rests. To then claim that in spite of these principles, a man will still choose equality over enrichment is fallacious; one need look no further than our legislature to be certain. Reduced to its most fundamental function, the Congress of the United States exists only to serve and to protect the citizens of the United States. It would appear then, that if Friedman's theory were correct, an institution created to benefit other people would be the first to embrace the notion of promoting equality over self-interest, yet, as discussed, this is not the case<sup>34</sup>.

### III. Exposure

What remains, following the increasing divergence from true, American, republican values, is a condition where elected representatives serve to profit themselves and not their constituents. Insider trading – that is breaking the law – by our own government, undermines public confidence in that government and poses a grave threat to the public as a result. News broadcast “60 Minutes” brought the issue of Congressional insider trading to sudden and tumultuous disclosure in November 2011 and in so doing, revealed the reprehensible and self-serving conduct of our representatives<sup>35</sup>. The program sought to dispense of the secrecy surrounding this behavior by interviewing and questioning several prominent

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<sup>34</sup> Kroft, Steve. "Congress: Trading Stock on Inside Information?." CBS News. [http://www.cbsnews.com/8301-18560\\_162-57323527/congress-exempt-from-insider-trading-laws/](http://www.cbsnews.com/8301-18560_162-57323527/congress-exempt-from-insider-trading-laws/) (accessed March 4, 2012).

<sup>35</sup> *Id.*

members of the House of Representatives including former Speaker Nancy Pelosi and current Speaker John Boehner<sup>36</sup>. Their attempts were largely in vain and when finally cornered at their weekly press conference, both Speakers provided defensive, evasive and aggressive responses to questions pertaining to their conduct<sup>37</sup>.

Speaker Boehner was asked generally if he felt it was appropriate that members of congress be allowed to trade on non-public information to which he answered that there “were many rules governing the ethics of house members and that [he] believed members obeyed them<sup>38</sup>”. Speaker Pelosi was questioned directly on her trade of Initial Public Offering stock from VISA during a time when new credit card regulations were pending in the House of Representatives. Asked if she felt if there was a conflict with that purchase, she replied that she “didn’t see a point to what [60 Minutes Reporter Steve Kroft] was saying” and asked him “what [his] point was.<sup>39</sup>” That our elected leadership does not recognize that their behavior is unethical is far more dangerous than the conscious schemers that simply disregard the fact. Mere weeks following this report, President Obama declared in his State of the Union “present me with a bill banning insider trading

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<sup>36</sup> Id.

<sup>37</sup> Id.

<sup>38</sup> Id.

<sup>39</sup> Id.

for congressmen and I will sign it.<sup>40</sup>” The point having been made, it seems congress was finally cornered.

#### a. The STOCK Act

The “Stop Trading on Congressional Knowledge” Act, or STOCK Act, was originally introduced in the House of Representatives on Mar. 28, 2006 by Brian Baird (D-WA) and Louise Slaughter (D-NY) where it died in committee. It was reintroduced the following year, as well as in 2009, where it also died in committee<sup>41</sup>. In December 2011, following the 60 Minutes piece, the Act was revived only to be quashed by congressional bureaucracy: “House Majority Leader Eric Cantor (R-VA) indefinitely postponed the ... session on Dec. 7, 2011, stating that ‘a large group of bipartisan members of the committee felt the legislation was flawed and being recklessly moved solely in response to media pressure. Members of both sides of the aisle wanted more time to gather information and develop appropriate alternatives.<sup>42</sup>” Only after the President’s speech in January 2012 did Congress get around to passing a preliminary version of the bill, somehow acquiring 96 votes in the Senate and an overwhelming 417 votes in the House<sup>43</sup>.

While it appears that issue has finally been resolved, a closer look at the STOCK Act reveals just how little corrective good it does and how little would

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<sup>40</sup> "Remarks by the President in the State of the Union Address." White House. <http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address> (accessed March 7, 2012).

<sup>41</sup> "What is the Stop Trading on Congressional Knowledge (STOCK) Act?." ProCon. <http://insidertrading.procon.org/view.resource.php?resourceID=004520> (accessed March 7, 2012).

<sup>42</sup> Id.

<sup>43</sup> "STOCK Act Votes." Politico. <http://www.politico.com/news/stories/0212/72670.html> (accessed March 7, 2012).

actually be changed. Respected Professor and author Stephen Bainbridge expounds on the limitations and recognizes the futility of this law as a mechanism for reform<sup>44</sup>. The misleading clause within the Act states that it prevents:

[A]ny person from buying or selling the securities or security-based swaps of any issuer while such person is in possession of material nonpublic information relating to any pending or prospective legislative action relating to such issuer, if--

(A) such information was obtained by reason of such person being a Member or employee of Congress; or

(B) such information was obtained from a Member or employee of Congress, and such person knows that the information was so obtained.<sup>45</sup>

This means that any member or employee of Congress cannot trade on material, non-public information if it is related to “pending or prospective legislative action” and tippees are banned from trading on the information if they know the source is a member or employee of Congress.

