with the Congress, the government, and, most important, with the American people. Establishing such a duty removes any doubt as to whether insider trading prohibitions apply to Congress. It is also important that the bill language makes clear that in offering this new language, it does not in any way prevent enforcement of the anti-insider trading provisions contained in current law. Again, I am confident that, under current law, Members of Congress and our staffs are prohibited from insider trading. This bill will ensure that the current prohibition is unambiguous and thereby strengthened.

The second major provision of the legislation instructs the ethics committees of both Chambers to issue clear guidance to Members and staffs on the prohibition on profiting from inside information. This guidance will clarify that existing rules in both Chambers relative to gifts and conflicts of interest also prohibit the use of nonpublic information gained in the conduct of official duties for private profit.

Finally, one other provision I will briefly mention, which is unrelated to insider trading but nonetheless an important step forward in terms of gaining the confidence of our constituents. As one of the originators of the Lobbying Disclosure Act of 1995, I am well aware of the value of transparency in government. The bill before us improves congressional transparency by requiring that personal financial disclosure filings required of Members and certain staff are made available electronically to the public. I commend Senators BEGICH and TESTER for offering a measure that improves that transparent governance.

Mr. President, it is important we pass this legislation, that we clarify and strengthen our rules and our laws and end any uncertainty about insider trading by Members of Congress. I hope we can promptly pass this legislation.

Again, I commend our chairman and ranking member and all the members of our committee for the work they have put into this bill.

I yield the floor.

CONCLUSION OF MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Morning business is now closed.

STOP TRADING ON CONGRESSIONAL KNOWLEDGE ACT—MOTION TO PROCEED

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will resume consideration of the motion to proceed to S. 2038, which the clerk will report.

The legislative clerk read as follows:

Motion to proceed to the consideration of S. 2038, a bill to prohibit Members of Congress and employees of Congress from using nonpublic information derived from their official positions for personal benefit, and for other purposes.

The ACTING PRESIDENT pro tempore. Under the previous order, the time until 5:30 p.m. will be equally divided and controlled between the two leaders or their designees.

The Senator from Connecticut.

Mr. LIEBERMAN. I thank the Chair. Mr. President, I want to begin debate, and I do so with gratitude that the distinguished ranking member Senator COLLINS is here, as well as Senator BROWN of Massachusetts, whose original legislation, along with Senator GILLIBRAND, forms the basis of this proposal that comes out of our committee.

I want to go back to the beginning, to President Washington, whose Farewell Address seems to take on more relevance as time goes by, although it is obviously more than 200 years old now. Washington said in his Farewell Address that ''virtue or morality is a necessary spring of popular government'' and that we cannot ''look with indifference'' at anything that shakes that foundation or, continuing his metaphor, dries the spring.

I think we have to say in the long proud course of American history since then there have been very few times where the springs of trust in popular government have been more dry than they are in our time.

I am grateful my colleague Senator MCCAIN is not on the Senate floor now because when we get to this subject, he usually says: When you look at the public opinion polls on Congress, the numbers of people who have a favorable impression of this body are so low we are down to close relatives and paid staff. Usually, when I am with him, I add: I'm not so sure about all the paid staff.

But, in any case, we have an opportunity with this piece of legislation to take a small step forward toward rebuilding public trust in Congress and to restoring those necessary springs of popular government—the trust of the people in us. This goes back just to last fall and early winter. A book appeared by an author named Peter Schweizer who was then interviewed on ''60 Minutes.'' He made allegations that some Members of Congress and their staffs have used information gained on their jobs to enrich themselves with timely investments, particularly in the stock market. Those allegations, as Washington might have said, certainly dried the springs of trust that we should have with the American people, even more than they already are.

So today I am proud to rise to bring before the Senate the STOCK Act, which stands for Stop Trading on Congressional Knowledge Act of 2012. This piece of legislation puts into law language and reporting requirements that will make it clear to the American people we understand being a Member of Congress means we have a responsibility to the public, a public trust, and any Member of Congress or staff member here who violates that trust will be punished.

This bill was reported as an original bill out of the Committee on Homeland Security and Governmental Affairs on December 14 with a bipartisan vote of 7 to 2. In advancing this bill, as I have said, Senator COLLINS and I worked closely with Senators GILLIBRAND and BROWN of Massachusetts, both of whom sponsored versions of the STOCK Act. Senator LEVIN, who has just spoken, worked closely with us on the substitute amendment that will be filed, and I thank them all for their contributions on this piece of legislation. I also thank the Senate majority leader, Senator REID, for deciding this important piece of legislation would be one of the first items we take up in Congress this year.

The specific rules making insider trading illegal are found in a large body of Securities and Exchange Commission regulatory activities pursuant to section 10(b) of the Securities Exchange Act of 1934 and court decisions interpreting those activities. Our Committee on Homeland Security and Governmental Affairs held a hearing on this topic in December, and the Securities and Exchange Commission actually filed a statement with us for the record declaring its belief that currently there is authority in the law to investigate and prosecute congressional insider trading cases. The chief enforcement officer of the SEC said:

> Trading by congressional members or their staffs is not exempt from the Federal securities laws, including the insider trading prohibitions.

But other witnesses at that hearing, including Georgetown University Law Professor Donald Langevoort and Columbia Law School Professor John Coffee told us that while the SEC might be technically right, in their opinion there was ambiguity in the law and they couldn't be sure how a court would rule if there was a challenge to the SEC's authority to bring an insider trading case against a Member of Congress or a staff member.

That is because, as the professors explained, a person may be found to have violated insider trading laws only if he or she breaks a fiduciary duty, a duty of trust and confidence owed to somebody—typically to the shareholders of a company or to the source of the nonpublic information. They argued it is possible a judge might decide that Members of Congress do not have a fiduciary duty—in the way in which it has normally been interpreted—to anyone with respect to the nonpublic information that we receive while carrying out our duties.

Now, I must say that I find it hard to see it that way. It seems to me self-evident that a public office is a public trust and that Members of Congress have a duty to the institution of Congress, of course to the government as a whole, and ultimately, most importantly, to the American people not to use information gained during their time in Congress—and unavailable to the public—to make investments for personal benefit. But the fact is there

are some very experienced and intelligent legal experts who told our committee they couldn't certify a judge would see it exactly that way.

That is the first purpose of this act, the STOCK Act: to clarify the ambiguity of securities law by explicitly stating that Members of Congress and our staffs have a duty of trust to the institution of Congress, to the United States Government, and to the American people—a duty that Members of Congress violate if we trade on nonpublic information we gain by virtue of our public position.

The bill also requires the ethics committees of both Houses of Congress to issue guidance to clarify that Members and staff may not use nonpublic information derived from their positions in Congress to make a private profit.

