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### Section 20(d) of the Securities Exchange Act: Congress, the Supreme Court, the SEC and the Process of Defining Insider Trading

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# SECTION 20(d) OF THE SECURITIES EXCHANGE ACT: CONGRESS, THE SUPREME COURT, THE SEC, AND THE PROCESS OF DEFINING INSIDER TRADING

STEVE THEL\*

A comment in a recent volume of the *North Carolina Law Review* analyzed option traders' standing to recover under the Securities and Exchange Commission's rule 10b-5<sup>1</sup> for issuer misrepresentations and insider trading.<sup>2</sup> Among other things, the comment argued that corporate insiders should not trade standardized options on corporate securities while in possession of inside information, and that when they do so trade they injure other option traders. The comment suggested that option traders should have the same rights against corporate insiders who trade options on corporate stock as people who trade the underlying stock have against insiders who trade the stock. Specifically, the comment concluded that a person who has traded standardized options on corporate stock should have a private right of action against any corporate insider who traded such options at the same time if the insider was in possession of material, nonpublic corporate information.<sup>3</sup>

This argument was based on certain forcefully stated principles of fairness taken as fundamental and in keeping with the "metaphysical foundations" of the federal securities laws.<sup>4</sup> Anyone who accepts these premises probably would agree that corporate insiders should be forbidden to trade options on corporate stock while in possession of material, nonpublic corporate information and that public option traders should have standing to challenge such trading. Most people probably do accept these premises and most probably would object to corporate insiders' trading options on the basis of inside information. Not everyone thinks insider trading is unfair, however, and even if insider trading in standardized options is inappropriate, recent Supreme Court decisions, particularly *Chiarella v. United States*,<sup>5</sup> can be read to pose serious doctrinal obstacles to any effective prohibition of such trading.

The comment dealt with the *Chiarella* problem at length,<sup>6</sup> but it did not consider the way the situation was changed by section 20(d) of the Securities

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1. 17 C.F.R. § 240.10b-5 (1990).

2. Comment, *Options Traders, Rule 10b-5, and Standing: Making Sense of It All*, 67 N.C.L. REV. 1124 (1989).

3. *Id.* at 1139-48.

4. *Id.* at 1125.

5. 445 U.S. 222 (1980).

6. Comment, *supra* note 2, at 1138-39.

Exchange Act of 1934,<sup>7</sup> which was enacted as part of the Insider Trading Sanctions Act of 1984 (Sanctions Act).<sup>8</sup> Broadly speaking, section 20(d) puts insider trading in a derivative instrument like a stock option on the same footing as insider trading in the security underlying the derivative instrument. This effectively makes it illegal for corporate insiders to trade options on the basis of nonpublic inside information and gives option traders standing to sue insiders who trade options illegally.<sup>9</sup> In an important sense then, Congress agrees that insider trading in stock options is objectionable and, perhaps more importantly, that such trading is essentially the same as insider trading in stock. This Essay develops some of the implications of that agreement for the way the federal securities laws are understood and applied.<sup>10</sup>

The term "insider trading" is not defined in the federal securities statutes, but it often is used to refer generally to all trading by people who possess material, nonpublic information. This definition encompasses not only corporate insiders' buying stock on the basis of nonpublic corporate information, but also trading by people who are not affiliated with the issuers of the securities they trade and trading motivated by relevant nonpublic information originating outside the issuer.<sup>11</sup> The House committee report on the Sanctions Act used the term in this broad sense: "'Insider trading' is the term used to refer to trading in the securities markets while in possession of 'material' information (generally, information that would be important to an investor in making a decision to buy or sell a security) that is not available to the general public."<sup>12</sup>

Insider trading of this sort is not always illegal.<sup>13</sup> Specific instances of insider trading, however, may run afoul of one or another of several provisions of

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7. 15 U.S.C. § 78t(d) (1988). Section 20(d) provides:

Wherever communicating, or purchasing or selling a security while in possession of, material, nonpublic information would violate, or result in liability to any purchaser or seller of the security under any provision of this chapter, or any rule or regulation thereunder, such conduct in connection with a purchase or sale of a put, call, straddle, option, or privilege with respect to such security or with respect to a group or index of securities including such security, shall also violate and result in comparable liability to any purchaser or seller of that security under such provision, rule, or regulation.