Professor Bainbridge notes the ambiguity of “pending or prospective legislative action” as well as its narrow constraints<sup>46</sup>. Bainbridge describes numerous hypothetical situations that would be simple to devise to effectively circumvent the law:

- After Congress defeats proposed legislation that would have sharply increased Acme’s costs of doing business, Acme’s CEO gives a key Congressman a hot tip on Acme stock as a pay off. There was a legislative action, but it was in the past and, accordingly, is neither pending nor prospective.

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<sup>44</sup> Bainbridge, Stephen. "I Have Seen the STOCK Act and I Am Unimpressed." Stephen Bainbridge. <http://www.professorbainbridge.com/professorbainbridgecom/2011/11/i-have-seen-the-stock-act-and-i-am-unimpressed.html> (accessed March 10, 2012).

<sup>45</sup> Id.

<sup>46</sup> Id.

- A Member of Congress learned from a Cabinet member that a government agency was about to enter a large procurement contract. There is no “pending or prospective” legislative action, but there is valuable material nonpublic information on which the member could trade.
- The CEO of Acme is an avid hunter. Congress is considering legislative action that would ban hunting of the CEO’s favorite game animal. The CEO of Acme gives a key Congressman a hot tip on Acme stock as a bribe to oppose the hunting law. This is perhaps the most egregious form of Congressional insider trading, yet there is no “pending or prospective legislative action relating to such issuer.” To the contrary, the legislative action in question is entirely unrelated to the issuer.
- During a confidential committee investigation, a Member of Congress learns that Acme is about to announce a major new discovery. The member infers that Ajax—Acme’s major competitor—will take a serious hit. The member shorts Ajax stock. Technically, the member has not traded in the stock of “such issuer.”<sup>47</sup>

None of these situations present any difficulty or substantial obstacle to impede members of Congress from carrying on “business as usual”. Another deceptive component of the Act is the reporting requirement.

Within 90 days after the purchase, sale, or exchange of any stocks, bonds, commodities futures, or other forms of securities that are otherwise required to be reported under this Act and the transaction of which involves at least \$1,000 by any Member of Congress or officer or employee of the legislative branch required to so file, that Member, officer, or employee shall file a report of that transaction with the Clerk of the House of Representatives in the case of a Representative in Congress, a Delegate to Congress, or the Resident Commissioner from Puerto Rico, or with the Secretary of the Senate in the case of a Senator.<sup>48</sup>

Essentially, Congressmen and Senators have 90 days to report their dealings if those dealings were worth \$1,000 or more. However, Section 16 of the Securities

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<sup>47</sup> Id.  
<sup>48</sup> Id.

and Exchange Act requires corporate insiders to report within only 2 days<sup>49</sup>.

Congressman Sean Duffy (R-Wisc) even condemns the “loop hole” stating: “For example, under the STOCK Act, a Member of Congress could trade \$50,000 in one day in 50 trades at \$950 a trade and never trigger the reporting requirement.”<sup>50</sup>

Subtly and again, Congress attempts to elevate themselves above the standards set for average citizens, while their conduct lands them decidedly beneath them.

Summarily, the STOCK Act is an insultingly clumsy attempt at remediation for a practice so markedly distasteful.

#### b. Exceptionalism

Despite the uncounted legal potholes the STOCK Act leaves untended, it is still necessary to demonstrate why the passage of this law continues a tradition of congressional exceptionalism. The simplest way to discuss this would be to compare the STOCK Act to those laws preventing insider trading to the rest of the population. That law, SEC Rule 10(b)5-1 states:

The “manipulative and deceptive devices” prohibited by Section 10(b) of the Act and Rule 10b-5 thereunder include, among other things, the purchase or sale of a security of any issuer, on the basis of material nonpublic information about that security or issuer, in breach of a duty of trust or confidence that is owed directly, indirectly, or derivatively, to the issuer of that security or the shareholders of that issuer, or to any other person who is the source of the material nonpublic information.<sup>51</sup>

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<sup>49</sup> 15 U.S.C. §78c, Section 16

<sup>50</sup> Duffy, Sean. “Congress Should Serve the People, Not Their Portfolios.” Sean Duffy. <http://duffy.house.gov/columns/duffy-op-ed-restrict-act> (accessed March 10, 2012).

<sup>51</sup> Securities Exchange Commission Rule 10b5-1

This law unambiguously prohibits the practice of insider trading to anyone with a duty to the shareholders of that corporation. 10(b)5-1 does in one paragraph what the STOCK Act cannot in several. Rather than merely appending the existing rule to include a specific ban on congressmen and their staffs, the STOCK Act was, through painful specificity, sure to avoid the issue entirely. However there have been alternatives proposed and while they are not likely to ever be passed, they are worth extrapolation.

c. A Stronger Alternative: the RESTRICT Act

Congressman Sean Duffy (R-Wisc) introduced the Restoring Ethical Standards, Transparency and Responsibility in Congressional Trading Act, or, RESTRICT Act<sup>52</sup>. The RESTRICT Act, according to Congressman Duffy, removes any doubt over the obligations members of Congress have regarding material, non-public information. Among the provisions of the RESTRICT Act is the directive that all members of Congress and their senior staff be required to either 1) move all of their assets into a blind trust, or 2) disclose any transaction within 3 days.<sup>53</sup> Although the RESTRICT Act would effectively eliminate insider trading by members of Congress, it has received little notoriety or attention from Congressman Duffy's colleagues.

c. The Empire Strikes Back<sup>545556</sup>.

