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The STOCK Act and Gratuities: Competing Visions, Common Goal

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Last month, Congress considered two different versions of a bill—the Stop Trading on Congressional Knowledge Act (STOCK Act)[1]—that would make clear that the federal insider trading laws apply to federal officials. The Senate and House of Representatives have passed different versions of the STOCK Act, each by overwhelming majorities: 96–3 in the Senate and 417–2 in the House. The difference between the two bills, however, is that the Senate version also addressed *other* perceived public corruption problems. The House amended the Senate bill by deleting those additional provisions and returned its revised version to the Senate.[2]

Several newspapers and private organizations have criticized the decision by House Majority Leader Eric Cantor (R–VA) and the House Members to forgo creation of those new crimes. They have maintained that the House-passed bill would leave "loopholes" that crooked politicians could use to line their pockets at the public's expense.[3]

Consider the law governing gratuities. The Justice Department urged Congress to amend the gratuity laws in order to overturn *United States v. Sun Diamond Growers*,[4] a case in which the Supreme Court unanimously rejected the proposition that the gratuities act outlawed giving or receiving a gratuity simply because the recipient was a government official. The Senate bill would have overturned the *Sun Diamond* case; the House-passed bill would not. The Senate bill has some weaknesses that perhaps could be addressed by redrafting the text, but that bill also highlights some important policy issues where reasonable people could disagree as to whether the bill is a valuable addition to the penal code. In our view, the House's policy choice is the better one, for several reasons.

First, the Senate bill makes a material alteration to the definition of an "official act" in the bribery statute, adding the phrase "any act within the range of official duty" to the definition. But there is no definition of what constitutes an "official duty" of a Member of Congress, and the scope of that term could be quite broad. A Member could reasonably claim that, because his entire record will be under consideration when he runs for re-election, anything publicly known that the Member did while in office is what one or more of his constituents wanted done. If so, there could be few limits on an "official duty" of a Member of Congress other than what the Constitution or other criminal laws forbid. Remember *Charlie Wilson's War*?

Second, it is not clear whether "intangible" gifts are covered. If they are, any number of things, including celebrity endorsements, would trigger the act. How much is Brad Pitt's endorsement worth? Or LeBron James's? What about the "score" that some organizations assign to a Member's voting record and make public for the Member's constituents? The list of intangibles could be quite long.

Third, although the Senate bill would create an exemption for gifts of $1,000 or less, it leaves unanswered the question of how long the period is for calculating that cap. Is it one year (by the calendar or from

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a Member's swearing-in)? Does the $1,000 threshold apply to each separate office during the tenure of a government official, or is the $1,000 threshold a lifetime cap? After all, the Senate bill refers to "*things* of value," so it could be argued that a prosecutor can add up every gift a person makes or receives during an official's tenure in one or more offices.

Fourth, by increasing, perhaps exponentially, the punishment for violating a state ethics law, the Senate bill's revised federal mail/wire fraud statute could act as a rather large multiplier, imposing a penalty way out of proportion to the sanctions available under state law. The Senate's version of the public corruption legislation would make a felony—punishable by up to 20 years' imprisonment—out of a state-law violation that might not be punished by anything more than a small fine or perhaps even a letter of admonition. That result presents the oddity of the federal government instructing the states and localities about how seriously they ought to treat infractions of their own election or ethics laws. It also would effectively preempt all state and local penalties for ethics violations. The upshot is that the federal government would dictate to the states how their own officeholders should be punished for a violation of state law. Congress does not generally issue such a diktat to the states, especially where matters of state self-government are concerned.

Fifth, the Senate's bill would also lead to inconsistency in federal law. If violations of state campaign, fundraising, or ethics regulations constituted the predicate acts that make conduct a federal crime, there would be, in effect, different federal laws at work in different states. State and local politicians would be subject to federal prosecution in some states for the same acts that would not amount to a federal crime elsewhere. In fact, the same problem could occur *within* a state, because different municipalities may have different disclosure rules.

Sixth, the Senate bill could have unintended consequences at the state or local level. If a state- or municipal-law violation subjects an offender to a potential 20-year term in a federal prison, a state legislature or city council may decide not to pass new disclosure laws, or to repeal the current rules, in order to avoid a penalty that is grossly disproportionate to the foot fault that triggers the federal crime. Inconsistency therefore could lead to a race to the bottom, not the top.

Keep in mind that the House-passed bill did not immunize any conduct from prosecution. The House just declined to add to the corpus of the federal criminal code. Calling a "time out" allows for additional consideration and debate. It should hurt no one, and it might even result in a better policy.

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1. S. 2038, 112th Cong., 2d Sess. (2012).
2. Title II of the Senate version, entitled "Public Corruption Prosecution Improvements," contained the provisions that only the Senate passed.
3. See, e.g., editorial, "The House's Less Persuasive Ban on Insider Trading," *The New York Times*, February 8, 2012, at *http://www.nytimes.com/2012/02/09/opinion/the-houses-less-persuasive-ban-on-insider-trading.html* (March 7, 2012), and Larry Margasak, "House Passes Insider Trading Bill," Associated Press, February 9, 2012, at *http://finance.yahoo.com/news/house-passes-insider-trading-bill-153829455.html* (March 7, 2012). Not all of the commentary on the House bill, however, has been critical. See James R. Copland, "Manhattan Moment: Politics Behind the STOCK Act," *Washington Examiner*, February 16, 2012, at *http://washingtonexaminer.com/opinion/2012/02/manhattan-moment-politics-behind-stock-act/275956* (March 7, 2012).
4. 526 U.S. 398 (1999).