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Appendix to Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 CORNELL L. REV. 845 (2013)

Parts IV. D and E below discuss two constitutional objections, which due to space constraints, could not be included in the full text of the Article.

IV
Objections

D. Separation of Powers

One objection, relevant only to *federal* legislators, is that this violates the separation of powers under the United States Constitution.[1] This analysis must distinguish SEC (or Department of Justice) prosecutions from the private right of action.

More specifically, one might argue that SEC prosecution of a member of Congress treads on the proper separation of powers among the branches of government because the sole constitutional recourse is for Congress to discipline its own members. Article I, § 5 of the U.S. Constitution does state that "[e]ach house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member."[2] Current self-discipline options range from expulsion, censure, reprimand, fine, loss of seniority, loss of privileges, to suspension.[3]

But the fact that Congress can punish one of its own does not mean that an independent agency of the federal government cannot.[4] In other words, the constitutional provision should not be read as pre-empting the field of Congressional punishment. To the contrary, members of Congress enjoy no plenary immunity from generally applicable criminal laws, even during their tenure in office. For example, members of Congress can be prosecuted for violating federal criminal law, such as the anti-bribery statute in 18 U.S.C. § 201.[5] Indeed, a member who has *already* been punished by Congress can thereafter be prosecuted and convicted without being put into "double jeopardy."[6] Finally, even exoneration by Congress does not preclude subsequent criminal prosecution.[7]

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[1] This subpart deals with more general separation of powers concerns not specifically reflected in the doctrine of the Speech or Debate Clause. For discussion on the Speech or Debate Clause, *see* Part IV.C *supra*.

[2] U.S. Const. art. 1, § 5.

[3] *See Stop Trading on Congressional Knowledge Act: Hearing on H.R. 1148 Before the H. Comm. On Fin. Servs., 112th Cong. 2 (2011)* (statement of Jack Maskell, Legislative Att'y, Cong. Research Serv.).

[4] For a skeptical take on whether Congress is institutionally capable of self-discipline and whether its procedures provide much due process to its members, *see* United States v. Brewster, 408 U.S. 501, 518, 519-20 (suggesting that "Congress is ill equipped to investigate . . . a wide range of behavior that is loosely and incidentally related to the legislative process" and pointing out that "it would be somewhat naive to assume that the triers would be wholly objective and free from considerations of party and politics and the passions of the moment").

[5] *See, e.g.*, United States v. Myers, 635 F.2d 932 (2d Cir. 1980) (upholding federal bribery conviction, under 18 U.S.C. § 201, of Rep. Michael O. Myers notwithstanding objections based on separation of powers and Speech or Debate clause), *cert. denied*, 449 U.S. 956 (1980).

[6] *See, e.g.*, United States v. Traficant, 368 F.3d 646, 650 (6th Cir. 2004), *cert. denied*, 543 U.S. 1055 (2005) (rejecting Traficant's argument that a criminal conviction after expulsion from the House amounted to double jeopardy in violation of the Fifth Amendment).

[7] *See, e.g.*, United States v. Rose, 28 F.3d 181 (D.C. Cir. 1994). Congress had determined that Rose's mistakes were inadvertent, not "knowing and willful," as the Ethics in Government Act requires. Nevertheless, the Department of Justice

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Does the analysis change when we switch from SEC prosecution to the private right of action, which exists under current federal securities law? It is true that the private right of action under Section 10(b) was first judicially implied by the courts.[8] But whatever controversy may have at one time existed about implying (or inferring) this right of action, that debate has long been settled.[9] With the passage of The Insider Trading and Securities Fraud Enforcement Act of 1988, Congress created an express private right of action for contemporaneous marketplace traders against traders, tippers and controlling persons who violate SEC rules by purchasing or selling a security while in possession of material nonpublic information.[10] To be sure, in doing so, Congress declined to provide a substantive definition of insider trading. However, the legislative history of both the Insider Trading Sanctions Act of 1984 and The Insider Trading and Securities Fraud Enforcement Act of 1988 indicate Congress's endorsement of the multiple bases of insider trading liability.[11]

The separation of powers objection, regardless of whether the SEC or a private individual is pressing the case, would have greater force if Congress had signaled that it was somehow exempt from insider trading laws. To the contrary, Congress has had several opportunities to exempt itself but has never done so. Donald Langevoort's review of the legislative history of the Insider Trading Sanctions Act of 1984 reveals not only that its drafters were substantially familiar with the multiple bases of insider trading liability (including the misappropriation doctrine posited by the SEC and approved by some of the lower courts at that time)[12] but also that the "principal drafters far preferred the flexible approach"—one that more broadly came "down hard on any trading that is inconsistent with basic notions of honesty and fair play."[13] Moreover, in the same term that the House of Representatives was holding hearings on the bill that would eventually become the Insider Trading Sanctions Act of 1984,[14] Congress was conducting hearings about the SEC's investigation of one of two Reagan Administration officials who were accused of insider trading.[15] Thus, there can be little doubt that Congress understood the possibility that government officials could be liable for insider trading.

