

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

SENIOR EXECUTIVES
ASSOCIATION, *et al.*,

Plaintiffs,

v.

UNITED STATES, *et al.*,

Defendants.

No. 8:12-cv-2297-AW

MOTION FOR A TEMPORARY PRELIMINARY INJUNCTION

Plaintiffs hereby move for the entry of a temporary preliminary injunction, extending until October 31, 2012, to preserve the *status quo* while Congress determines whether and how to amend the statutory provision at issue in this case. A temporary injunction will enable the parties and the Court to avoid litigating issues that may soon change or disappear.

On the day this lawsuit was filed, Congress took emergency action, by unanimous consent, to postpone until September 30, 2012 the effective date of the challenged provision — which requires the personal financial data of some 28,000 senior U.S. military officers and civilian employees to be posted on the Internet for the whole world to see. Congress took this extraordinary action just hours before its summer recess because it recognized that the challenged provision created a serious danger to national security and to the well-being of senior government employees.¹ Congress acted in order to give itself time to consider amending the provision at issue upon its return after Labor Day, and

¹ The title of the emergency legislation is “an act to prevent harm to the national security or endangering the military officers and civilian employees to whom internet publication of certain information applies.” It was passed by both Houses of Congress on August 2, 2012, and was signed by the President on August 16, 2012.

government counsel has noted that it is likely that the provision will be amended before the new September 30 deadline. It would therefore be a great waste of this Court's time and energy, not to mention the time and resources of counsel, to litigate over the statute in its current form when that form may change within a month.

Because Defendants are unwilling to consent to even a brief postponement of the September 30 deadline for Internet posting of Plaintiffs' personal financial information, and because Plaintiffs have made the necessary showings to support the entry of a preliminary injunction, the Court should issue a temporary preliminary injunction that will maintain the *status quo* until October 31, 2012, to enable the parties to litigate this case in light of whatever changes Congress makes to the challenged statute in September.

The grounds for this motion are more fully set out in the accompanying memorandum. A proposed order is also filed herewith.

Dated: August 27, 2012

Respectfully submitted,

/s/ Daron T. Carreiro

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**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION
FOR A TEMPORARY PRELIMINARY INJUNCTION**

Plaintiffs' motion for a temporary preliminary injunction should be granted for the following reasons:

1. Plaintiffs have shown a substantial likelihood of prevailing on the merits of their claims.

In addition to the extensive showing made in Plaintiffs' earlier motion for a preliminary injunction (ECF No. 3), which is hereby incorporated by reference, Congress has now provided emphatic proof that Plaintiffs are likely to prevail on the merits.

As explained in Plaintiffs' earlier memorandum, the leading Fourth Circuit case on the constitutional right to informational privacy is *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990), which held that "[p]ersonal, private information in which an individual has a reasonable expectation of confidentiality is protected by one's constitutional right to privacy." *Id.* at 192. That right specifically extends to a person's private financial information. *Id.* at 194. As *Walls* explained, however, that right to privacy can be overcome by "a compelling governmental interest in disclosure [that] outweighs the individual's privacy interest." *Id.* at 192.

At the time Plaintiffs filed this lawsuit, the STOCK Act was in effect, requiring Internet publication of Plaintiffs' private financial information. The Defendants could at least attempt to argue that Congress had identified an important governmental interest in Internet disclosure. Now, however, Congress itself has pulled the rug out from under that argument, recognizing that the extension of Internet publication to thousands of senior U.S. military officers and career civilian employees — without hearings or debate — was a mistake that needs to be corrected. Given Congress' action (which is described more fully below), no serious argument can be made that there is a compelling governmental interest in the Internet publication of Plaintiffs' private financial information while Congress itself considers how to deal with this issue. And without a compelling interest, Plaintiffs must prevail under established Fourth Circuit law.

2. Plaintiffs have shown that they and thousands of other senior U.S. military officers and civilian employees will suffer irreparable harm in the absence of an injunction.

In addition to the extensive demonstration of irreparable harm in Plaintiffs' earlier papers, Congress has also provided emphatic support for the proposition that Plaintiffs will suffer serious and irreparable harm because of the Internet publication requirement of the STOCK Act.

Plaintiffs' earlier memorandum and declarations (hereby incorporated by reference) laid out in detail the serious harms that likely would befall Plaintiffs and thousands of other senior U.S. military officers and civilian employees if their personal financial information were posted on the Internet. The dangers of identity theft, financial fraud, harm to family relationships, blackmail, and even kidnapping of Americans traveling abroad whose personal wealth would be known in detail by criminal elements

are as obvious as they are serious. And these harms would be truly irreparable, because once the information is posted on the World Wide Web, it can never be made private again.

