

A MODEST PROPOSAL TO END CONGRESSIONAL INSIDER TRADING

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INTRODUCTION

Both Republicans and Democrats in Congress have an insider trading problem, and former Speaker of the House Nancy Pelosi has become the “face” of the issue.¹ Pelosi has a reported net worth of \$114 million.² The “vast majority” of her wealth derives from her husband Paul Pelosi’s securities trading.³ His trades often coincide with major congressional decisions,⁴ and in 2020 his portfolio outperformed the market by a stunning 14.3%.⁵ Nancy Pelosi, a career politician,⁶ helps make the laws that dictate the financial outcomes of the companies in which her husband invests.⁷ The couple has made impeccably timed

1. David Dierking, *Want to Trade Stocks Like Nancy Pelosi? There’s An ETF For That!*, STREET (Feb. 22, 2023), <https://www.thestreet.com/etffocus/blog/want-to-trade-stocks-like-nancy-pelosi-an-etf-for-that> (noting an increased public awareness of Congress trading stocks on “information not available to the general public”).

2. Joe Concha, *Paul Pelosi’s Questionable Wall Street Windfall Spurs Bipartisan Calls for Stock Trading Ban*, HILL (July 24, 2022, 8:00 AM), <https://thehill.com/opinion/finance/3571790-paul-pelosis-questionable-wall-street-windfall-spurs-bipartisan-calls-for-stock-trading-ban/>.

3. *Id.*

4. See Allie Griffin, *House Speaker Nancy Pelosi Has Accrued Millions from Husband’s Trades: Report*, N.Y. POST, <https://nypost.com/2022/10/05/house-speaker-nancy-pelosi-has-accrued-millions-from-husbands-trades-report/> (Oct. 29, 2022, 8:31 PM) (“The speaker, one of the richest members of Congress, has vehemently denied sharing any information with her spouse—a venture capitalist. However, many have questioned trades made by Paul Pelosi that happened to coincide with major congressional decisions.”).

5. Concha, *supra* note 2.

6. See Nancy Pelosi, *Biography*, CONGRESSWOMAN NANCY PELOSI: CAL. 11TH DIST., <https://pelosi.house.gov/biography-0> (Oct. 17, 2023) (“Nancy Pelosi has represented San Francisco in Congress for more than 35 years.”).

7. See Madison Hall, *See Every Stock Trade Nancy Pelosi’s Husband, Paul Pelosi, Made While She Was House Speaker in 2021 and 2022*, BUS. INSIDER (Jan. 13, 2023, 10:20 AM), <https://www.businessinsider.com/nancy-pelosi-stock-trades-congress-investments-2022-7>.

trades related to VISA (2008),⁸ Clean Energy (2011),⁹ Microsoft (2021),¹⁰ Google (2022),¹¹ and Nvidia (2022),¹² to name a few.¹³ Pelosi's reputation has inspired investment tools such as X's (formerly Twitter's) @PelosiTracker and the "NANC" exchange traded fund, both of which help investors shadow the Pelosi portfolio.¹⁴ In response, Congress has recently proposed bills to ban Pelosi-style congressional trading.¹⁵ One such bill, the Preventing Elected Leaders from Owning Securities and Investments ("PELOSI") Act, even bears her name.¹⁶ The proposed

8. See Spencer K. Schneider, *Money, Power, and Radical Honesty: A Look at Member of Congress' Use of Information for Financial Gain*, 14 J. BUS., ENTREPRENEURSHIP & L. 295, 313 (2021); see also Stephanie Condon, *New Details on Visa's Attempt to Influence Pelosi*, CBS NEWS (Nov. 15, 2011, 3:01 PM), <https://www.cbsnews.com/news/new-details-on-visas-attempt-to-influence-pelosi/> (discussing the Pelosis' VISA stock purchases at the same time VISA was lobbying Pelosi to defeat a "troublesome piece of legislation" that would have hurt credit card companies).

9. See Daniel Indiviglio & Jeffrey Goldfarb, *A Congressional Conflict of Interest*, N.Y. TIMES (Dec. 15, 2011), <https://www.nytimes.com/2011/12/16/business/a-congressional-conflict-of-interest.html> (detailing how Pelosi's financial interest in Clean Energy shares coincided with her "Make it in America" agenda that subsidized Clean Energy).

10. See Concha, *supra* note 2 (noting that Paul Pelosi purchased \$5 million worth of Microsoft shares shortly before the government announced a \$21.9 billion contract with Microsoft, which produced a sharp increase in the share price).

11. See Bethan Moorcraft, *'The American People Are Tired': Lawmakers Take Aim at Insider Trading in Washington—Here's How They'd Force Congress to Put the People Before Their Portfolios*, MONEYWISE (Feb. 17, 2023), https://moneywise.com/a/ch-msna/lawmakers-reintroduce-trust-bill?utm_source=syn_msna_mon&utm_medium=Z&utm_campaign=24507&utm_content=msna_mon_24507 (discussing how the Pelosis sold 30,000 Google shares only a month prior to a government announcement of an antitrust suit against Google).

