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The Challenges Of Prosecuting Congressional Insider Trading

By **Robert K. Kelner, Peter Koski and Clayton Bailey** (June 18, 2020, 5:32 PM EDT)

Robert K. Kelner

Peter Koski

Clayton Bailey

Allegations that U.S. senators traded on confidential briefings about COVID-19 have brought new enforcement attention to the rarely used Stop Trading on Congressional Knowledge, or STOCK, Act.

In a sign of significant escalation, last month the FBI reportedly seized the mobile phone of Sen. Richard Burr, R-N.C., in connection with one such investigation, even as the U.S. Department of Justice announced it was closing investigations into Sens. Kelly Loeffler, R-Ga., Jim Inhofe, R-Okla., and Diane Feinstein, D-Calif.

The FBI also reportedly served a warrant on Apple Inc. seeking data stored in Burr's iCloud account.

The STOCK Act, first enacted in 2012, prohibits members of Congress and other government officials from trading on material nonpublic information "derived from such person's position as a Member of Congress or employee of Congress or gained from the performance of such person's official responsibilities."[1]

While these allegations may resemble traditional insider trading, the challenges for prosecutors are unique and exacting. Charges under the STOCK Act have never been brought against a member of the legislative branch, and prosecutors face at least two potentially existential challenges due to the nature of legislative work.

First, the U.S. Constitution's speech or debate clause may prevent the DOJ from satisfying an essential element of the offense — proving what legislators learned in the course of their official duties.

Second, the Confidential Information Procedures Act, or CIPA, may force prosecutors to risk publicizing classified information as a consequence of bringing an enforcement action.

The Speech or Debate Clause

In order to prove a violation of the STOCK Act, prosecutors must prove that the nonpublic information acted on by a member of Congress was "derived from such person's position" or "gained from the

performance of such person's official responsibilities." But for legislators, much of the information learned in the course of their official responsibilities could be shielded by the immunity granted under the speech or debate clause.

The clause presents a challenge not present in the insider trading case brought against former Rep. Chris Collins, R-N.Y., who was convicted of trading on material nonpublic information he obtained while serving on the board of a publicly traded company, as opposed to nonpublic information learned through his legislative activities.

Prosecutors could therefore be categorically barred from presenting the evidence necessary even to secure an indictment. Notably, in a prior civil STOCK Act investigation into whether a congressional staffer provided material nonpublic information to a lobbyist, the U.S. Securities and Exchange Commission was forced to abandon significant parts of its subpoena to the staffer and the House Ways and Means Committee because of the speech or debate clause.[2]

The Constitution provides that "for any Speech or Debate in either House, [senators and representatives] shall not be questioned in any other Place."[3] The clause was:

> designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch. It thus protects members against prosecutions that directly impinge upon or threaten the legislative process.[4]

Members of Congress and their staff are thus "immune from liability for their actions within the legislative sphere."[5]

Of practical importance, the U.S. Court of Appeals for the D.C. Circuit has held that the clause creates a broad nondisclosure privilege that protects against the disclosure of legislative material.[6] In other words, not only are members of congress immune from prosecution for legislative acts, but — at least within the D.C. Circuit — they also cannot be compelled to produce documents related to actions within the legislative sphere.

Here, application of the speech or debate clause requires a careful, fact-driven analysis of how the member of Congress learned the nonpublic information in question. It may be possible that some STOCK Act prosecutions can be pursued without running afoul of the clause.

But, like here, if the allegation is that a senator or representative learned the information during a formal committee briefing, the clause would likely preclude the introduction of evidence, or even the allegation in an indictment, of the information provided during that briefing, thereby precluding the prosecution from proving an essential element of the offense. The U.S. Supreme Court has held that the clause applies to committee hearings,[7] and courts would likely extend that application to official committee briefings.[8]

The FBI's seizure of Burr's cell phone, and its collection of Burr's iCloud data, presents an interesting wrinkle regarding the speech or debate clause. First, the clause is likely to complicate the FBI's review of Burr's communications. Information received in the course of legislative activity is likely to be on Burr's phone, and should be protected from review, at least within the D.C. Circuit. Second, the seizure may indicate a creative attempt by investigators to overcome the obstacles presented by the speech or debate clause.

