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'Slam dunk' or 'uphill climb'? Experts disagree on insider trading case against Sen. Burr

BY JAM MOORE
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North Carolina Gov. Roy Cooper says NC is happy to continue talking with the Republican National Convention about what a second-term convention would look like, but President Trump and the RNC are demanding a full arena for the August event. BY WAC-TV

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U.S. Sen. Richard Burr's stock sales are the subject of insider trading investigations by the U.S. Justice Department, the Federal Securities and Exchange Commission and the Senate Ethics Committee.

But can they prove he traded on confidential information when he sold up to \$1.7 million in stocks just before the market plunged?

Depends whom you ask.

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"This is really a slam dunk case," said James Cox, who teaches at Duke University's law school and has testified frequently about insider trading in Congress.

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But John Brito, a former SEC enforcement attorney, said he doesn't believe there's enough evidence to bring either a civil or criminal case.

"At the end of the day," he said, "I think they walk."

Burr, a North Carolina Republican, temporarily stepped down as chairman of the Senate Intelligence Committee this month after the FBI seized his cell phone as part of its investigation. He'd already said he won't run again in 2022.

Burr's stock sales came to light on March 19 when [FoxPublica](#) and the Center for Responsive Politics revealed that he'd sold between \$600,000 and \$1.72 million of his holdings on Feb. 13.

In January and early February, as the coronavirus pandemic was beginning to spread beyond China, intelligence officials were issuing dire warnings about its effects in closed-door Senate briefings, according to the [Washington Post](#). Burr also is a member of the Senate Health Committee, which also received briefings about COVID-19 in January.

Burr has said he sold his stocks on the basis of publicly available information, not on confidential briefings.

Two other senators, Democrat Dianne Feinstein of California and Republican Kelly Loeffler of Georgia have turned over documents to the FBI involving trades made around the same time.

[Feinstein](#) has said she was not involved in the trades by her husband.

So far Burr is the only one known to be under criminal investigation by the Justice Department's Public Integrity Section.

"It's the highest criminal priority they have," said Charlotte attorney Chris Swecker, a former assistant FBI director over the bureau's criminal division. "And those are the kinds of cases that get all the resources and a sense of urgency."

David Chase, a Florida attorney who prosecuted insider trading cases for the Securities and Exchange Commission, said authorities know what they're looking for.

"We all agree that his trades were suspicious in terms of timing but the question remains, were they illegal?" he said. "A core question is, what did he know and when did he know it?"

WHAT WAS IN THE BRIEFINGS?

It's unclear exactly what Burr heard about the coming pandemic in confidential briefings.

"You really have to know the specific nature and quality of the information that he was provided and whether that was non-public," Chase said. "Presumably it was material."

Experts say investigators can get access to classified briefings in some cases.

Michael Perino, who teaches at St. John's University School of Law, said information would be equally material "if a reasonable investor would consider it important in deciding whether to buy or sell securities."

"As a hypothetical matter," he said, "if you received a briefing that said COVID-19 was going to have a substantial impact on the economy and hit particularly hard airlines and hotels, I think a jury could reasonably find that that constitutes material, non-public information."

Burr's [13 sales](#) included shares of Wyndham Hotels and Resorts, Extended Stay America and Park Hotels & Resorts.

"If in fact he received significant, non-public information and then traded on it afterwards, that's a relatively straightforward case of insider trading," Perino said.

Cox, the Duke professor, said, "the fact the FBI ... seized his phone indicates they had a pretty strong case that a violation had occurred."

"The fact that this is going forward, apparently with some alacrity, shows ... Burr's in big trouble," he said.

FAMILY MEMBER'S SALES

The last lawmaker convicted of insider trading was Republican Rep. Chris Collins of New York last year. But that case was very different.

He was on the board of a pharmaceutical company when he learned the company had failed a critical drug trial. He called his son and sold him to sell his shares in the company, a move that [allowed his son](#) to avoid nearly \$600,000 in losses. Last fall Collins pleaded guilty to securities fraud. In January he was sentenced to 36 months in prison.

But that wasn't information he'd learned from his role as a congressman.

Lawmakers are barred by the 1933 [SECURITIES Act](#) from insider trading, or using "material, nonpublic information to purchase or sell a security, including using confidential information gained because of one's Senate position to make a profit or avoid a loss." The bill passed the Senate 96-9. Burr voted "no." He would be the first lawmaker charged under the act if he's charged.

There are other potential rules and laws that could have been violated, including wire fraud and SEC regulations, said John Coffey, director of the Center on Corporate Governance at Columbia University Law School.

"Prosecutors increasingly throw the kitchen sink at a defendant and charge him with three or four different crimes," Coffey said. "I would be surprised if the government puts all its eggs in one basket."

This month [FoxPublica also reported](#) that Burr's brother-in-law, Gerald Furch, sold up to \$180,000 in holdings in February. Furch sits on the National Mediation Board and, like Burr, has to disclose stock transactions.

James Wyant, a Charlotte attorney who has defended insider trading cases, said investigators will look at their correspondence. "That's why the authorities would want to gather any relevant communications — email, telephone calls — to examine them around the time" the trades were done, he said.

'AN UPHILL CLIMB'

Some experts say it could be hard for the government to make a case against Burr.

Swecker calls any prosecution "an uphill climb for the government."

"You have to prove an intent to defraud and that he intentionally used the information," Swecker said. "Intent is state of mind."

But he said Burr's brother-in-law's involvement could complicate things for the senator.

"When people are moving in the same direction at the same time you start getting at the intent argument," he said. "When you start to see clusters of people in the same social network you start to eliminate coincidence."

Burr, the former SEC enforcement attorney, said there was [rumored in the stock market](#) before Burr sold his stock and before the market [crashed at 10 a.m. time high](#) on Feb. 12. And all that was in the news.

"There was plenty of information out there that the market was riled," Brito said.

Burr may have known better than most the danger of pandemics.

In 2007, along with Democratic Sen. Ted Kennedy, he [sponsored](#) the Pandemic and All-Hazards Preparedness Act, a law designed to better prepare for a health emergency. The law was reauthorized last year.

The threshold for criminal prosecution — "beyond a reasonable doubt" — is higher than for a civil penalty, when officials could make their case based on a preponderance of evidence.

CONSTITUTIONAL HURDLES?

One hurdle for prosecutors could be the Constitution. Its so-called "speech or debate clause" gives lawmakers general immunity for speech or actions taken in the course of their duties.

But Donna Ngugi, a professor of business law at Indiana University's Maurer School of Law, said the clause doesn't necessarily pose a huge obstacle for prosecutors of congressional insider trading.

"While the clause may impede some SEC or DOJ evidence gathering," she said, "it is not a bar to prosecution if evidence can be obtained through means that do not involve 'questioning' lawmakers ... as is what was said in (a) briefing." If a lawmaker had confided the information to a third party, for example, authorities could get it from them.

Jennifer Aboarn, policy director for Citizens for Responsibility and Ethics in Washington, a group that filed a complaint over Burr's stock sales with the Senate Ethics Committee, said investigators have a "third case."

"There are a lot of facts you'd need to fill in," she said, "before you come to the conclusion that Sen. Burr violated the law."

Swecker, the former FBI official, said such publicized investigations have another effect:

"This type of investigation in the press," he said, "can stigmatize somebody very quickly."

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