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CALABRESI, *Circuit Judge*, concurring in the judgment,

I do not disagree with the majority's analysis. But I concur in the result separately because I believe much of that analysis is not needed to reach the outcome we all agree on.

Section 16(b) imposes strict liability on certain transactions and does so in a mechanical way. We have long held that, in this type of case, the law must be clear for liability to attach. *See, e.g., Foremost-McKesson, Inc. v. Provident Sec. Co.*, 423 U.S. 232, 252 (1976) ("It is inappropriate to reach the harsh result of imposing [Section] 16(b)'s liability without fault on the basis of unclear language. If Congress wishes to impose such liability, we must assume it will do so expressly or by unmistakable inference."); *C.R.A. Realty Corp. v. Tri-South Invs.*, 738 F.2d 73, 76 (2d Cir. 1984) ("Since the liability imposed is strict and the remedy harsh . . . courts have been chary of holding transactions within [Section] 16(b) unless Congress's intent to make the section applicable was clear."). Anything else would create traps for the unwary.

As the majority demonstrates in Parts III(d) and (e), the law far from being clear would readily lead one to believe that the transactions at issue in the instant cases did not give rise to liability. The law is not clear for many reasons, including the fact that a previous SEC rule clearly exempted issuer transactions from Section 16(b), and its removal was described as a measure for clarity only.

This is not to say that what was done may not lead to abuse. There are certainly ownership situations in which parties in control can make use of inside information to make huge profits by doing what was done here. And that is the reason I would decide this case as narrowly as possible. Congress or the SEC might, in appropriate ways, make rules that *are* clear and prevent the abuse that the current

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situations may present. Because I would not want any language in today's holding to make such governmental actions more difficult, I do not join the majority opinion and prefer to concur only in the result.