12. See *id.* (noting that the Pelosis, just days before Congress approved a semiconductor stimulus package, sold \$5 million worth of shares in Nvidia, a computer chip-making company).

13. See Madison Hall, *Nancy Pelosi's Husband Recently Sold 20,000 Shares of Visa Worth Up to \$5 Million*, BUS. INSIDER (Dec. 1, 2022, 11:49 AM), <https://www.businessinsider.com/nancy-pelosis-husband-just-sold-visa-shares-worth-up-to-5-million-2022-12> (discussing yet another suspicious VISA transaction in 2022, whereby Paul Pelosi sold up to \$5 million worth of VISA stock during a market upswing, this time apparently from the hospital in the aftermath of a much-publicized hammer attack at the Pelosi residence).

14. @PelosiTracker, X, <https://twitter.com/PelosiTracker>; see also Dierking, *supra* note 1 (discussing the NANC "Subversive Unusual Whales Democratic ETF" that tracks Pelosi and other political portfolios).

15. See Moorcraft, *supra* note 11 (detailing the PELOSI Act and the Transparent Representation Upholding Service and Trust in Congress ("TRUST") Act, which call for the use of blind trusts for members of Congress).

16. See Press Release, Josh Hawley, Sen., *Hawley Announces 'PELOSI Act,' Reintroduction of Bill to Ban Lawmakers from Trading Stocks* (Jan. 24, 2023), <https://www.hawley.senate.gov/hawley-announces-pelosi-act-reintroduction-bill-ban-lawmakers-trading-stocks>.

legislation would require members of Congress and their families to transfer assets into qualified blind trusts to minimize legislative conflicts of interest.¹⁷ These bills are “complex” and require debate.¹⁸ However, no debate took place because Pelosi, on behalf of other career politicians, sabotaged the legislation with “unnecessary roadblocks.”¹⁹ After killing the bill, Pelosi quipped, “[t]his is the legislative process.”²⁰

Unfortunately, Pelosi’s observation is correct. This narrative reflects several problematic aspects of the U.S. legislative process. A “permanent political class” exploits its power and access to nonpublic government information to generate personal wealth.²¹ This phenomenon is a bipartisan issue that spans both sides of the political aisle.²² The rank-and-file congressional salary is \$174,000,²³ yet the majority of members are millionaires.²⁴ Senator Rick Scott (R-FL) is worth \$200.3 million, Representative Darrel Issa (R-CA) is worth \$115.8 million, Senator Mark Warner (D-VA) is worth \$93.5 million, and Representative Doris Matsui

17. See Press Release, Abigail Spanberger, Congresswoman, House of Representatives., At Start of New Congress, Spanberger, Roy Reintroduce TRUST in Congress Act to Ban Members of Congress & Their Families from Trading Individual Stocks (Jan. 12, 2023), <https://spanberger.house.gov/posts/at-start-of-new-congress-spanberger-roy-reintroduce-trust-in-congress-act-to-ban-members-of-congress-their-families-from-trading-individual-stocks>.

18. Press Release, Chip Roy, Congressman, House of Representatives, Rep. Roy Criticizes Pelosi’s ‘Absurd,’ Closed, Under-the-Table Process for Stock Trading Reform Bill (Sept. 28, 2022), <https://roy.house.gov/media/press-releases/rep-roy-criticizes-pelosis-absurd-closed-under-table-process-stock-trading>.

19. See Molly Redden, *Designed to Fail? Some Democrats Point Finger at Nancy Pelosi Over Insider Trading Bill*, HUFFPOST (Sept. 30, 2022, 4:24 PM), https://www.huffpost.com/entry/pelosi-congress-insider-trading_n_63374676e4b0e376dbf6c714 (describing Pelosi’s delays and roadblocks). It is worth noting that Pelosi appears to have acted on behalf of her “closest allies,” who are also long-term or career politicians. See Mary Harris, *Why Nancy Pelosi Sabotaged Wildly Popular Bipartisan Legislation*, SLATE (Oct. 5, 2022, 4:08 PM), <https://slate.com/news-and-politics/2022/10/congressional-stock-market-ban-nancy-pelosi-sabotage.html> (observing that Pelosi acted, in part, for members she “served with for 10, 20, 30 years and are her closest allies”).

20. See Stephanie Lai & Kate Kelly, *House Puts Off Vote to Limit Lawmakers’ Stock Trades, Casting Doubt on Prospects*, N.Y. TIMES (Oct. 3, 2022), <https://www.nytimes.com/2022/09/30/us/politics/stock-trading-vote-congress.html>.