Besides these changes—and this is different and important—our committee decided the STOCK Act should require Members of Congress and their staffs to file public reports on our purchases or sale of stocks, bonds, commodities, futures, or other financial transactions exceeding $1,000 in value within 30 days of the transaction. Right now, as the Acting President of the Senate knows, these trades are reported once a year in our annual disclosure statements. This proposal would change that to within 30 days of the trade.

More timely reporting of this kind will allow not just the SEC but the public to assess whether there is anything suspicious or wrong about the timing of the trade and conduct in the Senate. That kind of real transparency will be an additional deterrent to unethical or illegal behavior.

The bill also contains another important provision offered in committee by Senators JON TESTER and MARK BEGICH that will require the financial disclosure forms filed by Members and staff to be filed electronically and perhaps even more significantly, therefore, be available online for public review. The fact is, our reports are now available for public review. But people have to go to the Office of the Secretary of the Senate and ask for copies of them. There is no sensible reason to make someone physically come to the House or Senate to see a copy of one of our financial disclosure forms. They are public records and they ought to be easily available to the public online, and this proposal will make sure that happens.

Those are the three major provisions of the proposal, as I see it: to affirm a clear fiduciary duty under the insider trading law so it is clear Members of Congress and our staffs are covered by them; secondly, to require disclosure of trades in excess of $1,000 within 30 days; and, third, that those trades and our annual financial report will be electronically filed and, therefore, be available online.

May I say, as we begin the second session of the 112th session of Congress, we begin with so much distrust of our Federal Government that I think passing the STOCK Act could have a positive effect on how we are being perceived, and particularly if, as I hope, we pass it on a bipartisan basis. The STOCK Act was passed out of our committee in exactly that way. I believe it has the support of Members and leaders of both parties in the House and Senate, and President Obama has promised to sign it as soon as it comes to his desk.

So let me end by quoting again from our first President, this time from his Inaugural Address, where he set the ideals for the new government that our country would have. He said:

> The foundations of our national policy will be laid in the pure and immutable principles of private morality . . . and the preeminence of free government [will] be exemplified by all the attributes which can win the affections of its citizens and command the respect of the world.

Enacting this proposal into law will say to our disappointed, our skeptical, our troubled constituents that we understand and accept Washington's wisdom.

I thank the Chair, and at this time I yield to my dear friend, the distinguished ranking member of our committee, Senator COLLINS.

The ACTING PRESIDENT pro tempore. The Senator from Maine.

Ms. COLLINS. Mr. President, I am pleased to join today the chairman of our committee, Senator LIEBERMAN, and the sponsor of this bill, Senator SCOTT BROWN, in urging our colleagues to begin consideration of what is known as the STOCK Act.

This legislation is based on a bill that was first introduced in the Senate by Senator SCOTT BROWN and a similar one introduced by Senator GILLIBRAND. Put simply, the STOCK Act is intended to ensure that Members of Congress do not profit from trading on insider information.

As a cosponsor of Senator BROWN's bill, I wish to commend him for his leadership in this area. I also wish to recognize Chairman LIEBERMAN for moving this important bill forward in such an expeditious manner.

Press reports on "60 Minutes" and elsewhere have raised questions about whether lawmakers have been exempt, either legally or practically, from the reach of our laws prohibiting insider trading. At a time when polls show record low public confidence in Congress, there is a strong desire on our part to address the concerns that underpin the public's skepticism and assure the American people that we are putting their interests ahead of our own.

The STOCK Act is intended to affirm that Members of Congress are not exempt from our laws prohibiting insider trading. While several of the witnesses who appeared before our committee's hearing on this bill testified that there is no legal exemption for Members of Congress, confusion and uncertainty nevertheless persists. For example, on the eve of our markup, the Wall Street Journal published an op-ed by a Yale law professor who wrote that "the Securities and Exchange Commission has determined that insider trading laws do not apply to Members of Congress or their staff."

This, however, is directly contradicted by the statement for the record submitted to the committee by the SEC's Enforcement Director who said: "There is no reason why trading by Members of Congress or their staff members should be considered exempt from the Federal securities laws, including trading prohibitions."

I ask unanimous consent to have printed in the RECORD the SEC statement at the conclusion of my comments.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

(See exhibit 1.)

Ms. COLLINS. Mr. President, to me, this illustrates the confusion over this issue. So I am pleased the committee not only reported Senator BROWN's bill but unanimously adopted an amendment I offered with Chairman LIEBERMAN that states clearly that Members and their staff are not exempt from insider trading laws.

The need for this unambiguous statement can likely be traced back to the nature of the insider trading laws. As our committee has learned, our Nation's insider trading laws are not, generally speaking, based on statutes passed by Congress but rather on court precedents. As one of our witnesses, law professor Donna Nagy from Indiana University, pointed out during our hearing:

> Congress has never enacted a Federal securities statute that explicitly prohibits anyone from insider trading. . . . The explicit statutory ban on insider trading . . . is entirely absent in U.S. securities law.

Rather, the SEC pursues insider trading cases under the general antifraud provisions of the Federal securities laws, most commonly section 10B of the Securities Exchange Act of 1934 and rule 10b5, a broad antifraud rule promulgated by the Commission. Therefore, what constitutes insider trading has largely been determined by the courts, including the Supreme Court, on a case-by-case basis.

Under the case law, two different types or theories of insider trading violations have developed; one where the defendant is a classic corporate insider using nonpublic information to trade on the company's stock and a second where the defendant has misappropriated inside information in violation of a duty owed to the source of the information, such as a lawyer who trades on advanced notice of a business transaction. Both types of cases, however, share common elements:

There must be a breach of a duty, such as a traditional fiduciary duty or a duty of trust and confidence; the breach must involve material information, which is the type of information a reasonable investor would consider important in making a decision to buy or

sell stock; the information must be nonpublic; and the defendant must receive a personal benefit, which the Supreme Court has said may include not only financial gain but also reputational benefits.

As the Supreme Court has held, under section 10B, the chargeable conduct must involve a deceptive device or contrivance used in connection with the purchase or sale of securities. In criminal prosecutions for insider trading, under rule 10b5, the government must prove that a person willfully violated the provision with culpable intent.

Although the witnesses who came before the committee generally agreed that Congress enjoys no exemption from insider trading laws, they also stressed the need to clarify the relevant duty that applies to Members.

The bill reported by the committee, in language refined by Senator LEVIN, addressed this issue by affirming a duty arising from the relationship of trust and confidence already owed by Members and their staff to the Congress, the U.S. Government, and the citizens we serve. At our markup, we clarified that this does not create a new fiduciary duty, in the traditional sense, but rather recognizes or affirms our existing duty.