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<sup>52</sup> Id.

<sup>53</sup> Id.

<sup>54</sup> The single most destructive issue surrounding this legislative miscarriage is the inability – and disincentive – for law enforcement and its affiliates to prosecute Congressmen and Senators for such behavior even if it were unambiguously illegal. The SEC is funded by Congress. While, it may not seem

#### IV. Conclusion

The dangers of allowing the practice of insider trading by members of Congress to continue are perilous. The practice undermines the integrity of the market and worse, the confidence the people of the United States have in their government. If left untended, it would lead to the irrevocable estrangement of the government to their people and the system would be broken. The STOCK Act will fail to redress this harm as the law, as written, does nothing to alter the course, but provides an ineffective detour on the road to continuing the practice.

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plausible that Congress would retaliate against its own agencies for doing their job, it has. In 2006, the William Jefferson, when he was Representative William Jefferson of the 2nd District of Louisiana was indicted on Federal bribery charges after \$90,000 in cash was found in his freezer.<sup>56</sup> The FBI executed a properly constituted search warrant on Jefferson's congressional office in the hunt for additional incriminating evidence. In response, the House of Representatives exploded, claiming it was an unconstitutional violation of the "speech and debate" clause<sup>55</sup> and threatened to cut the budget of the Department of Justice<sup>56</sup>. The Congress of the United States threatened financial retribution against an agency designed to protect the American citizenry from of all kinds and of the direst importance.

<sup>55</sup> The Speech and Debate Clause refers to Article 1, Section 6, Clause 1 of the Federal Constitution which states that members of both houses "shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their Respective Houses, and in going to and from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."

<sup>56</sup> "Threats Followed FBI Search of Congressman's Office." Associated Press.

<http://www.foxnews.com/story/0,2933,197293,00.html> (accessed February 12, 2012).



## V. Moral Underpinnings

### a. Moral Theory of John Finnis

While a moral indictment of the conduct at issue has been made, it is important to discuss the alignment of that indictment with certain moral principles; specifically, a discussion of the moral philosophy of Natural Law theorist John Finnis. In his “Natural Law & Natural Rights” Finnis enumerates seven basic goods – or as Finnis himself describes as “irreducibly” fundamental aspects of human well-being<sup>57</sup>. Finnis lists life, knowledge, play, aesthetic experience, friendship, practical reasonableness and religion as the primal “goods” one should seek to participate in and embrace throughout one’s life. In the pursuit of these goods, Finnis expounds on the notion of “practical reasonableness”, or, the effective and proper manner by which these basic goods be enjoyed.

Life, Finnis says, refers to a vast array of components that comprise its common understanding. Bodily health, freedom from pain and disease and the preservation of one’s own life as well as that of others. Finnis cites several institutions, networks and systems that exist solely to enrich and preserve this basic value. Additionally, Finnis partially incorporates the process of procreation and child rearing as part and parcel of this basic good. Knowledge, the pursuit of which for its own sake, is another fundamental good that one should seek to acquire. Knowledge, not merely as a vehicle to pursue other goods, but to fulfill the basic inclination to desire and embrace the truth. According to Finnis, the

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<sup>57</sup> Finnis, John. *Natural Law & Natural Rights*. New York: 1980.

natural proclivity of humans to exhibit curiosity is demonstrative of their desire to understand the objective truth of a situation and to avoid ignorance and unknowing. Finnis describes “play” as engaging in an activity for no purpose other than to engage in the activity. This absence of any ulterior or serious motivation is evidence that “play” exists, if only in the negative. Its value unto itself, Finnis says, is proven by the various global institutions that exist only to promote participation in this basic good. Finnis next discusses the concept of “aesthetic experience”, or simply, “beauty”. While beauty is often a part of play, Finnis distinguishes the two by noting participation in “beauty” requires no action on the part of the participant, rather merely an inward appreciation of that which is outside of the individual. Finnis also includes the notion that beauty can – to a greater extent – be participated in by creating some significant work of one’s design that can be appreciated.<sup>58</sup>

The fifth basic good Finnis describes as sociability or friendship. This good can be embraced along a spectrum of intensity, ranging from mere harmony with other persons to an intimate and full friendship. Friendship, Finnis points out, is a relationship between individuals wherein one party acts out of the interest of the other and to the betterment of the other’s well-being. However, this is only one relationship possible in exploring the good of sociability as a whole<sup>59</sup>. The next good, which shares its name with the desirable method of achieving the other goods: “practical reasonableness”, as Finnis puts it, is the process of obtaining the

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<sup>58</sup> Id. at 87

<sup>59</sup> Id. at 88

other goods by effective, efficient, and productive ways, which he explains in detail and will be discussed shortly. The seventh and last fundamental good Finnis offers is religion. Religion is not, Finnis makes clear, an acceptance or belief in the Divine but rather a thoughtful and thorough contemplation of the origin of human reason, life, and the cosmos. Doing so, Finnis suggests, allows one to better understand his own role among fellow humans and his own purpose.<sup>60</sup>

### c. Requirements of Practical Reasonableness

The pursuit of these goods requires an assessment process Finnis coins as “practical reasonableness.” Practical reasonableness provides a checklist, as it were, to consult when attempting to participate in each of the enumerated goods. Finnis provides eight criteria worthy of consideration that if followed, allows not only for the participation of the fundamental goods, but under circumstances beneficial for the interested parties.