*Id.*

8. Pub. L. No. 98-376, 98 Stat. 1264 (1984) (codified in scattered sections of 15 U.S.C.).

9. See also Securities Exchange Act of 1934 § 20A, 15 U.S.C. § 78t-1 (1988) (liability to contemporaneous traders for insider trading).

10. This Essay builds on Comment, *supra* note 2. More extensive discussion of the controlling precedent and citation to the secondary literature can be found there. See also Friedman, *The Insider Trading and Securities Fraud Enforcement Act of 1988*, 68 N.C.L. REV. 465 (1990) (describing current law).

11. H.R. REP. NO. 355, 98th Cong., 1st Sess. 2-3 (1983), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 2274, 2277-78; see also Memorandum of the Securities and Exchange Commission in Support of the Insider Trading Sanctions Act of 1982, reprinted in H.R. REP. NO. 355, *supra*, at 21 n.33 ("'Insider trading' is the term commonly used to describe the act of purchasing or selling securities while in possession of material, nonpublic information about an issuer or the trading market for an issuer's securities."), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 2274, 2293; Wang, *The "Contemporaneous" Traders Who Can Sue an Inside Trader*, 38 HASTINGS L.J. 1175, 1175 n.2 (1987) (adopting a similar definition).

12. H.R. REP. NO. 355, *supra* note 11, at 2, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 2274, 2275.

13. The term "insider trading" is sometimes restricted to illegal trading. See D. LANGEVOORT, INSIDER TRADING REGULATION 5 (1991).

the federal securities laws, particularly rule 10b-5,<sup>14</sup> under which the well-publicized crusade against insider trading has been mounted.<sup>15</sup> The operative scope of rule 10b-5 is important, but hard to define. The rule does not speak to insider trading directly, and it is framed in extremely broad terms. It is impossible to say (succinctly or otherwise) just what rule 10b-5 requires or forbids, and it is not always clear whether insider trading is illegal. Nonetheless, it is fairly clear how the rule applies to the paradigm case from which the practice of trading on the basis of nonpublic information gets its conventional name: it is a violation of rule 10b-5 for a corporation's directors or senior officers to buy common stock of the corporation on the basis of material, nonpublic information acquired from the corporation. Before Congress acted in 1984, however, it was not so clear that insider trading in options was legally equivalent to insider trading in stock; it may have been legal for insiders to trade options on corporate common stock at the same time that it was illegal for them to trade the underlying common stock directly.<sup>16</sup>

Any explanation of the positive law of insider trading must start with the Supreme Court's 1980 opinion in *Chiarella*.<sup>17</sup> Vincent Chiarella, a mark-up man for a financial printer, was convicted of violating rule 10b-5 and section 10(b) of the Exchange Act<sup>18</sup> after he profitably traded securities on the basis of confidential information he uncovered during the course of his employment.<sup>19</sup>

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14. 17 C.F.R. § 240.10b-5 (1990).

15. See also Securities Exchange Act of 1934 §§ 14(e), 16, 15 U.S.C. §§ 78n(e), 78p (1988) (establishing liability for untrue statements of material fact and omissions of facts with respect to tender offers); rule 14e-3, 17 C.F.R. § 240.14e-3 (1990) (regulations surrounding transactions made by directors, officers, and principal stockholders).