As reported, the bill would also have amended the Congressional Accountability Act to prohibit Members and staff from using nonpublic information gained through the performance of their official duties for personal benefit. This proposed prohibition, however, was not limited to the trading context or otherwise tethered to financial transactions. Because it was not anchored in financial transactions, I expressed some concerns about the potential breadth of this term and the potential for unintended consequences.

These concerns were echoed by several members of the committee during our consideration of the bill. Therefore, following the markup, we continued to refine the bill while adhering to the fundamental principle that Members of Congress should be subject to the same insider trading laws as other Americans. I believe we have come up with a solution that addresses the potential problem that troubles all of us; that is, public officials using public office for private gain. We need, however, to make sure that in doing so, we do not inhibit our ability to gather information so we can serve our constituents to the best of our ability.

The proposed substitute offered by Senator REID, Senator BROWN, and Senator LIEBERMAN reflects the work of our committee members as well as other bill sponsors. It would require the Senate Ethics Committee and the House Committee on Standards of Official Conduct to issue guidance on the relevant rules of each Chamber, clarifying that Members and staff may not use nonpublic information derived from their positions in Congress to make a personal profit. This would cover insider trading matters, as well as land deals and other financial transactions where nonpublic information could be wrongly converted into a private gain.

Similar to the reported bill, the substitute includes a straightforward statement making clear that Members and their staff are not exempt from insider trading prohibitions arising from the securities laws.

In keeping with an amendment that Senator PAUL successfully offered at our markup, the substitute applies the same framework—clarification of the prohibition against using nonpublic information for private profit and the affirmation of existing duty that we have—to the employees of the executive and judicial branches, as well as the legislative branch. Similar to the reported bill, the substitute includes earlier deadlines for financial reporting requirements and greater transparency for financial disclosure statements, as the chairman mentioned, by requiring that they be available online and in a searchable format.

I believe we need to reassure a skeptical public that we understand that elective office is a place for public service, not private gain; that it is an honor and a trust we have been given by the people we represent. Underscoring that important message is clearly the intent of this bill, and that is why I support it.

I urge my colleagues to vote yes to vote to invoke cloture on the motion to proceed.

EXHIBIT 1

[From U.S. Securities and Exchange Commission, Dec. 1, 2011]

STATEMENT ON THE APPLICATION OF INSIDER TRADING LAW TO TRADING BY MEMBERS OF CONGRESS AND THEIR STAFFS, BEFORE THE UNITED STATES SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

(By Robert Khuzami)

Chairman Lieberman, Ranking Member Collins, and Members of the Committee:

Thank you for the opportunity to provide a statement for the record on behalf of the U.S. Securities and Exchange Commission on the subject of insider trading.

Insider trading threatens the integrity of our markets, depriving investors of the fundamental fairness of a level playing field. To deter this conduct and to hold accountable those who fail to play by the rules, the detection and prosecution of those who engage in insider trading remains one of the Division of Enforcement's highest priorities.

My statement provides a summary of the Division of Enforcement's recent work in the area of insider trading, an overview of the law of insider trading as developed through our enforcement program and judicial precedent, and a description of how the current law of insider trading applies to securities trading by Members of Congress and their staffs.

ENFORCEMENT'S INSIDER TRADING PROGRAM

Insider trading has long been a high priority for the Commission. Approximately eight percent of the 650 average annual number of enforcement cases filed by the Commission in the past decade have been for insider trading violations. In the past two years, the Commission has been particularly active in this area. In fiscal year 2010, the SEC brought 53 insider trading cases against 138 individuals and entities, a 43 percent increase in the number of filed cases from the prior fiscal year. This past fiscal year, the Commission filed 57 actions against 124 individuals and entities, a nearly 8 percent increase over the number of filed cases in fiscal year 2010.

The increased number of insider trading cases has been matched by an increase in the quality and significance of our recent cases. In fiscal year 2011 and the early part of fiscal year 2012, the SEC obtained judgments in 18 actions arising out of its investigation of Galleon hedge fund founder Raj Rajaratnam, including a record $92.8 million civil penalty against Rajaratnam personally. The SEC also discovered and developed information that ultimately led to criminal convictions of Rajaratnam and others, including corporate executives and hedge fund managers, for rampant insider trading. In addition, we recently filed an insider trading action against Rajat Gupta, a former director of both Goldman Sachs and Procter & Gamble, whom we allege provided confidential Board information about both companies' quarterly earnings and about an impending $5 billion Berkshire Hathaway investment in Goldman Sachs to Rajaratnam, who traded on that information.

Among others charged in SEC insider trading cases in the past fiscal year were various hedge fund managers and traders involved in a $30 million expert networking trading scheme, a former Nasdaq Managing Director, a former Major League Baseball player, a Food and Drug Administration chemist, and a former corporate attorney and a Wall Street trader who traded in advance of mergers involving clients of the attorney's law firm. The SEC also brought insider trading cases charging a Goldman Sachs employee and his father with trading on confidential information learned by the employee on the firm's ETF desk, and charging a corporate board member of a major energy company and his son for trading on confidential information about the impending takeover of the company.

The Division also has targeted non-traditional cases involving the misuse or mishandling of material, non-public information. This past fiscal year, the Commission charged Merrill Lynch, Pierce, Fenner & Smith with fraud for improperly accessing and misusing customer order information for the firm's own benefit. The Commission also censured broker-dealer Janney Montgomery Scott LLC for failing to enforce its own policies and procedures designed to prevent the misuse of material, nonpublic information. Charles Schwab Investment Management was charged for failing to have appropriate information barriers for nonpublic and potentially material information concerning an ultra-short bond fund that suffered significant declines during the financial crises. This deficiency gave other Schwab-related funds an unfair advantage over other investors by allowing the funds to redeem their own investments in the ultra short-bond fund during its decline. The Commission also charged Office Depot, Inc. and two of its executives for violating Regulation FD by selectively disclosing to certain analysts and institutional investors that the company would not meet its earnings.

To respond to emerging risks, the Enforcement Division has developed several new initiatives targeted at ferreting out insider trading, which have enhanced our effectiveness in this area. During our recent reorganization, the Division established a Market Abuse Unit, with an emphasis on various abusive market strategies and practices, including complex insider trading schemes.

The Market Abuse Unit has spearheaded the Division's Automated Bluesheet Analysis Project, an innovative investigative tool that utilizes the ''bluesheet'' database of more than one billion electronic equities and options trading records obtained by the Commission in the course of insider trading investigations over the past 20 years. Using newly developed templates, Enforcement staff are able to search across this database to recognize suspicious trading patterns and identify relationships and connections among multiple traders and across multiple securities, generating significant enforcement leads and investigative entry points. While still in its early stages of development, this new data analytic approach already has led to significant insider trading enforcement actions that were not the subject of an SRO referral, informant tip, investor complaint, media report, or other external source.