Finnis begins by asserting that man’s energies should be devoted to a singular “rational life plan”<sup>61</sup>. This, according to Finnis, is more than merely blueprints, but a concordant, harmonious relationship among every decision an individual makes, in pursuit of an ultimate objective or achievement. That is to say, if one wishes to achieve a maximal level of physical fitness, one would not engage in activities contra to that goal; smoking, drinking, drug abuse, etc. Each rung of the ladder must be ascending, or at least moving laterally. Finnis expands

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<sup>60</sup> Id. at 89

<sup>61</sup> Id. at 103

this notion in declaiming that one should view his or her life from the perspective of that life's terminus. Every decision must be a rational part of a larger, life-long continuum that should be assessed as if one were living their final days.

Finnis next contends that no value should be arbitrarily preferred over another<sup>62</sup>. He stresses that preference is permissible and indeed favorable, but that it must have considered "one's capacities, circumstances...and one's tastes." Simply, Finnis believes one must have some "good reason" to subordinate one value to another. One cannot, Finnis warns, prefer one good over another because one devalues another good or overvalues an "instrumental" good, such as wealth or opportunity. One can reasonably choose to not pursue knowledge, but one cannot reasonably deny the importance of knowledge nor the desirability of avoiding ignorance. Following suit, Finnis then applies the same principles to the preference of persons. Finnis states that one cannot arbitrarily select to protect the interests of one person over another, but must have some rational reason in so doing. This is not a difficult standard to satisfy; it is reasonable to choose one's child over an unfamiliar child, one's friend over one's enemy and one's family over another's. Finnis also allows what he calls a "reasonable scope for self-preference", or the permissibility in certain situations to select one's own interests over other's.

Detachment and commitment<sup>63</sup>, Finnis declares, are also necessary to appropriately assess the pursuit of fundamental goods. Finnis remarks that one

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<sup>62</sup> Id. at 105

<sup>63</sup> Id. at 109

should not be so invested into any project that the failure of which would result in devastation to one's overall life plan. In this, Finnis argues that one must be sufficiently detached from a situation or task as to allow that person to handle disappointment reasonably and to move on from the letdown. Conversely but concordantly, Finnis stresses the need for commitment. Commitment, according to Finnis, is the necessary effort required to appropriately engage a task and that if one decides to apply himself, he must not surrender the project lightly. After all, Finnis reminds, the pursuit of any of the basic goods requires some commitment; to too easily give up would be tantamount to absence from any of the fundamental goods.

The sixth requirement Finnis describes as "efficiency within reason"<sup>64</sup>. This requires that the pursuit of any good must be done in a manner properly suited for the situation. One must not "waste one's opportunities by using inefficient methods. One's actions should be judged by their effectiveness...their fitness of purpose...utility [and] consequences." Simply put, this requirement asks that one should attempt to achieve the most good with the least amount of effort. Given the option of relieving pain or relieving pain and healing Finnis postulates, the latter is clearly preferable. This requirement demands more than mere "calculus" as Finnis calls it, or simple "cost-benefit" analyses. This is largely due to the incongruence between (and adherence to) a system of weighing goods and weighing moral

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<sup>64</sup> *Id.* at 111

decisions. This manifestation of consequentialism is arbitrary and unacceptable according to Finnis.

Next, Finnis stresses the need for respecting every basic value in every act<sup>65</sup>. This requirement can be satisfied by acting in a manner that serves no purpose other than to damage the pursuit of a basic value. The only way that such action can be justifiable is if there is some consequence, the good of which outweighs the damage inflicted. This is obtainable, Finnis says, simply by being deliberative in one's actions. One that acts deliberately acts only to protect or preserve some basic good, even if that good is selfish or facially malicious. Finnis' final two requirements to ensure practical pursuit of the basic goods are those which consider the common good, and those which reflect the inclinations of one's conscience. Simply, maintaining harmony with one's conscience requires only that if one "feels" some task or action is wrong, one should not continue. Considering such feelings are the result of time and experience, it is not unreasonable to recognize dissonance as a warning to desist.

#### b. Synergy

Having briefly introduced the moral standard by which the aforementioned issue will be measured, it is appropriate therefore to observe how the action of insider trading by members of congress aligns with or violates the applicable theory. Concurrently, the discussion will analyze the STOCK Act through the same sieve and determine the effectiveness of that law. From the outset, the conduct –

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<sup>65</sup> *Id.* at 118

and the attempt at remedy - is condemnable under any theory of morality, yet this analysis will strive to demonstrate its degeneracy specifically through the lens of Finnis.