16. See generally T. HAZEN, *THE LAW OF SECURITIES REGULATION* 680-82 (2d ed. 1990) (discussing stock rights and options in the insider trading context); Crespi, *Private Rights of Action for Option Position Holders Under Section 20(d) of the Securities Exchange Act*, 16 SEC. REG. L.J. 21, 21-30 (1988) (discussing availability of private right of action for option holders under § 20(d) of the Securities Exchange Act); Langevoort, *Commentary: The Insider Trading Sanctions Act of 1984 and Its Effect on Existing Law*, 37 VAND. L. REV. 1273, 1290-91 (1984) (outlining effect of Insider Trading Sanctions Act of 1984 on trading options); Silver, *Penalizing Insider Trading: A Critical Assessment of the Insider Trading Sanctions Act of 1984*, 1985 DUKE L.J. 960, 965-66 (describing the options market and its implications on insider trading); Thel, *Closing a Loophole: Insider Trading in Standardized Options*, 16 FORDHAM URB. L.J. 573, 573-76 (1988) (addressing the applicability of rule 10b-5 to close loopholes allowing corporate insiders to trade standardized options on corporate stock when they cannot trade the stock itself); Wang, *A Cause of Action for Option Traders Against Insider Option Traders*, 101 HARV. L. REV. 1056, 1056-60 (1988) [hereinafter Wang, *A Cause of Action*] (outlining cause of action available for options traders under § 20(d) of the Insider Trading Sanctions Act of 1984); Wang, *supra* note 11, at 1187-91 (discussing whether a contemporaneous trader must buy or sell a security or option with the same issuer as the security bought or sold by the inside trader); Wang, *Trading on Material, Nonpublic Information on Impersonal Stock Markets: Who is Harmed, and Who Can Sue Under SEC Rule 10b-5?*, 54 S. CAL. L. REV. 1217, 1286-87 (1981) (reviewing the effects of trading puts and calls under rule 10b-5); Comment, *supra* note 2, at 1154-59 (outlining situations in which option traders could have standing to sue under rule 10b-5); Note, *Insiders, Options and the Fiduciary Principle: A Rule 10b-5 Loophole*, 16 FORDHAM URB. L.J. 295, 321-28 (1988) (discussing insider trading in options); Note, *Private Causes of Action for Option Investors Under SEC Rule 10b-5: A Policy, Doctrinal, and Economic Analysis*, 100 HARV. L. REV. 1959, 1959-78 (1987) (discussing private actions for option investors under rule 10b-5); Note, *Securities Regulation for a Changing Market: Option Trader Standing Under Rule 10b-5*, 97 YALE L.J. 623, 625-30 (1988) (reviewing option trader cases and standing under rule 10b-5).

17. *Chiarella v. United States*, 445 U.S. 222 (1980).

18. 15 U.S.C. § 78j(b) (1988).

19. *Chiarella*, 445 U.S. at 225.

Reversing Chiarella's conviction, the Court held that to obtain a conviction, the government must prove more than that the defendant traded securities while in possession of material, nonpublic information.<sup>20</sup> While the holding was narrow, the Court's explanation had important implications for the law of insider trading.<sup>21</sup> Among other things, the Court's reading of section 10(b) suggested that the SEC is powerless to forbid corporate insiders from trading standardized options while in possession of material, nonpublic corporate information.<sup>22</sup>

The Court's starting point in *Chiarella*, as in most of its recent rule 10b-5 cases, was the language of section 10(b).<sup>23</sup> Section 10(b) authorizes the SEC to regulate the use of "any manipulative or deceptive device or contrivance" in connection with the purchase or sale of a security.<sup>24</sup> Chiarella had not lied to anyone, and the case turned on the legal effect of his silence.<sup>25</sup> The Court held that silence cannot be deceptive (the Court used the word "fraudulent") within the meaning of section 10(b) unless the silent party has a duty to speak.<sup>26</sup> Because the trial judge had permitted the jury to convict upon a naked finding that Chiarella had failed to disclose material, nonpublic information, without regard to whether he had a duty to disclose that information, the conviction had to be reversed.<sup>27</sup>

Although the Court reversed Chiarella's conviction, it indicated that rule 10b-5 and section 10(b) prohibit some insider trading. Specifically, the Court suggested that someone under a duty to disclose information before consummating a securities transaction violates the rule and section if she trades before making the required disclosure.<sup>28</sup> The Court also seemed to accept the SEC's contention that corporate insiders have a duty to disclose material, nonpublic corporate information before buying corporate stock, that duty arising from "the relationship of trust and confidence between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation."<sup>29</sup> It follows that when a corporate insider in possession of material, nonpublic corporate information buys common stock from a public stockholder without disclosing that information first, she violates rule 10b-5 and section 10(b).