21. PETER SCHWEIZER, *THROW THEM ALL OUT: HOW POLITICIANS AND THEIR FRIENDS GET RICH OFF INSIDER STOCK TIPS, LAND DEALS, AND CRONYISM THAT WOULD SEND THE REST OF US TO PRISON* xiv–xv (Houghton Mifflin Harcourt Publ’g Co. 2011).

22. See *infra* Part IIA (demonstrating the long history of both Republicans and Democrats engaging in questionable trading practices).

23. Mark Strand & Tim Lang, *How Much do Members of Congress Get Paid?*, CONG. INST. (Feb. 21, 2019), <https://www.congressionalinstitute.org/2019/02/21/how-much-do-members-of-congress-get-paid-2/>.

24. Karl Evers-Hillstrom, *Majority of Lawmakers in 116th Congress Are Millionaires*, OPENSECRETS (Apr. 23, 2020, 9:14 AM), <https://www.opensecrets.org/news/2020/04/majority-of-lawmakers-millionaires/>.

(D-CA) is worth \$73.8 million, while dozens of other elected officials report a net worth over \$20 million.²⁵ Members of Congress possess information worth billions to financial markets—markets in which they freely (and frequently) participate.²⁶ Yet, the government has never prosecuted a member of Congress for insider trading related to material nonpublic government information.²⁷ To excuse this history of non-prosecution, experts assert that insider trading law is too complex to successfully apply to Congress.²⁸ They likewise claim that congressional stock portfolio performance is too nebulous to establish liability.²⁹ The Securities and Exchange Commission (SEC) instead targets its enforcement efforts on middle-class traders with median profits of \$50,000.³⁰

This Article challenges these excuses and exposes systemic government corruption in an effort to formulate a modest proposal to end congressional insider trading. During economic shocks like the COVID-19 crisis, members of Congress engaged in brazen securities transactions motivated by material nonpublic government information. By shadow trading congressional portfolios during this crisis, we demonstrate that Congress generated a return in excess of 9.88% above the market return.³¹ This evidence suggests that politicians are illegally trading on congressional knowledge.³² In response, our modest proposal calls for an executive order directing the SEC to apply insider trading laws to Congress with the same zeal it routinely uses to target middle-class traders. This proposal diverges sharply from standard scholarly and political proposals to restrict congressional securities transactions via qualified blind trusts.³³ These short-sighted solutions would only further conceal congressional securities fraud while placating the public in the process. In challenging the mainstream narrative, this Article

25. Madison Hall & Angela Wang, *Meet the 25 Wealthiest Members of Congress*, BUS. INSIDER (Dec. 14, 2021, 7:02 AM), <https://www.businessinsider.com/wealthiest-members-congress-house-senate-finances-2021-12>.

26. See Tyler Gellasch, Opinion, *I Helped Write the STOCK Act. It Didn't Go Far Enough.*, POLITICO (Mar. 25, 2020, 3:50 PM), <https://www.politico.com/news/magazine/2020/03/25/congress-stock-trade-148678>.

27. See Danielle A. Austin, Note, *We the People or We the Legislature?: The Stock Act's Compromise Between Politically-Motivated Accountability and Keeping Congress Above the Law*, 42 HOFSTRA L. REV. 267, 269 (2013).

28. See *infra* Section I.A.

29. See *infra* Section II.B.

30. See Michael A. Perino, *Real Insider Trading*, 77 WASH. & LEE L. REV. 1647, 1655 (2020).

31. See *infra* Section II.B.

32. See *infra* Section II.B.

33. See *infra* Section III.B.

demonstrates that insider trading law is actually simple and pragmatic. In fact, routine SEC application of the law in its current form will certainly curtail congressional insider trading. The political class is likely to resist this modest proposal, which reinforces the troubling fact that government officials from both political parties operate under a different set of rules than average Americans.³⁴

This argument has four parts. Part I sets forth and refutes the standard narrative that insider trading law is “complex.” Insider trading law is quite straightforward: it prohibits an individual from trading on material nonpublic information derived from a breach of trust or confidence. Despite widespread confusion on this front, this same standard applies to members of Congress (and *always* has). Part II makes the case against Congress and presents overwhelming anecdotal and empirical evidence that members consistently engage in prohibited insider trading. This Part employs original data analysis to demonstrate that congressional COVID-era trades realized abnormal returns of nearly 10%, which defies the efficient capital markets theory and indicates congressional trading on government knowledge.³⁵ Part III frames as counterproductive the contemporary scholarly and political proposals to address the problem. Self-policing and the use of qualified blind trusts create the appearance of fair play, while adroitly concealing widespread securities fraud. Part IV proposes a simple executive order instructing the SEC to begin enforcing the law against members of Congress with the same legal standard it currently deploys to target middle-class traders. This Article concludes by suggesting that government officials will resist this just, efficient, and pragmatic proposal. In so doing, it highlights government hypocrisy and public complicity in tolerating widely recognized political corruption.