#### i. Knowledge

The basic good most heavily impacted by the controversial law is unquestionably “knowledge”. While the law deals facially with information, knowledge and the use of that knowledge, the analysis requires a far more involved inquiry. The good of knowledge in the Finnisian sense is the pursuit of knowledge simply for the sake of having it and to promote the avoidance of ignorance. To examine how “knowledge” is implicated by this law, “knowledge” must be bifurcated. The first part concerns the actual information that is stigmatized by the statute. As mentioned, “insider” information is that which comes from the source of the information but is not disseminated publicly. The law allows for certain individuals to possess and take advantage of this information while withholding from others the same privilege. The “information” itself would be used to make lucrative investments and thus enhance one’s well-being.

However, a more profound understanding of “knowledge” exposes a grimmer and indeed more crucial revelation: the average citizen is not aware that their representatives are engaging in this activity. Having knowledge of this controversial practice would alter the perspective of many Americans in their perception of their government. “Knowledge for knowledge’s sake”, as Finnis says,

would require that the citizenry be aware of the actions of their government, especially when the concealment of those actions impairs a citizen's right to make accurate and informed decisions about their governance. The current status of the law – along with the impotent attempt to cure it via the STOCK Act – do little in the way of properly informing the citizen and allowing them to make well-founded and rational decisions.

The STOCK Act proves even more injurious to this fundamental good than even the practice of insider trading itself. The act, as discussed earlier, does not ban the practice, rather it serves only to confound the average citizen into believing that it does. The language of the act requires such precise parsing to understand its deceptive nature that it further prevents the average citizen from understanding the actions of his representatives. This again is a two-fold attack on this basic value.

The first attack is the unabashed attempt of congress to write a law so obtuse and confusing in language, that the average citizen is incapacitated to become as well-informed as he has a right to be. Second, is the use of the law to continue a practice that unquestionably clouds the conduct of congressmen and creates a fog between the representative and his constituent that cannot be penetrated. As mentioned above, the codification of this Act creates a tangible bar on actions brought in protest. With the support of legislative act, congress can sit comfortably behind the act and claim that it was the result of duly debated and properly constituted republican procedure. This indisputably restricts the ability of



citizens to make informed decisions about their representatives and constrains their right to a transparent and honest government.

An analysis of life, play, aesthetic experience, and religion would be too attenuated to be significant for this discussion.

## ii. Friendship

Finnis' definition of "friendship" is a relationship where one individual puts the interests of his friend above his own. Under such a definition, the STOCK Act and insider trading cannot be sustained. The analysis of this basic good should be understood from the perspective of the definition and not the word itself. When taken in the context of a relationship by which one party seeks to enrich the other, even at the expense of itself, the intended function of Congress is revealed. The only role of a republican government is to provide the means by which those they represent can best pursue a fulfilling life. Plainly, the acceptance of an elected post carries with it as much power as it does responsibility. By choosing to represent other people, one's own interest must be forfeited or at the least, subordinated to those he now represents.

Therefore, the behavior of Congress in the instant appraisal unabashedly attacks this fundamental value. By taking advantage of their position to enrich themselves – and at the expense of the market and ordinary investors – they act in diametric opposition to the tenets of friendship. Further, the passage of the STOCK Act further emphasizes Congress' disregard for the will of their

constituents. If it were Congress' intent to produce an outright ban on insider trading by themselves and their staffs, the language of the law would not be too different from 10(b)5-1. Indeed, if their aim was to revive confidence in the integrity of the institution, the law would be still more plain spoken.

Satisfying Finnis' idea of friendship would require Congress only to do what they were intended: to abase themselves at the will of the people they claim to represent and to act only to benefit those individuals who trust in them to speak for them. If Congress feels this burden is too great, they ought resign the office and allow those willing to take their place.

### iii. Requirements of Practical Reasonableness: Coherent Life Plan

An attempt to justify these shortcomings by declaring them the result of a practically reasonable rationing process will find little refuge. Finnis demands that all goods be pursued as part of a "coherent life plan". This can apply to individuals and institutions alike. An institution founded on the republican ideals of transparency and fervent representation would not practice conduct that is inherently furtive. It undermines the principles upon which the institution was founded and more dangerously jeopardizes the authority that institution can claim to possess. It follows that a system that as a matter of survival requires honest communication between its members and its constituents would be incentivized to sustain that level of veracity if only to maintain their own positions. It is in this manner that the practice in dispute is wholly contrary to any rational life plan.

The STOCK Act does little to remedy this. As discussed earlier, that act exists only to obfuscate the practice and not to abolish it. In the pursuit of a sustainable, transparent government, lawmakers cannot rationalize such an insultingly lame attempt at a cure. The survival of a government depends on trust. Citizens trust their representatives to create laws that not only benefit them, but are also reasonably easy to understand. The STOCK Act violates this tenant twice.