On August 2, 2012, Congress passed, by unanimous consent in both chambers, S. 3510, titled “an act to prevent harm to the national security or endangering the military officers and civilian employees to whom internet publication of certain information applies.” The purpose of the bill was to extend the Internet publication deadline of the STOCK Act from August 31, 2012, to September 30, 2012, so that Congress could reconsider the requirement of Internet publication *in light of the irreparable harm that it recognized would flow from that publication.*¹

Senate Minority Leader Mitch McConnell explained why it was urgent and essential to pass the bill:

Mr. MCCONNELL. Mr. President, S. 3510 addresses the concerns raised by 14 of the most highly respected folks in the national security field, from Michael Chertoff to Mike McConnell [*sic*] to Michael Mukasey, all of whom wrote with serious concerns about the application of one provision of the STOCK Act requiring online posting of financial data which would potentially impact the national security ***and the personal safety of national security and law enforcement professionals and their families. These are very serious concerns they have raised,*** and given that we are on the eve of the August district work period, we do not have time to adequately address those concerns. . . . ***It is for the safety and security of our brave men and women that we need to ensure they are protected*** which is exactly what this bill does.

158 Cong. Rec. S5952 (daily ed. Aug. 2, 2012) (emphasis added). Thus, Congress has now confirmed Plaintiffs’ showing of irreparable injury when it cites the “very serious” concerns regarding “safety and security” of government personnel. It would be difficult to

¹ The full text of the bill was set out in Plaintiffs’ Notice of Congressional Action, filed August 6, 2012 (ECF No. 10). It was signed by the President on August 16, 2012. *See* Plaintiffs’ Notice That S. 3510 Has Become Law, filed August 17, 2012 (ECF No. 14).

imagine stronger proof of irreparable harm.²

3. The harms to Plaintiffs from Internet publication of their private financial information far outweigh the harm to Defendants from maintaining the *status quo* for one more month.

The irreparable harm facing Plaintiffs is briefly described above, and detailed at greater length in Plaintiffs' earlier papers, which are hereby incorporated by reference. The harm to the government from delaying *for one additional month* the Internet publication of the personal financial information of senior U.S. military officers and civilian employees is simply the abstract "harm" that may exist whenever a law is enjoined. There is no actual harm — if the Internet publication requirement is ultimately retained by Congress and upheld by the courts, the very same information can then be published, for the world to see.

4. The public interest favors maintaining the *status quo* at least until after Congress has had the opportunity to consider amending the challenged provision and the parties have had the opportunity, if necessary, to litigate a motion for preliminary injunction based upon Congress's action.

"[U]pholding constitutional rights is in the public interest." *Legend Night Club v. Miller*, 637 F.3d 291, 303 (4th Cir. 2011). The public interest here follows from Plaintiffs' demonstration that their constitutional rights will be irreparably abridged by compelled Internet publication of their personal financial data by the government. Additionally, the public interest certainly favors protecting Plaintiffs and thousands of

² The letter referred to by Senator McConnell, which was sent to congressional leaders on July 19, 2012, by former Secretary of Homeland Security Michael Chertoff, former Attorney General Michael Mukasey, former CIA Director Michael Hayden, former Director of National Intelligence Mike McConnell, and ten other very senior former federal officials in law enforcement, diplomatic, and national security positions, described in stark terms the harms that were likely to result from the challenged provision of the STOCK Act. The full text of that letter is attached hereto as Exhibit 1. Plaintiffs respectfully commend it to the Court's attention.

other senior U.S. military officers and civilian employees while Congress considers amending the STOCK Act, and for a reasonable time thereafter, if necessary, to litigate any issues still presented by the statute as of the end of September.

5. It would be a great waste of judicial resources, as well as the resources of government and private counsel, to litigate about the statute that the government says will likely be amended.

Finally, common sense and the principle of conservation of judicial resources support issuing a temporary preliminary injunction under the current circumstances. Unless the requested injunction is issued, the parties will have to continue litigating over the existing statute. The government will be required to file a major brief, the Plaintiffs will be required to file a reply, and the Court will be required to digest those briefs, research the issues, hold a hearing, and prepare a decision — all very likely for naught, as the statute may be amended by late September to change or even eliminate the dispute between the parties. All parties agree on this issue. See Reply in Support of Defendants' Motion for Extension of Time (ECF No. 17) at 3 (it is "unlikely" that Section 11 and its effective date will remain unchanged).