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20. *Id.* at 235-37.

21. See generally Langevoort, *Insider Trading and the Fiduciary Principle: A Post-Chiarella Restatement*, 70 CALIF. L. REV. 1 (1982) (discussing implications of *Chiarella*).

22. See Comment, *supra* note 2, at 1137-48.

23. 445 U.S. at 226; see also *Aaron v. SEC*, 446 U.S. 680, 689-90 (1980) (the primacy of "the plain meaning of the language of § 10(b)"); *Santa Fe Indus. v. Green*, 430 U.S. 462, 471-72 (1977) (the starting point is the language of § 10(b)); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976) ("turn first to the language of § 10(b)"). In explaining its focus on section 10(b) in an earlier rule 10b-5 case, the Court said: "The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" *Hochfelder*, 425 U.S. at 213-14 (citations omitted).

24. 15 U.S.C. §§ 78j(b) (1988).

25. 445 U.S. at 226.

26. *Id.* at 234-35; see also *id.* at 232.

27. *Id.* at 235-37.

28. *Id.* at 227-30.

29. *Id.* at 228.

Any insider-trading rule must deal with options. The price of a publicly traded option to buy or sell common stock moves with the price of the stock.<sup>30</sup> Accordingly, anything that affects the price of stock, including information about the affairs of its issuer, also will affect the price of options on the stock, and false or incomplete information about an issuer's affairs that is reflected in the market price of a security also will be reflected in the price of options on that security. Thus, someone who perceives a difference between the market price of a security and its value can trade the security or an option on it, and anyone who possesses nonpublic information relevant to the value of common stock may find it more profitable to trade options on the stock than to trade the stock itself.

The legal complication comes from the fact that publicly traded options on common stock are not issued by the corporations that issue the common stock underlying the options, but by the Options Clearing Corporation. Because a public option trader need not be a stockholder of the issuer of the underlying security, insiders of that issuer may not have any duty to disclose material, inside information before trading standardized options. Presumably the disclosure duty the Court recognized in *Chiarella*—the fiduciary duty of candor that corporate insiders owe to owners of corporate equity securities with whom they would trade—does not run to option traders who are not stockholders. To the extent that liability under rule 10b-5 turns on an inside trader's being affiliated with the issuer of the traded security, an insider who may not trade common stock legally may be able to trade options on that stock legally. Similarly, if a trader's standing to challenge insider trading in a private action turns on her being a stockholder of the corporation with which the insider is affiliated, an option trader may lack standing to challenge illegal insider trading of options or stock.

*Chiarella* did not foreclose the possibility that section 10(b) and rule 10b-5 might be construed to forbid corporate insiders from buying standardized options on the stock of the companies with which they are affiliated while in possession of material, nonpublic corporate information. The Court declined to consider the argument that section 10(b) and rule 10b-5 require persons who have misappropriated nonpublic information to disclose that information or refrain from trading.<sup>31</sup> Nonetheless, even though the text of the statute suggests that Congress enacted the Exchange Act at least in part because it objected to corporate insiders' use of inside information for personal profit,<sup>32</sup> the Court's

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30. See generally R. BREALEY & S. MYERS, *PRINCIPLES OF CORPORATE FINANCE* 469-94 (3d ed. 1988) (valuation of options).