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brought an EGA Action against Rose and secured a conviction. On appeal, the D.C. Circuit Court of Appeals rejected Rose's argument that the prosecution and conviction violated the separation of powers doctrine. *See id.* at 190.

8 *See* Kardon v. National Gypsum Co., 69 F.Supp. 512 (E.D. Pa. 1946) (first recognizing the § 10b private right of action).

9 *See, e.g.*, Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971) (announcing that "[i]t is now established that a private right of action is implied under § 10 (b)"); Herman & MacLean v. Huddleston, 459 U.S. 375, 380 (1983) ("The existence of this implied remedy [under Section 10(b) and Rule 10b-5] is simply beyond peradventure.").

10 DONALD C. LANGEVOORT, INSIDER TRADING: REGULATION, ENFORCEMENT & PREVENTION § 9:1, at 9-3 (2012).

11 Stephen M. Bainbridge, *Insider Trading Regulation: The Path Dependent Choice Between Property Rights and Securities Fraud*, 52 S.M.U. L. REV. 1589, 1617 (1999).

12 LANGEVOORT, *supra* note 10, § 2:13, at 2-18.4; Donald C. Langevoort, Commentary, *Insider Trading Sanctions Act 0f 1984 and Its Effect on Existing Law*,37 VAND. L. REV. 1273, 1286-1298, 1296 (1984).

13 LANGEVOORT, *supra* note 10, § 2:13, at 2-18.4; Langevoort, *Insider Trading Sanctions Act*, *supra* note 12, at 1289 (". . .the drafters' approach in discussing the substantive issues of liability seemingly eschews conceptualism—the legislative objective is to come down hard on any trading . . . that is inconsistent with basic notions of honesty and fair play.").

14 *See* Insider Trading Sanctions and SEC Enforcement Legislation: Hearing on H.R. 559 Before the Subcomm. On Telecommunications, Consumer Protection and Finance, 98th Cong., 1st Sess. 1 (1983); Langevoort, *Insider Trading Sanctions Act*, *supra* note 12, at 1277.

15 *See* The SEC's Investigation of Thomas Reed: Hearing Before the Subcommittee on Securities, 98th Cong., 1st Sess. (1983); Langevoort, *Insider Trading Sanctions Act*, *supra* note 12, at 1277.

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In addition, Steve Thel's comprehensive analysis of the legislative history of The Insider Trading and Securities Fraud Enforcement Act of 1988[16] supports the conclusion that Congress clearly intended to validate the misappropriation doctrine.[17] This is significant because the primary use of the misappropriation doctrine is to proscribe the misuse of *market* information, which emanates from a source outside of the issuer of the traded securities and tends to concern the supply or demand of the issuer's securities. And, as noted above, legislators generally will have easy access to market information, such as information about anticipated legislative developments, which might impact the demand for the issuer's securities.

Of course, the recent passage of the STOCK Act, which affirms the non-exemption of members of Congress,[18] makes much of this discussion academic. However, it also illustrates that Congress still retains the prerogative to carve itself out of federal insider trading law simply by passing a statute. This, in turn, suggests that the legislative branch's power is not being unduly constrained if and when federal judges construe insider trading law to cover members of Congress.[20] In sum, even if the STOCK Act had not passed and even if it were to be repealed, there is no overwhelming "separations of power" objection to a court finding that members of Congress are fiduciaries for purposes of federal insider trading law.

E. First Amendment

One might object that applying federal insider trading law to both federal and state legislators violates their First Amendment rights. But this would be a strange argument given that insider trading law doesn't violate the First Amendment rights of any *other* persons. If insider trading law can be constitutional as applied to the average person, why would they pose unique freedom of expression problems as applied to a legislator? If the intuition arises from the Speech or Debate Clause for

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[16] Section 2 of the Insider Trading and Securities Fraud Enforcement Act of 1988 provides:

"The Congress finds that—

> (1) the rules and regulations of the Securities and Exchange Commission under the Securities Exchange Act of 1934 governing trading while in possession of material, nonpublic information are, as required by such Act, necessary and appropriate in the public interest and for the protection of investors;
>
> (2) the Commission has, within the limits of accepted administrative and judicial construction of such rules and regulations, enforced such rules and regulations vigorously, effectively, and fairly; and
>
> (3) nonetheless, additional methods are appropriate to deter and prosecute violations of such rules and regulations."

The Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677, § 2 (codified as amended in scattered sections of 15 U.S.C.).

[17] Steve Thel, *Statutory Findings and Insider Trading Regulation*, 50 VAND. L. REV. 1091 (1997).