I. INSIDER TRADING LAW, POLICY, AND ENFORCEMENT RHETORIC

This Part examines (and questions) insider trading law’s alleged complexity, revealing instead that the law is demonstrably coherent and effective. In so doing, it engages section 10(b) of the Securities Exchange

34. See Grace Panetta, *14 Prominent Democrats Stand Accused of Hypocrisy for Ignoring COVID-19 Restrictions They’re Urging Their Constituents to Obey*, BUS. INSIDER (Sept. 20, 2021), <https://www.businessinsider.com/democratic-politicians-who-violated-covid-19-rules-guidance-list-2020-12> (describing the hypocrisy of elected officials imposing draconian rules on citizens, while openly ignoring those same rules in their own personal lives).

35. See Stephen M. Bainbridge, *Insider Trading Inside the Beltway*, 36 J. CORP. L. 281, 282 (2011).

Act of 1934 (“Exchange Act”), as it relates to classical and misappropriation insider trading.³⁶ After examining these legal policies, this Part concludes by demonstrating that these laws apply to—and have *always* applied to—congressional insider trading. The “complexity” narrative is a red herring that functions to obscure the issue and prevent congressional insider trading enforcement.

A. *Insider Trading Law’s Standard Complexity Narrative*

For many legal scholars, practitioners, and policy makers, insider trading law is inaccessible and its underlying “doctrinal problems are legion.”³⁷ The primary concerns arise from the fact that the Exchange Act neither expressly prohibits insider trading nor clearly defines the offense.³⁸ Insider trading law instead arises from key Supreme Court cases and decades of common law evolution.³⁹ As a result, market participants are left with the “complexity, ambiguity, and ever-changing benchmark of what actually constitutes insider trading.”⁴⁰ Professor John P. Anderson laments that insider trading doctrine is “fraught with controversy, instability, and uncertainty.”⁴¹ Elsewhere, Anderson condemns it as “schizophrenic” and “irrational.”⁴² Professor Miriam Baer describes insider trading law as problematically piecemeal and inadequately articulated.⁴³ Professor Donna Nagy criticizes this body of

36. 15 U.S.C. § 78j(b).

37. Perino, *supra* note 30, at 1651. Of course, it would be remiss to deny the nuance inherent in insider trading law. Perino accurately describes questions and ambiguities surrounding “materiality,” duties of “trust or confidence,” tipper “personal benefits,” and other fascinating doctrinal questions. *Id.* at 1651–52. However, while these are interesting scholarly discussions, they often overcomplicate an essentially simple doctrine.

38. Jeanne L. Schroeder, *Taking Stock: Insider and Outsider Trading by Congress*, 5 WM. & MARY BUS. L. REV. 159, 163 (2014).

39. *Infra* Part I.B; see also John P. Anderson, Jeremy L. Kidd & George A. Mocsary, *Public Perceptions of Insider Trading*, 51 SETON HALL L. REV. 1035, 1037 (2021) (“Congress and the Securities and Exchange Commission (SEC) have allowed the law to develop in the courts and administrative tribunals. But without the benefit of clear legislative guidance, the area’s sixty years of common law development has been neither linear in direction nor consistent in outcome.”); Donna M. Nagy, *Insider Trading, Congressional Officials, and Duties of Entrustment*, 91 B.U.L. REV. 1105, 1110 (2011) (observing that “[t]he result is that U.S. insider trading law has been almost entirely judge-made, although much of that law has been subsequently codified in additional rules promulgated by the SEC”).

40. Schneider, *supra* note 8, at 298.

41. Anderson et al., *supra* note 39, at 1040.

42. *Id.* at 1053 (“The result is a schizophrenic insider trading regime . . .”); see also JOHN P. ANDERSON, *INSIDER TRADING: LAW, ETHICS, AND REFORM* 59–60 (2018) (describing insider trading enforcement regimes as “inefficient, unfair, and irrational”).

43. See Miriam H. Baer, *Insider Trading’s Legality Problem*, 127 YALE L.J. F. 129, 145–48 (2017).

law as overly prone to judicial “revisionism.”⁴⁴ Former SEC Commissioner Robert Jackson and U.S. Attorney Preet Bharara decry insider trading laws as “shoddy” and enshrouded in “legal haziness.”⁴⁵ Still others deem insider trading jurisprudence “astonishingly dysfunctional.”⁴⁶ The scholarly and political consensus is that insider trading law is overly complicated and requires immediate reform. However, as the next Section demonstrates, insider trading law is actually quite straightforward.

