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The STOCK Act and Fraud: Competing Visions, Common Goal to Address Government Corruption

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Last month, the House and Senate passed, by overwhelming majorities, different versions of a bill entitled the Stop Trading on Congressional Knowledge Act (STOCK Act).[1] The bills would acknowledge that the insider trading laws apply to federal officials. The Senate version would also reach *other* perceived public corruption problems. An earlier *Issue Brief* discussed the provisions of the STOCK Act dealing with gratuities. This *Issue Brief* discusses the anti-fraud components of the Senate version. Here, too, the House's policy choice is the better one.

Taking STOCK. Historically, the mail fraud statute applied only to deceptive schemes to obtain a victim's property.[2] Beginning in the 1970s, the Justice Department persuaded the lower federal courts to treat the concept of "property" as including the "honest and faithful services" that state and local politicians owe the public.[3] The theory was that politicians who line their pockets at the public's expense effectively defraud the citizenry.

The Supreme Court, however, rejected that theory in *McNally v. United States*,[4] limiting the fraud statutes to their original understanding. Congress reacted to *McNally* by redefining the phrase "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services."[5] But in *Skilling v. United States*,[6] the Supreme Court again rejected the government's effort to expand the fraud laws, limiting the "intangible right of honest services" to kickbacks and bribery.

Going once more into the breach, the Justice Department has asked Congress to overturn *Skilling*. A proposed statute would make it a crime to engage in "undisclosed self-dealing," which would occur whenever a public official acts, in whole or in material part, to benefit himself or someone else close to him (e.g., a spouse) and knowingly lies, hides, or disguises material information that he must disclose under some federal, state, or local ethics law. This provision makes a good-faith effort to respond to the Supreme Court's warning in *Skilling* that the term "the intangible right of honest services" is unconstitutionally vague. The bill tries to avoid that problem by focusing on an official's violation of ethics and disclosure rules. But, here, too, there are policy objections to the new approach.

Four Major Problems. First, the term "undisclosed self-dealing" is new. It lacks a widely accepted contemporary interpretation as well as any longstanding common law antecedent. It could be read broadly. For example, suppose that a Member of Congress owns stock in an index fund and has not complied with every relevant disclosure requirement. Could that legislator be prosecuted for a host of official actions affecting the national economy, such as voting on the appointment of the Federal Reserve chairman or the Treasury Secretary, on revisions to the tax code, or on the federal budget?

Second, does the term "financial interest" embrace the very position for which a public official is seeking re-election? After all, the salary,

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medical coverage, retirement benefits, office budget, and so forth that come with the job could be a "financial interest" that triggers the bill, and any official action that a Member takes to be re-elected could be an "act within the range of official duty" or a "decision on or action on any ... matter" that comes up. The bill does not say.

Third, by increasing, perhaps exponentially, the punishment for violating a state ethics law, the new, revised federal mail/wire fraud statute might impose a penalty that is out of proportion to the sanctions available under state law. The state might deem the matter worthy of only a fine, but the federal government would make it a felony with up to 20 years' imprisonment as a possible sentence.

Fourth, it is odd for the federal government to instruct states and localities about how serious they ought to treat potential infractions under their own ethics laws. One could reasonably ask why state and local voters are incapable of making those decisions themselves. One also could ask what authority the federal government has to tell states and localities how to run their own political processes. No one has suggested that there is any racial concern in this regard, so neither the 14th nor the 15th Amendments comes into play. The Guarantee Clause of the Constitution (Article IV, Section 4) might be relevant because it provides that the United States "shall guarantee to every State in this Union a Republican Form of Government." But if political corruption—however longstanding, however entrenched, however highly situated—deprived a state of "a Republican Form of Government," then Illinois, to name just one state[7]—unbeknownst to its own citizenry, to the Illinois congressional delegation, and to the current President, who hails from Illinois—has lacked that form of government for a fair amount of the past 20 years.

Time Out. Keep in mind that here, too, 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. At a minimum, calling a "time out" to discuss these problem areas should hurt no one.

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1. The Stop Trading on Congressional Knowledge Act, S. 2038.
2. See, e.g., *Durland v. U.S.*, 161 U.S. 306 (1896).
3. See *Skilling v. U.S.*, 561 U.S. ___, 2926-28 (2010).
4. *McNally v. U.S.*, 483 U.S. 350 (1987).
5. 18 U.S. Code § 1346.
6. *Skilling v. U.S.*, 561 U.S. ___, 2896 (2010).
7. Hearing on the Clean Up Government Act of 2011 before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, U.S. House of Representatives, 112th Cong., 2nd Sess., August 26, 2011, at *http://judiciary.house.gov/hearings/printers/112th/112-70_67574.PDF* (February 18, 2012). Representative Mike Quigley (D–IL): "Hunting for corruption in Illinois is like hunting for cows."