At first glance, it buries the continuation of the practice underneath a torrent of legal terminology and exceptions, which, to the average citizen, may appear to restrict the action but conceals its more nefarious goal. Its second injury to basic republicanism is outright lie told to citizens. This act was advertised as the death knell to the practice of insider trading by congressmen and their staffs. In practice, it achieves the opposite. The proposal and approval of the STOCK Act is arguably worse than it never having existed; it tells the citizen a story and prevents that citizen from checking for himself by creating a labyrinth of legalese penetrated only by those with legal training.

#### iv. No Arbitrary Preferences

Finnis requires that no decision be made with an arbitrary preference for values or persons. This means that a preferential choice be made only when supported by some reasonable foundation. In fact, Finnis notes that a decision is also considered “arbitrary” if the pursuit of a given good is achieved by devaluing another fundamental good. In that context, the decision to both engage in an

activity prohibited to the citizenry-at-large and to intentionally avoid holding oneself accountable is arbitrary and iniquitous. While one can only speculate as to Congress' rationale in behaving as they do, that speculation is strongly supported by contextual evidence lending itself to demonstrate Congress' overwhelming preference for themselves. While Finnis allows a "reasonable scope of self-preference", no such defense can be properly asserted. Congress exists only to serve the people who placed them in office. This narrows a congressman's scope for self-preference so greatly as to extinguish it entirely. Every action taken by a "representative", at least while in that capacity, must be favorable only to those he represents – even at his own expense.

The STOCK Act is extremely arbitrary. It favors Congress for no other reason that they are Congress. Only congress can pass the laws. Therefore, congress has the power to pass laws that benefit themselves. This is an example of just that. The passage of the STOCK Act codifies that means by which congressmen can continue to insider trade while pretending that it serves to abolish the practice altogether. The whole process is saturated with inequitable self-preference. This law considers the interests of none but the congress themselves and compounds the insult by pawning it off as the death knell of the practice. This analysis would be of greater depth if there was but the slightest ambiguity in the design and aim of the law. However, this law can be understood only as the product of a self-interested, self-absorbed body that abuses its popular authority to serve itself.

## v. Detachment and Commitment

Finnis requires also that decisions be made with appropriate degrees of detachment and commitment. In trading on inside information *and* using their power to preserve such a practice, congress acts in opposition to these requirements of practical reasonableness. Detachment, insofar as governing is concerned, requires that a representative act in the objectively best interests of his constituents. Further, his decisions must also be tempered with his own conscience. When coupled, these influences allows a representative to be the voice of his electorate. Even if his attempts fail before his peers in congress, he is not personally devastated nor does he feel his purpose has been stricken because he has vocalized his constituents' concerns and they were outnumbered by the concerns of other representatives. Moreover, this "ideal" representative would have satisfactorily "committed" himself in the effort by voicing his district or state's concerns as far as his role allowed him and would not have abandoned his task lightly.

The current state of politicking survives no such analysis. Presently, members of congress are wholly invested in their positions because their positions are a source of obscene wealth. They become servants to the prospect of fortune and use their power to benefit themselves without regard for their constituents. Because they rarely – if ever – act solely for the interests of their citizens, without the ability to enrich themselves, their position becomes empty and their incentive to perform, neutered. With respect to detachment, the modern politician falls

painfully short of satisfaction. The position which they have the privilege of holding is by its nature detached from all personal endeavors; their purpose in office is to speak for their people and not for themselves. Failure must also be allocated concerning "commitment". While congress no doubt pursues these efforts with aplomb, the pursuits themselves are perfidious. Ipso facto, the pursuit of an action that violates the purpose of the actor cannot serve to satisfy this requirement for practical reasonableness. The energy devoted to self-preservation and enrichment should be directed towards serving the public and not themselves.

On that same note, the energy spent in developing a deceitful and duplicitous law such as the STOCK Act represents a greedy attachment to power and an obsessive desire to augment it. The representative should be without interests outside of those of his constituents. His is merely a conduit that channels the needs of his citizens and champions their interests for the sake of their interests only. This act however, demonstrates the effect of representatives who serve themselves, for the sake of themselves, and have long since forgotten his purpose as a representative. Rather than proposing laws in the name of the people, laws like this represent a generation of lawmakers that propose laws that benefit their constituents incidentally, while the whole of their concern is concentrated on lengthening their tenure in congress while eliciting some other benefit: i.e., individual accession to wealth.

This is proven by the very language of the STOCK Act. It is so confusing that it forces the individual to rely on the goodwill of his representative. This

invests so much power in the representative that he becomes frighteningly attached to the position. Evidence of this is the failure of congress to pass any bill that so much as mentions “term limits”. This ravenous attachment to position and power undeniably fails Finnis’ fifth criterion.

#### vi. Efficiency

The last remark overlaps with the sixth requirement of practical reasonableness demanding the efficient appropriation of effort in the pursuit of goods. While this requirement cannot truly be employed in the instant case, it is important to note that the effective utilization of skill and energy is recognized by Finnis as necessary to bring about the fundamental goods. The sixth requirement assumes that a basic value is being pursued, but the manner which it is procured is questionable. Concerning the issue in controversy, no good is being pursued. In fact, the inefficient legislative process is being employed to facilitate the passage of legislation that *damages* the values of many others.