B. The Classical & Misappropriation Theories of Insider Trading

In simple terms, insider trading occurs when an individual benefits from using material nonpublic information to trade securities (or advises another to trade) while breaching a duty of trust or confidence to the information’s source or a market counterparty.⁴⁷ Information is “material” if there is a substantial likelihood that a reasonable investor would deem the information important in deciding to trade.⁴⁸ Information is “nonpublic” until it receives a broad, public dissemination⁴⁹ or until the stock price reflects the pertinent information.⁵⁰ Insider trading law did not develop overnight, and its evolution has not been teleological.⁵¹ Still, the end result is an “interstitial” and “dynamic” body of law that quickly adapts to changing financial markets and technologies.⁵²

Congress does not specifically define or prohibit insider trading by statute.⁵³ Instead, section 10(b) of the Exchange Act⁵⁴ includes Rule 10b-

44. See Donna M. Nagy, *Insider Trading and the Gradual Demise of Fiduciary Principles*, 94 IOWA L. REV. 1315, 1320–21 (2009).

45. Preet Bharara & Robert Jackson, *Insider Trading Laws Haven’t Kept Up with the Crooks*, N.Y. TIMES (Oct. 9, 2018), <https://www.nytimes.com/2018/10/09/opinion/sec-insider-trading-united-states.html>.

46. Saikrishna Prakash, *Our Dysfunctional Insider Trading Regime*, 99 COLUM. L. REV. 1491, 1493 (1999).

47. See *infra* Part I.B.1–2.

48. *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988). Proving materiality is often circular in nature, as courts tend to infer materiality from the very fact that an individual traded while knowing the information in question. See *SEC v. Tex. Gulf Sulphur Co.*, 401 F.2d 833, 851 (2d Cir. 1968) (en banc) (holding that an insider’s decision to trade on information is sometimes sufficient for determining materiality).

49. See *Dirks v. SEC*, 463 U.S. 646, 653 n.12 (1983).

50. See *United States v. Libera*, 989 F.2d 596, 601 (2d Cir. 1993).

51. Jill E. Fisch, *Federal Securities Fraud Litigation as a Lawmaking Partnership*, 93 WASH. U. L. REV. 453, 480–83 (2015) (describing insider trading law as a “lawmaking partnership” that includes courts, prosecutors, the SEC, and Congress).

52. See Perino, *supra* note 30, at 1657.

53. Nagy, *supra* note 39, at 1109.

54. 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5 (2023).

5, which broadly prohibits the use of fraud or deception “in connection with the purchase or sale of any security.”⁵⁵ Rule 10b5-2 defines the duties of trust or confidence that implicate deception in the insider trading context.⁵⁶ These include, but are not limited to, scenarios where parties agree to keep information confidential; when parties have a history, pattern, or practice of confidentiality; and where parties share certain confidential familial bonds.⁵⁷ Together, these statutory provisions provide the broad basis for insider trading enforcement. Insider trading liability arises from two judicially constructed legal theories stemming from these statutes: “classical insider trading” and “misappropriation insider trading.”⁵⁸ The SEC investigates and enforces insider trading violations as a civil offense, and the Department of Justice (DOJ) prosecutes referred violations as a crime.⁵⁹

1. Classical Insider Trading

Classical insider trading arose in 1961 when the SEC declared that corporate insiders have a duty to disclose or abstain from trading when in possession of material nonpublic information.⁶⁰ In 1968, federal courts adopted this theory in *SEC v. Texas Gulf Sulphur Co.* by holding that a corporate insider must disclose material nonpublic information to the public or abstain from trading on the basis of that information.⁶¹ The Supreme Court eventually endorsed the theory in 1980 with *Chiarella v. United States*.⁶² Chiarella worked for a financial printer and decoded corporate deal documents to anticipate mergers prior to public

55. 17 C.F.R. § 240.10b-5 (2023).

56. 17 C.F.R. § 240.10b5-2.

57. 17 C.F.R. § 240.10b5-2(b)(1)–(3).

58. Mangesh Patwardhan, *To Legislate or Not to Legislate: Judging the Judge-Made Insider Trading Prohibition Theories in the United States*, 45 DEL. J. CORP. L. 323, 330 (2021) (identifying three primary judicial theories). However, our analysis subsumes “equal access” into the classical insider trading paradigm.

59. 15 U.S.C. § 78ff(a) (stating that natural persons who violate the Exchange Act “shall upon conviction be fined not more than \$5,000,000, or imprisoned not more than 20 years, or both”); see also *Duties of Entrustment*, *supra* note 39, at 1109 (stating that “violations of the rule may be prosecuted by the SEC as a civil offense or prosecuted by the Department of Justice (DOJ) as a crime”); Michael T. Byrne, Note, *United States v. Blaszczyk Brings Insider Trading Law to a Tipping Point*, 66 VILL. L. REV. 187, 189–91 (2021) (discussing additional avenues of insider trading liability under 18 U.S.C. § 1348).

60. *In re Cady, Roberts & Co.*, 40 S.E.C. 907, 911 (1961). The earliest judicial articulation of insider trading was in *Strong v. Repide*, 213 U.S. 419, 431 (1909) (recognizing insider trading as a form of fraud).

61. *SEC v. Tex. Gulf Sulphur Co.*, 401 F.2d 833, 848–51 (2d Cir. 1968) (enunciating the rule in a case where corporate insiders traded on material nonpublic information related to a particularly valuable mineral and ore deposit the company had discovered).