As part of the reorganization, the Division also established a cooperation program to encourage key fact witnesses to provide valuable information. Insider trading investigations are extremely fact-intensive. Enforcement staff undertake the often painstaking work of collecting and analyzing trading data across equity and options markets, analyzing communications (email, telephone calls and instant messages, among others) and analyzing market-moving events (e.g., announcements of corporate earnings, product development, and acquisitions and mergers) to identify persons who may have engaged in insider trading or who may have information about such activity. Our new cooperation program is a valuable tool that can help us break open an insider trading investigation earlier in the process, thereby preserving resources. We are already seeing the effectiveness of the cooperation program in our insider trading cases and expect this trend to continue as more cooperators come forward in our investigations.

With an aggressive investigative approach that includes early coordination with the FBI, Department of Justice, and other law enforcement agencies, we have been able to identify potential cooperators who may assist criminal authorities with their covert investigative techniques, helping amass critical evidence in numerous insider trading investigations. Our work with certain SROs has provided valuable early tips, helping us mitigate the harm from insider trading schemes by freezing the illicit proceeds before funds are moved to offshore jurisdictions.

LAW OF INSIDER TRADING

There is no express statutory definition of the offense of insider trading in securities. The SEC prosecutes insider trading under the general antifraud provisions of the Federal securities laws, most commonly Section 10(b) of the Securities Exchange Act of 1934 (''Exchange Act'') and Rule 10b–5, a broad anti-fraud rule promulgated by the SEC under Section 10(b). Section 10(b) declares it unlawful ''[t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.'' Rule 10b–5 broadly prohibits fraud and deception in connection with the purchase and sale of securities. As the Supreme Court has stated, ''Section 10(b) and Rule 10b–5 prohibit all fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception,'' because ''[n]ovel or atypical methods should not provide immunity from the securities laws.''

There are two principal theories under which the SEC prosecutes insider trading cases under Section 10(b) and Rule 10b–5. The ''classical theory'' applies to corporate insiders—officers, directors, and employees of a corporation, as well as ''temporary'' insiders, such as attorneys, accountants, and consultants to the corporation. Under the ''classical theory'' of insider trading liability, a corporate insider violates Section 10(b) and Rule 10b–5 when he or she trades in the securities of the corporation on the basis of material, nonpublic information. Trading on such information qualifies as a ''deceptive device'' under Section 10(b), because ''a relationship of trust and confidence [exists] between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation.'' That relationship ''gives rise to a duty to disclose [or to abstain from trading] because of the 'necessity of preventing a corporate insider from . . . tak[ing] unfair advantage of . . . uninformed . . . stockholders.' ''

The Supreme Court has recognized that corporate ''outsiders'' can also be liable for insider trading under the ''misappropriation theory.'' Under this theory, a person commits fraud ''in connection with'' a securities transaction, and thereby violates Section 10(b) and Rule 10b–5, when he or she misappropriates confidential and material information for securities trading purposes, in breach of a duty owed to the source of the information. This is because ''a fiduciary's undisclosed, self-serving use of a principal's information to purchase or sell securities, in breach of a duty of loyalty and confidentiality, defrauds the principal of the exclusive use of that information.'' The misappropriation theory thus ''premises liability on a fiduciary-turned-trader's deception of those who entrusted him with access to confidential information.'' Under either the classical or misappropriation theory, a person can also be held liable for ''tipping'' material, nonpublic information to others who trade, and a ''tippee'' can be held liable for trading on such information.

A common law principle is that employees owe a fiduciary duty of loyalty and confidence to their employers. In addition, employees often take on contractual duties of trust or confidence as a condition of their employment or by agreeing to comply with a corporate policy. Accordingly, employees have frequently been held liable under the misappropriation theory for trading or tipping on the basis of material non-public information obtained during the course of their employment. This includes prosecution of federal employees who, in breach of a duty to their employer, the federal government, trade or tip on the basis of information they obtained in the course of their employment. For example, the SEC recently brought insider trading charges against a Food and Drug Administration employee alleging that he violated a duty of trust and confidence owed to the federal government under certain governmental rules of conduct when he traded in advance of confidential FDA drug approval announcements.

In light of existing precedent regarding the liability of employees—including federal employees—for insider trading, any statutory changes in this area should be carefully calibrated to ensure that they do not narrow current law and thereby make it more difficult to bring future insider trading actions against any such persons.

APPLICATION OF INSIDER TRADING LAW TO TRADING BY MEMBERS OF CONGRESS AND THEIR STAFF

The general legal principles described above apply to all trading within the scope of Section 10(b) and Rule 10b–5. There is no reason why trading by Members of Congress or their staff members would be considered ''exempt'' from the federal securities laws, including the insider trading prohibitions, though the application of these principles to such trading, particularly in the case of Members of Congress, is without direct precedent and may present some unique issues.

Just as in any other insider trading inquiry, there are several fact-intensive questions—including the existence and nature of the duty being breached and both the materiality and nonpublic nature of the information—that would drive the analysis of whether securities trading (or tipping) by a Member of Congress or staff member based on information learned in an official capacity violates Section 10(b) and Rule 10b–5.

The first question is whether the trading, or communicating the information to someone else, breached a duty owed by the Member or staff. Although there is no direct precedent for Congressional staff, there is case law from other employment contexts regarding misappropriation of information gained through an employment relationship. This precedent is consistent with a claim that Congressional staff, as employees, owe a duty of trust and confidence to their employer and that a Congressional staff member who trades on the basis of material nonpublic information obtained through his or her employment is potentially liable for insider trading under the misappropriation theory, like any other non-governmental employee.

The question of duty is more novel for Members of Congress. There does not appear to be any case law that addresses the duty of a Member with respect to trading on the basis of information the Member learns in an official capacity. However, in a variety of other contexts, courts have held that ''[a] public official stands in a fiduciary relationship with the United States, through those by whom he is appointed or elected.'' Commenters have differed on whether securities trading by a Member based on information learned in his or her capacity as a Member of Congress violates the fiduciary duty he or she owes to the United States and its citizens, or to the Federal Government as his or her employer.

Existing Congressional ethics rules also may be relevant to the analysis of duty for both Members and their staff. For example, Paragraph 8 of the Code of Ethics for Government Service provides that ''Any person in Government service should . . . [n]ever use any information coming to him confidentially in the performance of governmental duties as a means for making private profit.''