[18] *See* STOCK Act, Pub. L. No. 112-105, 126 Stat. 291, § 4(a) (2012) (to be codified in scattered sections of 15 U.S.C. app.) ("Affirmation of Non-exemption.—Members of Congress and employees of Congress are not exempt from the insider trading prohibitions..."). Its statutory amendment to § 21A of the Exchange Act is designed explicitly to "*affirm* a duty arising from a relationship of trust and confidence owed by each member of Congress." *Id.* (emphasis added).

[20] *Cf.* United States v. Brewster, 408 U.S. 501, 524 (1972) (making similar point about bribery) ("If we underestimate the potential for harassment, the Congress, of course, is free to exempt its Members from the ambit of federal bribery laws, but it has deliberately allowed the instant statute to remain on the books for over a century."). For a summary of laws that Congress has not applied to itself, *see* Harold H. Bruff, *That the Laws Shall Bind Equally on All: Congressional and Executive Roles in Applying Laws to Congress*, 48 ARK. L. REV. 105 (1995).

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members of Congress, then, that's a separate argument, which is addressed above.[21] But if we stay focused on the First Amendment rights of both federal and state legislators, there seems to be no justification for legislator exceptionalism.

A recent Supreme Court opinion, *Nevada Commission on Ethics v. Carrigan*,[22] provides strong support for this view. The State of Nevada had adopted a recusal statute that required public officers to "not vote upon or advocate the passage or failure of . . . a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by . . . [h]is commitment in a private capacity to the interests of others."[23] The Nevada Commission on Ethics concluded that Michael Carrigan, a City Council member of Sparks, Nevada, should have recused himself due to a conflict of interest on a vote to authorize a hotel/casino project. Carrigan filed for judicial review in the state courts, and the Nevada Supreme Court held that his vote was protected by the First Amendment and that the recusal law was unconstitutionally overbroad.

The Supreme Court reversed. Writing for the majority, Justice Scalia explained that although an individual citizen's vote is protected speech, a legislator's vote is not.[24] Instead, it is merely his or her "apportioned share of the legislature's power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it."[25] Accordingly, a "legislator casts his vote 'as *trustee* for his constituents, not as a prerogative of personal power.'"[26] Furthermore, the Court noted that an "act of voting symbolizes nothing. It discloses, to be sure, that the legislator wishes (for whatever reason) that the proposition on the floor be adopted, just as a physical assault discloses that the attacker dislikes the victim. But neither the one nor the other is an act of communication."[27]

If a law that forces a state legislator to refrain from voting or even *advocating* on a particular matter during a legislative session[29] is consistent with the First Amendment, then surely a law of general applicability that can be construed to proscribe legislator insider trading poses no constitutional difficulties. If a legislative vote doesn't count as protected speech because it is not an act of communication, then neither should a self-serving trade based on material nonpublic information.[30] Although an inside trade could disclose that the trader (for whatever confidential reason) thinks the purchase or sale to be advisable, inside trades in and of themselves have no symbolic or communicative

[21] *See supra* Part IV.C.

[22] Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343 (2011).

[23] Nevada Ethics in Government Law, Nev. Rev. Stat. § 281A.420(2) (2007).

[24] 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONST. L. § 20.11(c) (5th ed. 2012).

[25] *Nev. Comm'n on Ethics*, 131 S. Ct. at 2350.

[26] *Id.* (quoting Raines v. Byrd, 521 U.S. 811, 821 (1997)) (emphasis added).

[27] *Id.* at 2350. Also, Justice Scalia emphasized that rules requiring legislative recusal have existed since the time of the nation's founding and have never been found to have violated the First Amendment. *Id.* at 2348-50. In a concurring opinion, Justice Alito asserted that a legislative vote was protected free speech akin to an individual's vote. *Id.* at 2354-55 (Alito, J., concurring). However, the longstanding tradition of accepting recusal laws made it a permissible limit on free speech. *Id.* at 2355.

[29] *See id.* at 2347 (describing the constraint on a legislator's advocacy as a reasonable time, place, and manner limitation).

[30] The Court conceded that even as to constitutionally unprotected speech, viewpoint discrimination is not allowed. *See id.* at 2349-50 (citing R.A.V. v. St. Paul, 505 U.S. 377 (1992)). But the Nevada recusal laws were not viewpoint discriminatory: "The statute is content-neutral and applies equally to all legislators regardless of party or position." *Id.* The same would be true for insider trading law.

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value. To the contrary, an inside trade will ordinarily be conducted furtively and anonymously in a manner that minimizes any possible communicative content. Like other business transactions, the trade is merely the means by which the trader realizes his or her anticipated gain (or loss avoidance). In sum, there is no serious First Amendment objection to a court finding that federal and state legislators are fiduciaries for purposes of federal insider trading law.

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