Reports have indicated that Burr and his brother-in-law dumped their stock on the same day. Communications sent from Burr to individuals outside the legislative branch are likely fair game for investigators, as the Supreme Court has ruled that the dissemination of information outside the legislative branch is unprotected by the speech or debate clause.[9]

This principle even includes official communications, like press releases, that describe legislative acts, such as a vote or sponsorship of a bill.[10] Any communications by Burr with his brother-in-law, even to share information that he learned through the course of his legislative duties, would therefore likely be unprotected by the speech or debate clause.

On this point, it is worth noting that in the SEC's investigation described above, the district court ruled that a congressional staffer's communications to a lobbyist are categorically unprotected by the speech or debate clause, declaring that documents relating to such communications must be produced to the SEC.[11]

The government may also believe that the phone could provide evidence of secondary charges, such as charges related to a failure to preserve potentially incriminating emails or text messages. This type of charge — and the evidence necessary to prove it — is unlikely to be burdened by the same constitutional challenges associated with enforcing the STOCK Act.

The Confidential Information Procedures Act

If prosecutors manage to collect the evidence necessary to bring a STOCK Act case to trial, they face another problem: The potential disclosure of classified information. Because a STOCK Act prosecution requires evidence that a member of Congress received specific nonpublic information in the course of official duties, there is a risk that the information itself, or the source of that information, is classified.

A member of Congress charged with violating the STOCK Act may also seek to put that information in context by presenting other information learned in the course of those duties, even if that information remains classified. For someone like Burr, who until very recently served as chair of the Senate Intelligence Committee, that defense seems even more probable.

Given his position, the classified information may be significant, and release at trial may prove harmful to the national interest. This type of defense strategy, referred to as graymailing, has frustrated the government's ability to fully pursue its law enforcement interests in several recent high-profile cases.

CIPA is a procedural law that seeks to balance a defendant's right to a fair trial with the government's interest in protecting classified information. CIPA requires defendants to provide the prosecution with notice of their intent to put on classified information as evidence at trial, and requires the court to hold a pretrial hearing for the purpose of making admissibility rulings before a jury is even empaneled.[12]

Should the court rule that classified information is admissible, the government may move for substitution of an unclassified summary of the information at issue that "will provide the defendant with substantially the same ability to make his defense as would disclosure of the classified information."[13]

Should the government lose such a motion, it will be forced to weigh the importance of its prosecution against the importance of preventing the public disclosure of the classified information. That balance will depend on the individual circumstances of the case, but it is not a situation that any prosecutor welcomes.

Robert K. Kelner is a partner and chair of the election and political law practice group at Covington & Burling LLP.

Peter Koski is of counsel at the firm. He previously served as deputy chief of the DOJ's Public Integrity Section.

Clayton Bailey is an associate at Covington.

[1] 15 U.S.C. § 78u-1(g)(1).

[2] Sec. & Exch. Comm'n v. Comm. on Ways & Means of the U.S. House of Representatives, 161 F. Supp. 3d 199, 246 (S.D.N.Y. 2015).

[3] Art. I, Sec. 6, Cl. 1.

[4] Gravel v. United States, 408 U.S. 606, 616 (1972).

[5] Doe v. McMillan, 412 U.S. 306, 312 (1973).

[6] United States v. Rayburn House Office Building, 497 F.3d 654, 655, 660 (D.C. Cir. 2007).

[7] United States v. Brewster, 408 U.S. 501, 509, 512 (1972).

[8] Gravel, 408 U.S. at 624 (holding that the Clause applies broadly to Members' conduct within the "sphere of legitimate legislative activity").

[9] Hutchison v. Proxmire, 443 U.S. 111, 133 (1979); Brewster, 408 U.S. at 512.

[10] Hutchison, 443 U.S. at 133.

[11] Sec. & Exch. Comm'n, 161 F. Supp. 3d at 245-46.

[12] 18a U.S.C. §§ 4, 6.

[13] 18a U.S.C. § 6(c)(1)(B).