The second question is whether the information on which the Member or staff trades (or tips) is ''material''—that is, is there ''a substantial likelihood'' that a reasonable investor ''would consider it important'' in making an investment decision? Materiality is a mixed question of fact and law that depends on all the relevant circumstances. In some scenarios, it may be relatively clear that an upcoming Congressional action would be material to a particular issuer or group of issuers, while in others it may be more challenging to establish that.

The third critical question is whether the information on which the Member or staff traded (or tipped) is ''nonpublic.'' The Commission has stated that ''[i]nformation is nonpublic when it has not been disseminated in a manner making it available to investors generally.'' Whether information is ''nonpublic'' would likely depend on the circumstances under which the Member or staff learned the information and the extent to which the information had been disseminated to the public.

As with all issues of liability with regard to insider trading and other claims under Section 10(b), the conduct at issue must be intentional or reckless. Since all of these issues are inherently fact-specific, it is difficult to generalize about the likely outcome of any particular scenario. However, trading by Congressional Members or their staffs is not exempt from the federal securities laws, including the insider trading prohibitions.

APPLICATION OF TIPPER AND TIPPEE LIABILITY THEORIES TO MEMBERS OF CONGRESS AND THEIR STAFF

Communication of nonpublic information to others who either trade on the information themselves or share it with others for securities trading purposes, could be analyzed under the case law relating to tipper and tippee liability and also would turn on the specific facts of the case.

A person can be liable as a tipper where he or she discloses information in breach of a fiduciary duty or other similar duty of trust or confidence and the tippee trades on the basis of that information. The same duty requirement described above is applicable in the tipper context, as are the requirements that the tipped information be nonpublic and material. In addition, a court may require a showing that the Member of Congress or staff member personally benefited from providing the tip.

A person who trades on the basis of material, nonpublic information conveyed by a Member or staff member in breach of a duty also could be liable for illegal insider trading as a tippee. An additional element of liability is that the tippee knew or should have known of the tipper's breach of duty in disclosing the information.

Investigations into potential trading or tipping by Members of Congress or their staff could pose some unique issues, including those that may arise from the Constitutional privilege provided to Congress under the Speech or Debate Clause, U.S. Const. art. I, §6, cl.1. The Supreme Court has stated that ''[t]he Speech or Debate 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.'' The Clause ''protects Members against prosecutions that directly impinge or threaten the legislative process.'' While the ''heart'' of the privilege is speech or debate in Congress, courts have extended the privilege to matters beyond pure speech and debate in certain circumstances. There may be circumstances in which communication of nonpublic information regarding legislative activity to a third party falls ''within the 'sphere of legitimate legislative activity,' '' and thus may be protected by the privilege.

CONCLUSION

The SEC's continued focus on insider trading and innovative investigative techniques demonstrates our commitment to pursuing potentially suspicious trading in a variety of contexts. While recent innovations in the Division of Enforcement are enhancing our ability to obtain that evidence, to establish liability we must satisfy each of the elements of an insider trading violation, including the materiality of the information, the nonpublic nature of the information, the presence of scienter, and a fiduciary or other duty of trust and confidence that was violated by the trading or tipping. While trading by Members of Congress or their staff is not exempt from the federal securities laws, including the insider trading prohibitions, there are distinct legal and factual issues that may arise in any investigations or prosecutions of such cases. Any statutory changes in this area should be carefully calibrated to ensure that they do not narrow current law and thereby make it more difficult to bring future insider trading actions against individuals outside of Congress.

Ms. COLLINS. I now yield the floor to the sponsor of the bill, Senator BROWN.

The ACTING PRESIDENT pro tempore. The Senator from Massachusetts.

Mr. BROWN of Massachusetts. Mr. President, I wish to thank Ranking Member COLLINS and Chairman LIEBERMAN for doing something very unusual around here, which is to get something out in a very short period of time, having it not only come up and being filed by Senator GILLIBRAND—her bill and even my bill—and then you both working together to move it forward for a hearing. That hearing going very well and coming out so quickly is unheard of, and I wish to thank you for that.

I also wish to thank Leader REID for bringing this bill to the floor today as well as, as I said, Chairman LIEBERMAN, Ranking Member COLLINS, and Senator GILLIBRAND. We have worked together to draft a bipartisan version of the STOCK Act, an act that passed out of committee by an overwhelming margin. That is appropriate because this isn't a partisan or ideological issue. It is about cleaning up Washington.

Abraham Lincoln spoke at Gettysburg of fighting to preserve ''government of the people, by the people, and for the people.'' I think that if the approval ratings are any indication, the American people have lost faith that we are living up to Lincoln's ideal, and we need to do it better. They have lost faith that Congress works for them. They believe too many Members of Congress have come to Washington to make themselves rich or to do other things instead of taking care of the people's business and that Congress only steps in to bail out the people with the most money or the most lobbying power, and that is not right.

With the bill before us today, we can take a small step to reestablishing the trust between the American people and Congress. If we can pass the STOCK Act this week, it will send a very strong and unified message to the American people that Congress does not consider itself to be above the law. We can start to finally address that deficit of trust that the President referenced in his State of the Union Address. Members of Congress must live by the same rules that govern every other American citizen.

As you may recall from a ''60 Minutes'' investigation only 2 months ago, we learned that Members of Congress, their staff, as well as other Federal employees, may be using material nonpublic information for their personal gain, either through stock trades, real estate deals or other financial activity. Everyone agrees this should be illegal or it already is, as referenced by the ranking member and her very thorough explanation of the law and the problems with it. But somehow, despite all the evidence, there has never been a single Member of Congress or congressional staffer charged with insider trading.

I have to admit, similar to you and many others, I was shocked by this report. I think we all were. As a result, I filed my version of the STOCK Act, which would prohibit Members and employees of Congress from using material nonpublic information for their personal benefit.

When Homeland Security and Governmental Affairs Committee held a hearing on the state of insider trading law as it applies to Congress, one thing was very clear. Although, as Ranking Member COLLINS said, the SEC theoretically has the ability to prosecute Members, there has been no precedent for it, and the state of law at this point is very unsettled. To remove any and all doubt, we need to act, and we need to act now. In addition to clarifying that insider trading is indeed a criminal offense, we are increasing the transparency of Members' trading activity to make sure our investment decisions are out there for everyone to see as plain as day. As President Ronald Reagan liked to say: Trust but verify.

In conclusion, I wish to say that Senator COBURN has a phrase that I think is very accurate in this context. He talks about all the earmarks and contracts and Washington spending that end up in the hands of those people he calls well-heeled and well-connected. In my opinion, no one is more well-connected, with more access to a wide range of privileged, nonpublic information, than Members of Congress, their friends, employees or family members.