Without a temporary preliminary injunction, the litigation cannot go forward in a sensible way because Defendants' brief will be due on September 21, which means it must be prepared before Congress recesses, and therefore very likely before Congress acts on the STOCK Act. Plaintiffs then have only four days to file their reply, two of which are Saturday and Sunday. Thereafter the Court will have only two days to prepare for a hearing, and only *one business day* in which to issue a decision before the September 30 deadline. And there will be no time for either party to seek emergency relief from the

court of appeals. Only by issuing a temporary preliminary injunction can the Court avoid this senseless waste of its own resources, and the parties’.

CONCLUSION

The traditional and essential purpose of a preliminary injunction is to preserve the *status quo* in the face of impending irreparable injury while a court sorts out the merits. That is precisely the situation presented here. Plaintiffs have shown that they are entitled to a preliminary injunction of the usual kind, good until a final decision on the merits. However, in light of the probability that Congress will amend the STOCK Act within the next month, Plaintiffs at this time seek only a *temporary* preliminary injunction, preserving the *status quo* for an additional month so that the parties and the Court can address the statute that will exist at the end of September rather than the statute that exists today. In addition to the standard four-factor test for preliminary relief, which Plaintiffs have satisfied, common sense and conservation of limited judicial resources strongly support issuance of a temporary preliminary injunction.

For the reasons given above, as well as those in Plaintiffs' earlier papers, the motion for a temporary preliminary injunction should be granted.

Dated: August 27, 2012

Respectfully submitted,

/s/ Daron T. Carreiro

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Counsel for Plaintiffs

EXHIBIT 1

**(to Plaintiffs' Memorandum in Support of Motion
for a Temporary Preliminary Injunction)**

The Honorable Harry Reid
Majority Leader
United States Senate

The Honorable Eric Cantor
Majority Leader
House of Representatives

The Honorable Mitch McConnell
Minority Leader
United States Senate

The Honorable Nancy Pelosi
Minority Leader
House of Representatives

The Honorable Carl Levin
Chairman of the Senate Committee on Armed
Services
United States Senate

The Honorable Buck McKeon
Chairman of the House Committee on Armed
Services
House of Representatives

The Honorable John McCain
Ranking Member of the Senate Committee on Armed
Services
United States Senate

The Honorable Adam Smith
Ranking Member of the House Committee on Armed
Services
House of Representatives

The Honorable John Kerry
Chairman of the Senate Committee on Foreign
Relations
United States Senate

The Honorable Ileana Ros-Lehtinen
Chairman of the House Committee on Foreign
Affairs
House of Representatives

The Honorable Richard Lugar
Ranking Member of the Senate Committee on
Foreign Relations
United States Senate

The Honorable Howard Berman
Ranking Member of the House Committee on
Foreign Affairs
House of Representatives

The Honorable Joe Lieberman
Chairman of the Senate Committee on Homeland
Security and Governmental Affairs
United States Senate

The Honorable Peter King
Chairman of the House Committee on Homeland
Security
House of Representatives

The Honorable Susan Collins
Ranking Member of the Senate Committee on
Homeland Security and Governmental Affairs
United States Senate

The Honorable Bennie Thompson
Ranking Member of the House Committee on
Homeland Security
House of Representatives

The Honorable Dianne Feinstein
Chairman of the Senate Select Committee on
Intelligence
United States Senate

The Honorable Mike Rogers
Chairman of the House Permanent Select Committee
on Intelligence
House of Representatives

The Honorable Saxby Chambliss
Ranking Member of the Senate Select Committee on
Intelligence
United States Senate

The Honorable Dutch Ruppersberger
Ranking Member of the House Permanent Select
Committee on Intelligence
House of Representatives

The Honorable Patrick Leahy
Chairman of the Senate Committee on the Judiciary
United States Senate

The Honorable Lamar Smith
Chairman of the House Committee on the Judiciary
House of Representatives

The Honorable Chuck Grassley
Ranking Member of the Senate Committee on the
Judiciary
United States Senate

The Honorable John Conyers, Jr.
Ranking Member of the House Committee on the
Judiciary
House of Representatives

July 19, 2012 (Updated Version, 3:30 PM)

RE: Application of Section 11 of the STOCK Act to National Security Officials

Dear Congressional Leaders:

We are writing to express concern about section 11 of the Stop Trading in Congressional Knowledge Act (the STOCK Act), which requires that the financial disclosure forms of senior executive branch officials be posted on the Internet by August 31. While we agree that the government should have access to the financial information of its senior officials to ensure the integrity of government decision making, we strongly urge that Congress immediately pass legislation allowing an exception from the Internet posting requirement for certain executive branch officials, in order to protect the national security and the personal safety of these officials and their families.