31. 445 U.S. at 235-37; see also *id.* at 237 (Stevens, J., concurring) (*Chiarella* arguably violated a duty of silence); *id.* at 239 (Brennan, J., concurring in the judgment) ("a person violates § 10(b) whenever he improperly obtains or converts to his own benefit nonpublic information which he then uses in connection with the purchase or sale of securities"); *id.* at 240 (Burger, C.J., dissenting) ("a person who has misappropriated nonpublic information has an absolute duty to disclose that information or refrain from trading"); cf. *id.* at 227 n.8 (traditional insiders owe disclosure duties to outsiders to whom they sell stock).

32. See Securities Exchange Act of 1934 § 16(b), 15 U.S.C. § 78p(b) (1988) ("For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director or officer by reason of his relationship to the issuer, any profit realized by him" from short-selling transactions shall inure to the issuer.). But see Thel, *The Genius of Section 16: Regulating the*

opinion in *Chiarella* seems to suggest that more than taking advantage of confidential information—specifically, an independent duty of disclosure—is necessary before insider trading is illegal. If the language of section 10(b) really does limit the SEC to regulating deceptive conduct, any judicial or administrative extension of the disclose-or-abstain-from-trading rule to insider option trading is problematic at least. The misappropriation or misuse of confidential information may breach duties of confidentiality or secrecy, but such breaches do not create independent duties of disclosure, and absent such a duty it is difficult to say that silent trading meets section 10(b)'s threshold requirement that regulated conduct be deceptive.<sup>33</sup>

In the aftermath of *Chiarella*, at least some courts held that option traders did not have standing to challenge insider trading.<sup>34</sup> By denying option traders standing, these courts avoided the difficult question of whether insider trading in options violated section 10(b) and rule 10b-5 at all. Denying a plaintiff standing may effectively decide difficult questions of substantive law and obscure the nature of the "underlying rights and interests at stake" in a dispute,<sup>35</sup> and in the area of insider trading, as the comment showed, standing became a term of art in which analysis of standing and the underlying cause of action merged.<sup>36</sup>

This was the situation in 1984 when Congress enacted the Insider Trading Sanctions Act.<sup>37</sup> Along with the better-known provision that authorized the SEC to seek civil penalties of up to three times the profit made or loss avoided by illegal insider trading,<sup>38</sup> the Sanctions Act addressed insider trading in options. Section 20(d) of the Exchange Act now provides that if it is a violation of the Exchange Act or its rules to trade a security while in possession of material, nonpublic information, then it is a violation to trade options on the security in the same circumstances.<sup>39</sup> Section 20(d) also gives option traders a cause of

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*Management of Publicly Held Companies*, 42 HASTINGS L.J. 391, 478-85 (1991) (the purpose clause of § 16(b) was an afterthought that does not reflect congressional intent).

33. See D. LANGEVOORT, *supra* note 13, at 159-71 (questioning doctrinal validity of misappropriation theory); cf. *Carpenter v. United States*, 484 U.S. 19 (1987) (tie vote without opinion on misappropriation theory). *Dirks v. SEC*, 463 U.S. 646 (1983), can be read to introduce an independent requirement that there be a breach of some duty of confidentiality before tippees can be held accountable for trading on inside information, but *Chiarella* would still seem to require that the trading tippee be under a duty of disclosure as well.

34. See, e.g., *Laventhall v. General Dynamics Corp.*, 704 F.2d 407 (8th Cir.) (option trader lacked standing to challenge corporation's purchase of its own stock without disclosing material information), *cert. denied*, 464 U.S. 846 (1983); see also Comment, *supra* note 2, at 1140 n.153 (tracing line of cases following *Laventhall*).

35. See *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 490-91 (1982) (Brennan, J., dissenting); see also *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 456 (1974) (only if statute creates a right of action need court consider standing).