At a time when our economy is struggling and the average American family has to make hard economic choices, congressional Members and staff should not be lining their pockets on insider information. Serving our country is a privilege, one I cherish very much. I believe we must level the playing field and show the American people that the people in Congress do not consider themselves to be above the laws we expect everyone else across the country to obey.

I believe it is time to listen to our constituents and remember that every seat in this room is the people's seat.

I yield the floor.

The PRESIDING OFFICER (Mr. BLUMENTHAL). The Senator from New York.

Mrs. GILLIBRAND. I thank my colleague from Massachusetts for his strong advocacy on such an important issue. I would like to recognize Chairman LIEBERMAN and Ranking Member COLLINS for their leadership and advocacy and their work on getting this out of the committee so quickly.

I urge my colleagues to vote yes on cloture tonight on this bipartisan bill to ensure clearly and unambiguously that all Members of Congress, their staffs, and Federal employees play by the exact same rules as all the American people. The American people deserve the right to know their lawmaker's only interest is what is best

for the country, not their own financial interests. Members of Congress and their families and staff should not be able to gain personal profit from information to which they have access that everyday middle-class Americans do not. It is simply not right. Nobody should be above the rules. I introduced a bipartisan bill in the Senate with 28 of our colleagues from both sides of the aisle to close this loophole.

The STOCK Act legislation is very similar to the legislation introduced by my friends in the House of Representatives, Congresswoman LOUISE SLAUGHTER and Congressman TIM WALZ. I thank them for their longstanding advocacy and dedication to this important cause. I again thank Chairman LIEBERMAN, Ranking Member COLLINS, and all the committee members for their work in acting swiftly to move this bipartisan, commonsense bill to the floor for a vote. I also thank Leader REID for his leadership in moving this body forward to this important debate and an up-or-down vote that the American people deserve.

Our bill, which has received the support of at least seven good-government groups, covers two important principles:

First, Members of Congress, their families, and their staff should be barred from buying or selling securities on the basis of knowledge gained through their congressional service or from using the knowledge to tip off anyone else. The SEC and the CFTC must be empowered to investigate these cases. To provide additional teeth, such acts should also be in violation of Congress's own rules, to make it clear that the activity is inappropriate.

Second, Members should be required to disclose transactions within 30 days, to make this information available online for their constituents to see, providing dramatically improved oversight and accountability from the current annual hard copy reporting.

I am pleased that the final product that passed with bipartisan support out of the committee is a strong bill with teeth and includes measures such as ensuring that Members of Congress cannot tip off others with nonpublic information gained through their duties and ensuring that trading with this information would be a violation of Congress's own ethics rules.

Some critics have said this bill is unnecessary and is already covered under current statutes. I have spoken with experts tasked in the past with investigations of this nature, and they strongly disagree. We must make it unambiguous that this kind of behavior is illegal.

My home State newspaper, the Buffalo News, noted:

> . . . the STOCK Act would ensure that it is the people's business being attended to.

President Obama said in his State of the Union—send him the bill and he will sign it right away.

We should not delay. It is time to act. I urge my colleagues to vote yes tonight for cloture so we can pass this bill without delay. Let's take this step to begin rebuilding the trust necessary in Congress.

The PRESIDING OFFICER. The Senator from Montana.

Mr. TESTER. Mr. President, today the Senate will be given the opportunity to ban insider trading by Members of Congress and their staff. Insider trading is illegal for everyone in America, and there is no doubt about that. But when it comes to the information that folks in Congress learn before the general public learns it, there are no clear-cut rules, and that is unacceptable. Folks in Congress clearly have advanced knowledge of which bills and issues Congress will consider. They know how those bills will affect basic goods and services, and often the legislation we pass impacts how well a company does on the stock market.

Good men and women work for Congress, and I have the deepest respect for my colleagues. I would say all come to the Senate with good intentions and carry out their daily responsibilities without thinking about using information they learn for personal financial gain. That is why banning insider trading should be an easy lift. The fact that Members of Congress and their staffs are allowed to buy and sell stocks based on privileged information is incredible to me.

Congress has historically low approval ratings from the American people. They believe many in Congress do not represent them and have forgotten what it means to be a normal American. Most folks would assume Congressmen and Senators already cannot trade stocks based on information they get in their jobs, but it turns out this may not be true. That is just one more example of why the American people have lost faith in this institution.

As elected officials, it is our duty to regain the trust of the American people. We have an obligation to be as transparent and as accountable as possible. That is why I was the first Member of Congress to post my public schedule online for everybody to see. My constituents can look at my schedule every day to see with whom I meet and which hearings I attend.

Now we have the opportunity to help regain trust in this body by bringing our own rules in line with the rest of America. By adding transparency and accountability, the American people will know we are working on their behalf without considering personal financial gains.

This bill contains a provision Senator BEGICH and I sponsored to ensure that the annual financial disclosure forms filed by Members of Congress are available electronically. As with most transparency, full transparency means the public has the right and the ability to see our records. In the 21st century, there is no reason we can't do it right away. Letting those disclosures sit in a filing cabinet somewhere in the Capitol Complex is not transparency; putting the files online in a searchable format is.

At a time of hyperpartisanship, this is an opportunity for both sides to work together on a bill we sorely need. There is not a Democratic or Republican angle to this. Every elected official should want to make sure the rules we are held to are consistent and transparent and in line with the rest of the Nation. In fact, this is as nonpartisan a bill as can be, with ideas from Senator GILLIBRAND and Senator SCOTT BROWN but carried by Senator LIEBERMAN. This bill covers each section of the political spectrum. It is a straightforward bill that is long overdue. The STOCK Act will be a step toward ensuring that when people run for Congress or come to work for Congress, they are doing so because they want to work on behalf of the American people and not for their own personal benefit.

I call on my colleagues on both sides of the aisle to vote yes on this act so we can restore faith in Congress.

I yield the floor.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. BROWN of Massachusetts. Mr. President, I failed to reference—I was hopeful I could have Nathaniel Hoopes participate in the legislative process and participate on the floor in this debate.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. LIEBERMAN. I was going to reserve the right to object to Mr. BROWN's motion on behalf of Mr. Hoopes because I was about to that say the above-mentioned Mr. Hoopes got his start in my office and I was looking for an opportunity to say that.

We have about 20 minutes until the vote on the motion occurs. Obviously, we are all here together—Senator COLLINS, Senator BROWN, Senator GILLIBRAND, Senator TESTER, and I—to urge Members to vote for cloture, to take up this measure. It would be a ray of light—warm light—if we pass this measure, this cloture vote, overwhelmingly. Then we could go on to debate it.