The STOCK Act was intended to stop insider trading by Members of Congress. However, section 11 of the Act, which was added without any public hearings or consideration of national security or personnel safety implications, requires that financial data of over 28,000 executive branch officials throughout the U.S. government, including members of the U.S. military and career diplomats, law enforcement officials, and officials in sensitive national security jobs in the Defense Department, State Department and other agencies, be posted on their agency websites.

It is not clear what public purpose is served by inclusion of Section 11. We are not aware that any transparency concerns have been raised about the adequacy of the existing review process for executive branch officials, most of whom have devoted their careers to public service. For several decades, executive branch officials have prepared and submitted SF-278 financial disclosure forms to their employing agencies. The completed forms and the extensive financial data they contain are carefully reviewed by agency ethics officers in light of the specific responsibilities of the officials submitting them in order to identify and eliminate potential conflicts of interest. Although the forms may be requested by members of the public, they are not published in hard-copy or on the Internet. Moreover, individuals requesting copies of the forms must provide their names, occupation, and contact information. Agencies generally notify the filing officials about who has requested their personal financial information.

In contrast, Section 11 of the STOCK Act would require that the financial disclosure forms of executive branch officials be posted on each agency's website and that a government-wide database be created containing the SF-278s that would be searchable and sortable without the use of a login or any other screening process to control or monitor access to this personal information.

We believe that this new uncontrolled disclosure scheme for executive branch officials will create significant threats to the national security and to the personal safety and financial security of executive branch officials and their families, especially career employees. Placing complete personal financial information of all senior officials on the Internet would be a jackpot for enemies of the United States intent on finding security vulnerabilities they can exploit. SF-278 forms include a treasure trove of personal financial information: the location and value of employees' savings and checking accounts and certificates of deposit; a full valuation and listing of their investment portfolio; a listing of real estate assets and their value; a listing of debts, debt amounts, and creditors; and the signatures of the filers. SF-278s include financial information not only about the filing employee, but also about the employee's spouse and dependent children.

Posting this detailed financial information on the Internet will jeopardize the safety of executive branch officials — including military, diplomatic, law enforcement, and potentially intelligence officials — and their families who are posted or travel in dangerous areas, especially in certain countries in Asia, Africa, and Latin America. Embassy and military security officers already advise these officials to post

no personal identifying information on the Internet. Publishing the financial assets of these officials will allow foreign governments, and terrorist or criminal groups to specifically target these officials or their families for kidnapping, harassment, manipulation of financial assets, and other abuse.

Equally important, the detailed personal financial information — particularly detailed information about debts and creditors — contained in the SF-278s of senior officials is precisely the information that foreign intelligence services and other adversaries spend billions of dollars every year to uncover as they look for information that can be used to harass, intimidate and blackmail those in the government with access to classified information. Yet under the STOCK Act, these SF-278s will be placed on the Internet for any foreign government or group to access without disclosing their identity or purpose and with no notice to the employees or their agencies. We should not hand on a silver platter to foreign intelligence services information that could be used to compromise or harass career public servants who have access to the most sensitive information held by the U.S. government.

Section 11 could also jeopardize the safety and security of other executive branch officials, such as federal prosecutors and others who are tracking down and bringing to justice domestic organized crime gangs and foreign terrorists. Crime gangs could easily target the families of prosecutors with substantial assets or debts for physical attacks or threats.

Finally, publishing detailed banking and brokerage information of executive branch officials, especially with their signatures, is likely to invite hacking, financial attacks, and identity theft of these officials and their families, particularly by groups or individuals who may be affected by their governmental work.

Given these inevitable adverse national security consequences, we urge you to amend the STOCK Act to protect U.S. national security interests and the safety of executive branch officials by creating an exception from the requirements of Section 11 for senior executive branch officials with security clearances. The exception should also apply to other officials based on a determination by an agency head that an exception is necessary to protect the safety of the official or the official's family. At the very minimum, Congress should act to delay implementation of Section 11 until the national security and personal safety implications can be fully evaluated.