62. 445 U.S. 222, 227 (1980).

announcements; he traded and profited on this information.⁶³ In establishing insider trading as a breach of trust or confidence against potential market participants, the Court determined that Chiarella had *not* engaged in insider trading, because:

No duty could arise from [Chiarella's] relationship with the sellers of the target company's securities, for [Chiarella] had no prior dealings with them. He was not their agent, he was not a fiduciary, *he was not a person in whom the sellers had placed their trust and confidence*. He was, in fact, a complete stranger who dealt with the sellers only through impersonal market transactions.⁶⁴

In other words, classical insider trading liability can only arise where a duty of trust or confidence exists between the buyer and seller of the security. Chiarella had no relationship with any of the corporate entities (thus, he had no duty of trust or confidence with those entities' shareholders). Therefore, Chiarella's market counterparties had not placed any trust or confidence in him.⁶⁵ The simple fact that the corporate entities utilizing Chiarella's services encoded the deal documents proves that none of parties placed trust in him.⁶⁶

Three years later in *Dirks v. SEC*, the Court expanded this concept of classical insider trading liability to "constructive insiders" and "tippees."⁶⁷ First, the Court determined that a "constructive insider" (e.g., an underwriter, consultant, accountant, or lawyer working for a corporation) enters into a relationship of trust or confidence with corporate shareholders.⁶⁸ In such cases, the constructive insider cannot trade on material nonpublic information they gleaned through their professional relationship with the corporation.⁶⁹ In effect, corporate shareholders indirectly place their trust in these constructive insiders not to exploit material nonpublic information that the corporate principle shared with them. Second, the Court determined that if a corporate or constructive insider benefits from providing a third party with material nonpublic information, such as a stock "tip," that "tippee" (the person who receives the tip) assumes a derivative duty of trust or confidence to the

63. *Id.* at 224.

64. *Id.* at 232–33 (emphasis added).

65. *See id.*

66. *See id.* at 244–45 (Brennan, J., concurring) (describing how Chiarella had to decipher and decode the deal documents to ascertain the names of the merging companies).

67. 463 U.S. 646 (1983).

68. *Id.* at 655 n.14.

69. *See id.*

shareholders.⁷⁰ That is, the person who received the stock tip inherits the insider's duty of trust or confidence to the shareholders and cannot trade if they know (or should know) that the "tipper" inappropriately shared material inside information with them.⁷¹ This inherited and derivative chain of liability extends to all tippees—however remote they may be from the original source of material nonpublic information.⁷²

2. Misappropriation Insider Trading

Whereas courts premise classical insider trading on a breach of trust or confidence between market participants, misappropriation insider trading arises when the trading party betrays the trust of *any* source of material nonpublic information. The Court embraced the misappropriation theory in 1997 with *United States v. O'Hagan*.⁷³ O'Hagan was a law firm partner, and other lawyers at his firm—but, importantly, not O'Hagan himself—represented a corporate party in a merger transaction.⁷⁴ O'Hagan surreptitiously gleaned information about the merger from a law partner who was working on the transaction and traded prior to the public announcement, making \$4.3 million in profits.⁷⁵ O'Hagan owed no duty to corporate shareholders (i.e., he was not a corporate insider, constructive insider, or tippee), but he did owe a duty of trust or confidence to his law partner—the *source* of the material nonpublic information.⁷⁶ The Court established that a person incurs section 10(b) insider trading liability when that trader "misappropriates confidential information for securities trading purposes, in breach of a duty owed to the *source* of the information."⁷⁷

In essence, when a person feigns loyalty to a trusting source of information in order to misappropriate nonpublic information to trade securities, they commit misappropriation insider trading.⁷⁸ In misappropriation cases, no duty exists between the trader and corporate shareholders; instead, the relevant duty is between two parties who trust one another not to betray confidences.

70. *Id.* at 659–60.

71. *Id.*

72. *See* *Salman v. United States*, 580 U.S. 39, 47 (2016) (defining a remote tippee as an individual "who receive[s] inside information from another tippee, rather than the tipper"); Perino, *supra* note 30, at 1729 (discussing the theoretically indefinite chain of tippee liability).

73. 521 U.S. 642 (1997).

74. *Id.* at 647.

75. *See id.* at 647–48.

76. *See* *United States v. O'Hagan*, 139 F.3d 641, 648–49 (8th Cir. 1998).

77. 521 U.S. at 652 (emphasis added).

78. *See* Peter Molk, *Uncorporate Insider Trading*, 104 MINN. L. REV. 1693, 1706 (2020).