Some people may have amendments—obviously, I presume they will—they want to offer. I hope that in considering amendments, our colleagues will focus on the problem that stimulated this legislation, that led Senator BROWN and Senator GILLIBRAND to introduce it and led our committee to pass it out on a bipartisan vote, which was the concern that Members of the Congress and our staffs are not covered by insider trading laws. This legislation makes clear that we are covered by insider trading laws and therefore can be investigated and prosecuted for violation of those laws, both by the SEC and the Justice Department, but we have also asked the ethics committees of both Houses of Congress to issue interpretive guidance, making clear that insider trading is also a violation of the ethics rules of both Chambers.

I am sure there are a lot of different aspects that Members of Congress, including ourselves on our committee who worked on this bill, might have in mind to also correct problems that exist, perhaps to also try to help rebuild public confidence in the institution of Congress, but I really appeal to our colleagues not to do so in a way that will make it more difficult or at worst impossible to fix the wrong, the problem that motivated this legislation, which is fear that Members of Congress and our staffs are not covered by insider trading laws.

I have talked to Senator COLLINS about this. Members have other ideas. Please introduce them as legislation. To the extent they are forwarded to our committee, we will give them hearings and due consideration and try to approach them thoughtfully and then follow the will of the majority of members of our committee. In other words, let's try to not make this measure so sweet or so good that it cannot pass.

I say to my colleagues, I just had a very unusual metaphor come to mind. I go to Dr. Seuss, one my favorite Dr. Seuss books I have not read in a while, ''Thidwick the Big-Hearted Moose.'' I don't know if you remember Thidwick, but he was a very good-natured moose. One by one through the pages of the book as Dr. Seuss records it, other animals in the forest want to lodge in his enormous antlers. He welcomes them until finally there is too much there and his antlers fall off and they all fall to the ground. We don't want this wonderful bill, which really does accomplish some very important things, to be so loaded that it falls to the wayside like Thidwick's antlers and does not pass.

I urge my colleagues to join us in a spirited debate, but let's exercise the kind of restraint, on a bipartisan basis, that will allow us to have a significant, bipartisan, good-government accomplishment here at the beginning of this session of Congress.

I listened to a conversation a while ago where somebody was asked, why is the public opinion of Congress so bad? And the answer was that it is because Congress has been so bad. This has not been a time in the history of this great institution that I think any of us feel good about. This is an opportunity to do something real that we can not only feel good about but, more important, that our constituents can feel good about.

I hope we will have a resounding vote at 5:30.

I yield to the Senator from Massachusetts.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. BROWN of Massachusetts. Mr. President, I concur, and I have always felt one good deed begets another good deed, and so on and so forth. This is a measure the American people are clamoring for. We need to reestablish the trust with the American people, and this is the first step in doing that very thing.

Once again, I thank the chairman for referencing something I failed to reference as well. I would encourage my colleagues on my side of the aisle and my friends on the other side of the aisle to keep all amendments germane. We need to make sure we move for cloture, get cloture, and then have a free, fair, and spirited debate on the issues that concern them but don't get sidetracked to the point where the bill gets killed or pulled. I think that would be a travesty and a mistake. So I am going to encourage my colleagues to make sure if they have a concern, let's air it out and take a full and fair vote on it and move forward.

I love hearing the Senator's stories. I am reading his book because of his knowledge and history and the way he can weave things back and forth. That is a very good analogy.

I too have concerns. We have referenced many times that there may be forces beyond us who want to make sure this doesn't come out of this Chamber and go next door and then ultimately be signed by the President. I am not one of them. I want to make sure—as the Senator from Connecticut, the Senator from Maine, and many of the other Members and the cosponsors—that this bill comes out in a good and fair form.

We are here for a very specific reason, to address a very specific issue that affects people, quite frankly, in a manner that I never thought was possible. If there are other concerns, I commend the chairman for publicly stating to bring them up in a separate matter on a separate bill and address them if there are issues we have missed. I have a fear—and I hope I am wrong—that by making it, as the Senator from Connecticut referenced, too perfect or too sweet, it could fail, and I don't want to see that. I want to make sure we have a laser-sharp bill that addresses a very specific issue, and if we do it together and work in a true bipartisan manner, we have an opportunity right now in this moment in our history of this country to do something special.

I was sent here to do the people's business, and I do it each and every day by working across party lines with good people and good Democrats like the Senator from Connecticut and others. I take that role very seriously. We have an opportunity right now to send a very powerful message for which the American people are yearning. They want us to do well. They want us to be good. They want us to be better than we have been representing ourselves right now.

So I am encouraging—just to reference and take it a step further—my colleagues to do the same thing. Let's put our party differences aside. Let's put the inner party differences aside and push this legislation through in a thoughtful, methodical, respectful, and responsible manner that will make the American people say: OK, it is a good first step. What is next, Congress? Are we going to do the postal bill and try to save the postal bill? I hope that is the next issue. We need to work in a truly bipartisan manner.

Once again, who is here? It is me, Senator LIEBERMAN, Senator COLLINS, and Senator COCHRAN who are pushing to try to save the post office. That should be the next issue. What is after that? We need to address our fiscal and financial issues so we can come out of this 3-year recession in a lean-and-mean manner so we can be a better country and be able to compete on a global basis. We need to start putting the American people's interests first instead of everybody else's.

I usually get in trouble when I go off like this, but I think it is critically important to let the people know that one good deed begets another good deed, and this is the first step in this new calendar year to do just that.

I yield the floor.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. LIEBERMAN. I appreciate the comments.

Mr. President, I am pleased to report that I just received notice that within the hour the administration put out the Statement of Administration Policy—the so-called SAP—strongly endorsing this legislation, S. 2038, and we appreciate that very much. It is a very strong statement of support for the principles and exactly the kinds of things Senator COLLINS, Senator BROWN, Senator GILLIBRAND, Senator TESTER, and I have been saying.

As the President said in his State of the Union speech, if we can get this bill to his desk—and the sooner the better—he will sign it as soon as he possibly can.

If there is no one else who wishes to speak at this time, I would suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. LIEBERMAN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

CLOTURE MOTION

Under the previous order and pursuant to rule XXII, the Chair lays before the Senate the pending cloture motion, which the clerk will report.

The assistant legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, hereby move to bring to a close the debate on the motion to proceed to Calendar No. 301, S. 2038, the Stop Trading on Congressional Knowledge Act:

Harry Reid, Joseph I. Lieberman, Sherrod Brown, Joe Manchin III, Tom Udall, Mark Begich, Herb Kohl, Bill Nelson, Frank R. Lautenberg, Jeanne Shaheen, Richard Blumenthal, Benjamin L. Cardin, Christopher A. Coons, Dianne Feinstein, Patrick J. Leahy,

Richard J. Durbin, Patty Murray, and Charles E. Schumer.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call has been waived.