If the financial disclosure forms of senior executive officials are actually posted on the Internet in August, there will be irreparable damage to U.S. national security interests, and many senior executives and their families may be placed in danger. This issue is too important to be trapped in partisan politics. We urge Congress to act swiftly, before the Congress goes on its summer recess on August 6.

Sincerely,

Richard Armitage
Deputy Secretary of State, 2001-2005

John B. Bellinger III
Partner, Arnold & Porter LLP; Legal
Adviser, U.S. Department of State, 2005-
2009; Legal Adviser, National Security
Council, The White House, 2001-2005

Joel Brenner
National Counterintelligence Executive,
2006-2009; Inspector General, National
Security Agency, 2002-2006

Michael Chertoff
Secretary of Homeland Security, 2005-
2009

Jamie Gorelick
Deputy Attorney General, 1994-1997;
General Counsel, Department of Defense,
1993-1994

John Hamre
Deputy Secretary of Defense, 1997-2000

Michael Hayden
General USAF (RET); Director of the
Central Intelligence Agency 2006-2009;
Director of the National Security Agency
1999-2006

Mike McConnell
Vice Admiral USN (RET); Director of
National Intelligence, 2007-2009; Director
of the National Security Agency, 1992-
1996

Michael B. Mukasey
Partner, Debevoise & Plimpton; Attorney
General, 2007-2009; U.S. District Judge,
Southern District of New York, 1988-
2006

John Negroponte
Deputy Secretary of State, 2007-2009;
Director of National Intelligence, 2005-
2007

Thomas Pickering
Under Secretary of State for Political
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Frances Townsend
Assistant to the President for Homeland
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Kenneth L. Wainstein
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Security and Counterterrorism, 2008-
2009; Assistant Attorney General for
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Juan Zarate
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No. 8:12-cv-2297-AW

[Proposed]

TEMPORARY PRELIMINARY INJUNCTION

The Court has before it Plaintiffs' motion for a temporary preliminary injunction to preserve the *status quo* while Congress determines whether and how to amend the statutory provision at issue in this case and thereby enable the parties and the Court to avoid litigating issues that may soon change or disappear.

It appears to the Court that Congress has recognized, by passage of "an act to prevent harm to the national security or endangering the military officers and civilian employees to whom internet publication of certain information applies," that the challenged statutory provision endangers the national security and the safety of senior U.S. military officers and civilian employees, and that Congress is therefore likely to amend that provision before the current September 30 deadline for Internet publication of the personal financial data of thousands of senior U.S. military officers and civilian employees. Counsel for the United States agrees that amendment is likely.

It further appears to the Court that it would be a waste of judicial resources, as well as the resources of government and private counsel, to litigate over the statute in its

current form when that form may change within a month to obviate or at least reduce the very harms that Plaintiffs seek to avoid by means of this lawsuit.

Having carefully considered the papers filed by Plaintiffs and by Defendants, the Court finds that Plaintiffs have demonstrated (i) a substantial likelihood of prevailing on the merits of their claims, (ii) that they and thousands of other senior U.S. military officers and civilian employees will suffer irreparable harm in the absence of an injunction, (iii) that the harms to Plaintiffs from Internet publication of their private financial information far outweigh the harm to Defendants from maintaining the status quo for one more month, and (iv) that the public interest favors maintaining the *status quo* at least until after Congress has had the opportunity to consider amending the challenged statutory provision and the parties have had the opportunity, if necessary, to litigate a further motion for preliminary injunction based upon Congress's action.

Accordingly, it is hereby

ORDERED that Plaintiffs' motion for a temporary preliminary injunction is GRANTED; and it is

FURTHER ORDERED that Defendants, and their officers, agents and employees, as well as all other persons acting in active concert or participation with them, are hereby enjoined, until October 31, 2012, from implementing Section 11 of the STOCK Act to make financial disclosure forms of covered Executive Branch employees or the information contained in them available on the websites of any agency of the United States or otherwise available on the Internet; and it is

FURTHER ORDERED that Defendants, and their officers, agents and employees, as well as all other persons acting in active concert or participation with them, are hereby

enjoined, until October 31, 2012, from requiring employees to submit financial disclosure information so long as such information is subject to Internet publication by federal agencies; and it is

FURTHER ORDERED, that because Defendants will not suffer financial damage as a result of this injunction, Plaintiffs shall not be required to post a bond, and this injunction shall be effective immediately.

Dated: September ____, 2012

Alexander Williams
United States District Judge