Concordantly, the STOCK Act only serves to cloud the law on insider trading. It creates an ocean of ambiguities that one way or another will have to be sorted out by the courts. This creates a monumental systemic inefficiency. If congress’ intent was to procure an outright ban on insider trading, the language of the bill would have reflected that.

## vii. No Direct Attack on Other Goods

Recognizing this possibility, Finnis also prohibits any action that serves only to damage the realization of a value or good by others. This seventh requirement allows for the indirect and incidental damage of goods if the expectation and purpose of the action was to promote the realization of another value or good. This is quite different than “weighing” the pros and cons of an action which Finnis dismisses as nonsensical and impracticable. Fortunately (or unfortunately), the analysis of this requirement of practical reasonableness is unequivocal. Congress has made it so by engaging in an action that directly impairs the realization of several goods while failing to even offer a good that might be promoted. As mentioned earlier, the engaging in of insider trading and the subsequent failure to make an honest attempt to denounce and eliminate the practice inhibits the citizen’s ability to trust and support their government, to enjoy unadulterated honesty from their representatives and serves to undermine the very authority that government claims to possess.

The STOCK Act is a direct attack on all of the preceding and pertinent goods as it serves to exacerbate the problem rather than provide a remedy. For all of the above reasons, it clouds the language of the law and the restrictions, it thickens the barrier between constituent and representative and creates an overall inhibition on the abilities of citizens to pursue goods and values to their rightfully maximum potential.



### viii. Good of the Community

Finnis' eighth requirement is that the common good of one's community be better served. In a perverse way, congress is actually acting to benefit the community of congressmen. In turn, however, the larger community, i.e., the population of the United States is injured. Therefore, these actions cannot plausibly be seen to serve the common good. The ninth and final requirement of practical reasonableness asks that an actor act in congruence with his conscience. Invoking the Thomist perspective, Finnis states simply that if an act "does not feel right", then the act should be abandoned. Indeed, if one chooses to do what one feels is unreasonable, than the act is *per se* unreasonable. Similarly, no objective reasoning could justify a group of individuals trusted with the welfare of a larger group of people using their positions to benefit themselves without consideration for that larger group.

### ix. Promotion of Justice

Finnis recognizes the importance of justice as a prevailing and pervasive component that must be considered in the analysis of a given action. Given the breadth of term like "justice", Finnis splits his analysis into two manifestations: distributive and commutative<sup>66</sup>.

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<sup>66</sup> Id. at 164

### a. Distributive Justice

Distributive justice, according to Finnis, is the notion that resources common to a community are allocated in a manner befitting the most productive use of the resources<sup>67</sup>. As it pertains to the instant assessment, this would implicate the distribution of wealth from rich to poor so that the poor could at least provide for the basic values in their own lives. This, Finnis asserts, is the most productive use of surplus wealth rather than lying stagnant in the vaults of the rich. Six criteria exist to measure an action against in determining its satisfaction of distributive justice.

Primacy is given to “need”. Need, per Finnis, is a fundamental component of the common good<sup>68</sup>. Axiomatically, resources ought to be distributed with due consideration given to those who would benefit most from its physical receipt. While this can be corrupted, by those who become needy by their own devices or by those simply unwilling to exert in their own benefit, this criterion remains dominant.

Akin to “need” is the element of “function”. Function, according to Finnis, is the “need” of certain roles within a community – whereas “need” considers who by necessity is want of a resource, “function” considers who within the community could best use the resource<sup>69</sup>. Capacity, Finnis says, is that which considers the

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<sup>67</sup> Id. at 166

<sup>68</sup> Id. at 174

<sup>69</sup> Id. at 175

propensity for individual achievement in the distribution of a resource<sup>70</sup>. Examples include “flutes to flute players” and that higher education, if provided for, should be granted to those most able to use it. Succinctly, a round peg in a round hole.

Meritorious deserts follow fourth. As the name suggests, those who have contributed much and through self-sacrifice have benefitted the community should be duly considered<sup>71</sup>. Conversely, the chance that avoidable risk was created or foreseen should be considered fifth<sup>72</sup>. The sixth and final criterion asks that each of the preceding criteria be considered in the context of each individuals responsibilities within his community; from each to his ability, to each from his merit, as it were<sup>73</sup>.

#### b. Commutative Justice

The other hemisphere of Finnis’ construal of justice is what he refers to as “commutative justice”<sup>74</sup>. Commutative justice is that which applies to interpersonal relationships. Again Finnis divides this analysis into five criteria.

First, Finnis simply requires that the relationship be between certain individuals. He invokes a basic example: “A’s failure, without good reason, to perform a on a contract with B is commutatively unjust,”<sup>75</sup> as a result, A would pay B damages in recompense. This is self-explanatory, one owes an obligation to

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<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Id. at 177

<sup>75</sup> Id. at 183

another and must fulfill that obligation lest he be in breach of commutatively just behavior.