The SEC and courts employ an expansive interpretation of the duty of trust or confidence in misappropriation cases.⁷⁹ For example, a father who rummaged through his daughter's belongings to find merger documents and traded on that information misappropriated by breaching the father-daughter relationship of trust.⁸⁰ An electrician who eavesdropped to overhear material nonpublic information while repairing wires on a job and traded on that information misappropriated by violating the trust that arises upon an invitation to enter another person's property to work for them.⁸¹ A jury member who tipped information from a grand jury investigation to other traders misappropriated by breaching the confidentiality inherent in closed-door jury deliberations.⁸² Finally, a member of Alcoholics Anonymous (AA) who traded on information he learned in connection with an AA meeting engaged in misappropriation by breaching the sanctity of recovery-related sharing of confidences.⁸³ As such, all trading based on a breach of trust or confidence against the source of material nonpublic information constitutes misappropriation insider trading.

C. SEC Policy and Enforcement Rhetoric

As the above discussion demonstrates, both the classical and misappropriation theories of insider trading afford the SEC a great deal of latitude in enforcing insider trading rules under section 10(b). This legal latitude provides the SEC and federal prosecutors with maximum flexibility to promote the policies undergirding insider trading prohibitions.⁸⁴ These policies stem from the SEC's three-part mission: "[t]o protect investors, maintain fair, orderly, and efficient markets, and

79. See Nagy, *supra* note 39, at 1119–20.

80. See Brief for Petitioner at 1–2, SEC v. Goetz, No. 11 CV 1220 (S.D. Cal. 2011); *Litigation Release No. 21990*, SEC (June 6, 2011), <https://www.sec.gov/litigation/litreleases/2011/lr21990.htm> (“[The father] and his daughter shared a relationship of trust and confidence. Unbeknownst to his daughter, [the father] misappropriated confidential deal information from her while she worked on the transaction at her parents’ house over the holidays in December 2008.”).

81. See SEC v. Falbo, 14 F. Supp. 2d 508, 523 (S.D.N.Y. 1998). Ironically, the electrician’s case relates to the same merger that implicated O’Hagan in misappropriation insider trading.

82. See John Herzfeld, *Crime: Grand Juror Sentenced to Prison for Leaks to Insider Trading Ring*, 38 Sec. Reg. & L. Rep. (BNA) 2081, at 2098 (Dec. 18, 2006).

83. See *United States v. McGee*, 763 F.3d 304, 309–10, 317 (3d Cir. 2014) (explaining that the relationship between members of AA creates a duty of trust or confidence between the individuals).

84. See STEPHEN M. BAINBRIDGE, INSIDER TRADING LAW AND POLICY 141–45 (2014).

facilitate capital formation.”⁸⁵ The broad and flexible insider trading prohibition bolsters public confidence in the stock market’s integrity, without which “ordinary investors would refuse to invest, ultimately impairing capital formation.”⁸⁶ If ordinary investors believe the big players are cheating, they will simply refuse to play a fixed game by putting their money in the market.⁸⁷ Former SEC Chairman William Cary stated that insider trading prohibitions must be expansive and flexible so as to promote investor confidence, a policy argument oft-echoed by scholars and enforcers alike.⁸⁸

The government’s insider trading enforcement rhetoric aligns with these populist policy arguments. The rhetoric focuses on strict and uniform enforcement based on a mistrust of “the wealth and power of economic elites.”⁸⁹ As such, former SEC officials have promised to crack down on insider trading with “hobnail boots.”⁹⁰ Preet Bharara, while still in his capacity as a federal prosecutor, expressed disdain for insider trading, because the perpetrators were “among the most advantaged, privileged, and wealthy insiders in modern finance.”⁹¹ For these privileged actors, “material non-public information is akin to a performance-enhancing drug,” and “[i]t is unfair; it is offensive; it is

85. SEC, STRATEGIC PLAN FISCAL YEARS 2022–2026, at 5 (2022), https://www.sec.gov/files/sec_strategic_plan_fy22-fy26.pdf.

86. Perino, *supra* note 30, at 1660.

87. However, recent studies demonstrate that ordinary investors might not disapprove of insider trading as much as scholars often suggest. See Anderson et al., *supra* note 39, at 1082 (“Overall, fewer than half of the survey’s participants said that they would be less likely to trade in a given stock if they believed that insider trading was occurring in that stock, and even fewer said that ‘common’ insider trading in the broader stock market would deter them from trading.”). It is also important to note that various commentators disagree with these policy arguments. Professor Jonathan Macey argues that insider trading produces price accuracy and healthy markets. See JONATHAN R. MACEY, INSIDER TRADING: ECONOMICS, POLITICS, AND POLICY 10 (1991). Others have argued that insider trading is actually an efficient form of executive compensation. See, e.g., Ian Ayres & Steven Choi, *Internalizing Outsider Trading*, 101 MICH. L. REV. 313, 338 (2002).

88. See *In re Cady, Roberts & Co.*, 40 S.E.C. 907, 912–13 (1961) (stating that the SEC is “not to be circumscribed by fine distinctions and rigid classifications”); see also THE BHARARA TASK FORCE ON INSIDER TRADING, REPORT OF THE BHARARA TASK FORCE 4 (2020) (noting that without clear insider trading enforcement policies “[t]he public has been left to question the fundamental fairness and integrity of the markets”).