The question is, Is it the sense of the Senate that the debate on the motion to proceed to S. 2038, a bill to prohibit Members of Congress and employees of Congress from using nonpublic information derived from their official positions for personal benefit, and for other purposes, be brought to a close?

The yeas and nays are mandatory under the rule.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from Louisiana (Ms. LANDRIEU) and the Senator from New Jersey (Mr. MENENDEZ) are necessarily absent.

Mr. KYL. The following Senators are necessarily absent: the Senator from Georgia (Mr. ISAKSON), the Senator from Illinois (Mr. KIRK), and the Senator from Mississippi (Mr. WICKER).

The yeas and nays resulted—yeas 93, nays 2, as follows:

[Rollcall Vote No. 3 Leg.]

YEAS—93

Akaka	Franken	Moran
Alexander	Gillibrand	Murkowski
Ayotte	Graham	Murray
Barrasso	Grassley	Nelson (NE)
Baucus	Hagan	Nelson (FL)
Begich	Harkin	Paul
Bennet	Hatch	Portman
Bingaman	Heller	Pryor
Blumenthal	Hoeven	Reed
Blunt	Hutchison	Reid
Boozman	Inhofe	Risch
Boxer	Inouye	Roberts
Brown (MA)	Johanns	Rockefeller
Brown (OH)	Johnson (SD)	Rubio
Cantwell	Johnson (WI)	Sanders
Cardin	Kerry	Schumer
Carper	Klobuchar	Sessions
Casey	Kohl	Shaheen
Chambliss	Kyl	Shelby
Coats	Lautenberg	Snowe
Cochran	Leahy	Stabenow
Collins	Lee	Tester
Conrad	Levin	Thune
Coons	Lieberman	Toomey
Corker	Lugar	Udall (CO)
Cornyn	Manchin	Udall (NM)
Crapo	McCain	Vitter
DeMint	McCaskill	Warner
Durbin	McConnell	Webb
Enzi	Merkley	Whitehouse
Feinstein	Mikulski	Wyden

NAYS—2

Burr	Coburn

NOT VOTING—5

Isakson	Landrieu	Wicker
Kirk	Menendez	

The PRESIDING OFFICER. On this vote, the yeas are 93, the nays are 2. Three-fifths of the Senators duly chosen and sworn having voted in the affirmative, the motion is agreed to.

The Senator from Connecticut.

MORNING BUSINESS

Mr. LIEBERMAN. Mr. President, I ask unanimous consent that the Senate proceed to a period of morning business, with Senators permitted to speak therein for up to 10 minutes each, and that Senator GRASSLEY be recognized to speak for up to 20 minutes.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

ORDER OF BUSINESS

Mr. LIEBERMAN. Mr. President, on behalf of the majority leader, he has asked me to announce there will be no more votes tonight.

If I may say, on my own behalf, we will go to the STOCK Act, S. 2038, tomorrow morning and hope anyone who has a relevant amendment will come to the floor and offer it.

I yield the floor.

The PRESIDING OFFICER (Mrs. HAGAN). The Senator from Iowa.

ORDER OF PROCEDURE

Mr. GRASSLEY. Madam President, I have been asked by Senator BROWN of Ohio if he could be recognized immediately after me.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

RECESS APPOINTMENTS

Mr. GRASSLEY. Madam President, one week ago today, I addressed the Senate on President Obama's decision to bypass the Senate, and the Constitution as well, by making four ''recess'' appointments at a time when the President's recess appointment power did not apply.

I explained in detail why the legal memo released by the Obama administration attempting to justify President Obama's actions did not hold legal water.

Last Thursday, I laid out the case that this is not an isolated incident or a technical legal squabble. Rather, the President's recent actions are part of a pattern of disregard for the constitutional system of checks and balances.

Today, I will address why such criticisms are justified and why such criticisms are necessary.

First, is it legitimate for a U.S. Senator to criticize a legal opinion issued by the Office of Legal Counsel and the Senate-confirmed head of that office?

I have no doubt Senators may criticize such opinions and, when the facts warrant, ask whether that office and its head are exercising the independence that is required for the Constitution to be upheld. Recently, we read some in the media apparently disagreed with this. They say it is wrong for a Senator to ever criticize a Senate-confirmed official's independence and judgment. They say that all a Senator can do is criticize the official's substantive arguments.

I say nonsense. When the media makes these claims, it merely seeks to divert attention from the weakness of the opinion's actual conclusions and reasoning. In my statement last week, I laid out my disagreement with the contents of the Office of Legal Counsel. Of course, Senators and administration officials can reach different conclusions on the law; each can have a reasonable point of view; but that is not the case here.

If the Office of Legal Counsel is to be ''the Constitutional conscience of the administration'' that some in the media characterize it to be, it must exercise a certain level of independence, as I mentioned in my statement.

When a President who takes an expansive view of his power asks the Justice Department officials, who owe their job to him, whether he has the constitutional or legal authority to take such action, there is always the chance that pressure will overtake their responsibilities to provide their best legal judgment.

That is why at Ms. Seitz' confirmation hearing and in a followup communication, we took very painstaking efforts to give her the opportunity to state on the record her commitment to providing independent legal advice, to make sure she would place loyalty to the law and loyalty to the Constitution above her loyalty to the President. That was our purpose. Ms. Seitz promised to act independently. She promised not to stand idly by if she thought the Constitution was being violated.

The only way to tell whether the office has given independent advice, the only way to tell whether pressure has been resisted, is to review the arguments and the reasoning the Office of Legal Counsel provides.

The media cannot address criticism of whether the head of that office is independent and has used good judgment without such a review. It is not enough that the media might agree with her conclusions. In this case, the analysis in the Office of Legal Counsel opinion was so poor as to raise legitimate questions concerning judgment and independence.

The Office of Legal Counsel is supposed to give the President objective legal advice before that person acts. It is not supposed to provide a weakly thought-out rationalization for a Presidential decision to act that has already been made.

Here, the arguments in the opinion are so weak that a fair-minded person can question the independence and judgment of the opinion's author. For instance, the opinion is internally inconsistent. It correctly recognizes that a President's ability to make recess appointments turns on the capacity of the Senate to conduct business. But in determining whether the pro forma sessions constitute a recess, the opinion does not consider at all the capacity of the Senate to conduct business and what it could do. Rather, it relies upon what individual Senators said, not what the institution said or can do, and it ignores not only what theoretically the capacity of the Senate had to act but even its actual actions.

Similarly, the established meaning of the word ''recess'' is the same each