36. Comment, *supra* note 2, at 1125, 1131.

37. Pub. L. No. 98-376, 98 Stat. 1264 (1984) (codified in scattered section of 15 U.S.C.).

38. Securities Exchange Act of 1934 § 21(d)(2), 15 U.S.C. § 78u-1(a) (1988).

39. The scant publicly available record of the enactment of § 20(d) suggests that the sponsors were concerned that without the amendment, insider trading in options might have been legal. See 130 CONG. REC. H7757-58 (daily ed. July 25, 1984) (statement of Rep. Dingell); see also 130 CONG. REC. S8913 (daily ed. June 29, 1984) (statement of Sen. D'Amato) ("This provision would make clear that it is not possible to insulate oneself from the prohibition of insider trading by restricting

action against insiders who engage in such illegal option trading.<sup>40</sup>

Section 20(d) is an important part of the law of insider trading, and to fully understand the issues the comment discusses, it is important to appreciate how the section works. Conversely, study of the comment can lead to a better understanding of the statute. Reading section 20(d) against the background of the comment can yield valuable insights into the current state of the law of insider trading and also into the way statutory law is made and applied, at least in the field of securities regulation. The comment argued that corporate insiders should be prohibited from trading options on corporate stock while in possession of material, nonpublic corporate information, and that public option traders should be able to recover from insiders who trade options in such circumstances. These propositions are fairly disputable, but most people probably would agree with them. Insider trading in stock options probably provokes public antipathy just as much as (and perhaps more than) insider trading in corporate stock, and as soon as it was apparent that insider trading in options might not be illegal Congress stepped in to make sure that it would be.

If the Supreme Court held insider trading in options and other forms of trading on nonpublic information to be outside the scope of rule 10b-5 in *Chiarella*, it was not because it found such trading unobjectionable. The Court simply found that the language of section 10(b) does not permit the SEC to address those concerns. "We cannot affirm petitioner's conviction without recognizing a general duty between all participants in market transactions to forgo actions based on material, nonpublic information. Formulation of such a broad duty . . . should not be undertaken absent some explicit evidence of congressional intent."<sup>41</sup>

Clearly Congress was not satisfied entirely with the limited prohibition of insider trading indicated by the Supreme Court's approach to interpreting section 10(b).<sup>42</sup> With section 20(d), Congress provided very explicit evidence that corporate insiders' duty to disclose information is broader than the duty the Court was prepared to recognize in *Chiarella*.<sup>43</sup> After 1984, one might have asked whether the congressional dissatisfaction evident in section 20(d) was sufficiently explicit to justify regulation of types of insider trading law that Congress did not expressly address (insider trading in debt instruments, for example). The explicit evidence of section 20(d) may go only to insider trading in options, but section 20(d) may reflect objections to insider trading that are

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activity to securities that are derivative of the securities to which the material, nonpublic information relates.").

40. The parameters of an option trader's cause of action are discussed in Crespi, *supra* note 16; Wang, *A Cause of Action*, *supra* note 16; and Wang, *supra* note 11, at 1187-91.

41. *Chiarella*, 445 U.S. at 233 (citation omitted).

42. See Langevoort, *supra* note 16, at 1290-91 ("[W]hile the drafters [of the Sanctions Act] were prepared to recognize and ratify the Supreme Court's approach in construing current law, they believed that from a policy standpoint it can result in too narrow a prohibition."); see also D. LANGEVOORT, *supra* note 13, at 63 n.59.

43. Cf. D. LANGEVOORT, *supra* note 13, at 62-64 (substantive implications of Congress's failure to change substantive law of insider trading); Langevoort, *supra* note 16, at 1290 ("[T]he statutory change is effectively a statement that the disclosure obligation should exist, in some cases at least, absent any preexisting fiduciary duty.").



much broader than those the Supreme Court acknowledged in *Chiarella*. Congress had little reason to make insider trading in options illegal if it felt that insider trading is objectionable only when it violates a duty of candor owed to corporate security holders. The decision to forbid some insider options trading suggests that Congress was concerned with something other than candor. Section 20(d) may have responded to the considerations of fairness and propriety that the comment cited in support of giving option traders standing to challenge insider trading, and those considerations justify a broader proscription of insider trading than can survive *Chiarella*.