Second, Finnis establishes a duty of care. Similar to that of tort law, it is a requirement to act responsibly towards others they directly interact with; the avoidance of negligent or reckless activity<sup>76</sup>.

Third, Finnis expands the duty of care to demand that one act responsibly towards those he may not directly interact with, but whose participation in the same system implicates that individual's interests<sup>77</sup>. A ripe example of this would be one member of a gym letting his friends in the back door and not requiring them to pay membership. The gym would suffer and eventually shut down, depriving others of the benefit that it provided.

Finnis then explains the duty of the citizen to obey and adhere to the laws of a government, even if those laws may appear unjust<sup>78</sup>. Lastly, Finnis requires in the inverse, that those in power treat respectfully those subject to their authority and control<sup>79</sup>.

#### a. Application of Distributive Justice

Both the practice of insider trading and the insipid law offered in remedy cruelly violate the principles of distributive justice. It should be noted that the

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<sup>76</sup> *Id.* at 184

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

interests of distributive justice and the common good are closely aligned as they pertain to this issue and therefore that concept will be discussed as well.

#### i. Need

It is no coincidence that those in power are also wealthy. The practice of insider trading by members of congress permits those individuals to augment their wealth *by virtue of* their power. This cycle serves to exclude those in more desperate and humble need of such excess. Any extant poverty in a nation where the lawmakers are privy to wealth beyond measure is the unacceptable result of an unacceptable practice. The allowance of insider trading blinds those responsible for the enrichment of society with visions of their own affluence at the expense of those truly in need.

#### ii. Function

As per function, the distribution of excess market wealth to those interested only in its acquisition cannot meet this requirement. For function to be properly met, the monies available from such surreptitious exchanges would be reinserted into charitable organizations or at the very least, the federal treasury. This would ensure that those best situated to use the money most effectively would be in possession of it.

Instead, as with “need”, the money is hoarded by a handful of individuals who are in no position to productively use their wealth beyond gratifying their

own interests. The STOCK Act merely codifies the practice and demonstrates the unwillingness of the legislature to engage in distributively just behavior.

### iii. Capacity

Finnis defines “common” resources as those which no man has an inherent claim of right. The air, the sea, that which lies in the sea, etc. As opposed to private property, that carries a self-explanatory interpretation. Money, however, is a bizarre intermediary. It is required to obtain almost every other resource but is itself, useless. Because it is tied so closely to human affairs and is as readily available to the privileged as any other resource would be, it can arguably be considered common.

Following suit, Finnis’ requirement of “capacity” would demand that this resource be distributed to those most capable of benefitting from it. It can be stated with some certainty that a body of individuals charged with running the government – not funding it – would not benefit more from excess wealth than the besieged farmer or the single mother. The farmer could use the money to repair and restore his farm (and by extension helping all those who purchase from the farmer) and the single mother could apply it towards enriching the lives of her children. These are but two of many examples of individuals better suited to benefit than our legislators.

### iv. Deserts and Contributions

From the outset this requirement cannot be met. Congressmen have neither contributed to the production of dividends nor merited the receipt of them. They “deserve” as much wealth from successful (and rigged) stock trades as a gambler “deserves” his winnings. Yea, a gambler at least risks losing and is not privy to what cards the other players are holding.

#### v. Acceptance of Avoidable Risk

While congressmen who trade on inside information might not create the risks nor are subject to them, when risks do exist, one never hears them warning other shareholders (see, citizens) about the potential for loss. So while they have little part in the failures of the companies which they invest, they have equally small part in alerting those they claim to represent and protect of those risks.

#### vi. Relativity to Responsibility

By assuming rulership over their people, congressmen must be held to the highest standard in behaving justly. Yet, even if they were held to the lowest standard, their conduct could not plausibly satisfy any of the requirements of distributive justice.

#### b. Application of Commutative Justice

Both the practice of insider trading by members of congress and the STOCK Act implicate Finnis’ fifth factor of commutative justice. Seeing as the subject of the practice and the creators of the law are members of government, congressmen owe a duty of commutative justice to all of those beholden to their authority. In

that manner, Congress and their law fail utterly. Congress' fundamental purpose is the creation of laws that benefit the common good. Even the most narrow application of this power could not find Congress' present actions agreeable. This practice and this law were created unabashedly and specifically for the purpose of immunizing Congress from punishment for behavior prohibited to the rest of the country. Their dealings with each other are held in priority over those with their constituents – whom they are lawfully obligated to represent. It is inconceivable that such avarice could be justified by any power of Congress.

#### xi. Confluence and Conclusion

Finnis does not believe that the satisfaction his requirements of practical reasonableness add up to a “moral” action. Instead, Finnis asks that a decision be the result of a natural and harmonious combination of each of the requirements; no one requirement is dispositive of morality or immorality. Further, while every requirement does not necessarily fit into every moral decision, every moral decision reflects some conjugation of those requirements.

Ultimately, the practice of insider trading and the creation of a law that does little more than to deceive the average citizen into believing it a remedy cannot be sustained under a moral analysis. This objectively and indisputably selfish conduct is antithetical to Finnis' perception of moral behavior and anathema to American values of democratic-republican representation and governance.