Section 20(d) may have responded to more parochial interests of course,<sup>44</sup> and whatever moved Congress, it always is difficult to justify changing law Congress did not address on the basis of policies thought to underlie laws it did make. In any event, the substantive content of the Sanctions Act may be primarily a matter of historical interest now. The enactment of the Insider Trading and Securities Fraud Enforcement Act of 1988 (ITSFEA)<sup>45</sup> reduced the practical importance of the question of whether the Sanctions Act made implicit changes in the substantive law of insider trading. The 1988 Act did address expressly the substantive law of insider trading, employing some remarkable statutory devices in the process. Not the least of these were enacted congressional findings that the SEC's rules governing trading while in possession of material, nonpublic information are appropriate and have been enforced effectively and fairly within the limits of accepted administrative and judicial construction.<sup>46</sup>

Although there may no longer be any reason to try to read the entrails of the Sanctions Act to understand the securities laws, the fact that section 20(d) did have substantive implications is important. With the proliferation of statutory law, many commentators have given up on the possibility of Congress keeping its laws current.<sup>47</sup> Congress delegated broad powers to the SEC in section 10(b) of the Exchange Act in an attempt to avoid statutory rigidity and obsoles-

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44. It is somewhat puzzling that the government puts so much energy into fighting insider trading. Insider trading may be harmful, but whatever harm it does is not compelling. The explanation may lie in a widely shared sense that insider trading is unfair. See Langevoort, *Investment Analysts and the Law of Insider Trading*, 76 VA. L. REV. 1023, 1046-50 (1990). Proscription also serves the particular interests of various people involved in the securities market. For example, those who are next in line to get confidential information may favor a rule forbidding those in front of them to trade. See Haddock & Macey, *A Coasian Model of Insider Trading*, 80 NW. U.L. REV. 1449, 1451-52 (1987). The SEC also benefits from regulating insider trading under rule 10b-5. Insider trading is widely considered to be unfair, and the SEC may find it attractive to focus its resources on insider trading instead of more complicated initiatives that may injure politically powerful interests. Thus the SEC increasingly emphasized insider trading cases in the early 1980s at the same time it turned away from more controversial pursuit of management malfeasance.

45. Pub. L. No. 100-704, 102 Stat. 4677 (1984) (codified in scattered sections of 15 U.S.C.).

46. *Id.* § 2 (codified as an appendix to 15 U.S.C. § 78u-1 (1988)). See generally Friedman, *supra* note 10 (explaining "hidden" changes effected by ITSFEA); Kaswell, *An Insider's View of the Insider Trading and Securities Fraud Enforcement Act of 1988*, 45 BUS. LAW. 145 (1989) (discussing ITSFEA).

47. See, e.g., G. CALABARESI, *A COMMON LAW FOR THE AGE OF STATUTES* 7 (1982) (describing courts' responses to legislatures' incapacity to keep statutes up to date).

cence, but by the mid-1980s, section 10(b) itself seemed to be ossifying.<sup>48</sup> Almost immediately, however, Congress responded to judicial interpretations of section 10(b) with which it could not agree. That response lies in the hidden substance of the 1984 and 1988 insider trading statutes.

The way Congress responded also is interesting. An increasingly popular argument in favor of courts' interpreting statutes literally is that by doing so they will encourage Congress to express itself clearly, which is thought to be a good thing. For whatever reason, the Supreme Court has tried to interpret section 10(b) literally,<sup>49</sup> employing what Justice Blackmun has disparaged as "technical linguistic analysis."<sup>50</sup> Congress has responded to the Court's literal (and narrow) reading of section 10(b) in both the Sanctions Act and the 1988 Act, but not in the way that might have been predicted. Neither response is anything like a clear statement. Perhaps the result of Congress's approach will be continued evolution of the substantive law of insider trading as the Court and the SEC respond in turn. The process should continue to be interesting.

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48. See Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 461-64 (1990).

49. See *supra* note 41 and accompanying text; see also Thel, *supra* note 48, at 386-88 (Supreme Court's approach to § 10(b)).

50. *Aaron v. SEC*, 446 U.S. 680, 715 (1980) (opinion of Blackmun, J.).