89. Donald C. Langevoort, *Rereading Cady, Roberts: The Ideology and Practice of Insider Trading Regulation*, 99 COLUM. L. REV. 1319, 1329 (1999).

90. Leslie Wayne, *Inside Trading by Outsiders; The S.E.C. Strives to Widen its Net. But Major Rulings Have Held it Back*, N.Y. TIMES, May 27, 1984 (§ 3), at 1, <https://www.nytimes.com/1984/05/27/business/inside-trading-outsiders-sec-strives-widen-its-net-but-major-rulings-have-held.html>.

91. Preet Bharara, U.S. Att’y, S. Dist. N.Y., *The Future of White Collar Enforcement: A Prosecutor’s View* (Oct. 20, 2010), <https://www.justice.gov/usao-sdny/speech/future-white-collar-enforcement-prosecutor-s-view-prepared-remarks-us-attorney>.

unlawful; and it puts a black mark on the entire enterprise.”⁹² The insider trading enforcement rhetoric unequivocally focuses on stopping privileged and elite investors from exploiting positions of power at the expense of rank-and-file market participants. That rhetoric translates to an enforcement policy with a great deal of prosecutorial elasticity.⁹³ This elasticity allows the SEC to pursue cases that rarely involve a “smoking gun,” and in which they enforce the law using mostly “circumstantial evidence” to establish insider trading liability.⁹⁴

D. Application of Insider Trading Law to Congress

Insider trading law, policy, and rhetoric create an enforcement paradigm seemingly well-suited to combating congressional insider trading. After all, if the SEC imputes an insider trading-related duty of trust or confidence to eavesdropping electricians and opportunistic alcoholics,⁹⁵ surely fairness, justice, and basic common sense demand that the same duties of trust or confidence apply to members of Congress with regard to trading related to nonpublic government information. Members of Congress are also among the most powerful and elite in U.S. society. This Section demonstrates that, despite a surprising degree of scholarly disagreement on the subject,⁹⁶ members of Congress have always had a clear duty of trust or confidence toward various market participants (most notably, citizen-investors) not to trade on material nonpublic information gleaned from government service.⁹⁷

The congressional duty of trust or confidence against exploiting government information for personal profit has existed from the Republic’s earliest days.⁹⁸ Institutional norms and expectations have

92. *Id.*

93. See Nagy, *supra* note 39, at 1132–33.

94. *Id.* at 1135.

95. See *supra* Section I.B.2.

96. See Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 CORNELL L. REV. 845, 847–52 (2013) (discussing the long-standing “majority view” among scholars that Congress did not have a fiduciary-like duty of trust or confidence to U.S. citizens prior to 2012); see also Michael A. Perino, *A Scandalous Perversion of Trust: Modern Lessons from the Early History of Congressional Insider Trading*, 67 RUTGERS U. L. REV. 335, 338–39 (2015) (discussing the continuing debate as to when, whether, and to what extent congressional duties of trust or confidence apply in the context of insider trading) [hereinafter Perino, *Scandalous Perversion*].

97. See Nagy, *supra* note 39, at 1111 (“[M]embers of Congress and legislative staffers owe fiduciary-like duties of trust and confidence to a host of persons including the citizen-investors whom they serve, as well as the federal government, other members of Congress, and government officials outside of Congress who rely on their loyalty and integrity.”).

98. Perino, *Scandalous Perversion*, *supra* note 96, at 340.

consistently prohibited Congress from profiting on material nonpublic government information.⁹⁹ Members of Congress have always owed a duty of trust or confidence to both the government in which they participate and the citizens whom they represent. Congress first articulated the duty after Samuel Chase, a Maryland delegate to the Continental Congress in 1778, used material nonpublic Revolutionary War intelligence to corner the flour market for personal profit.¹⁰⁰ Chase's colleagues universally condemned his congressional profiteering as a "breach of confidence,"¹⁰¹ which brought Congress into disrepute.¹⁰² Given U.S. insider trading law's policy commitment to public trust and confidence, this conclusion should strike most readers as obvious. The absence of this duty would create "perverse incentives for these officials," introducing "innumerable distortions and the potential for immeasurable harm in a legal system in which public trust and confidence is critical."¹⁰³ In the absence of this explicit congressional duty, the body politic might develop a cynical suspicion that members of Congress sometimes put personal financial interests ahead of the public interest.

Perhaps aware of these optics (though, admittedly, a bit late in the game), Congress affirmatively memorialized this duty in 1958 by adopting the *Code of Ethics in Government Service*, which obligated members of Congress to "[n]ever use any information coming to him confidentially in the performance of governmental duties as a means for making private profit."¹⁰⁴ Despite this explicit ethical code, finance journalists continued asserting that the "practice of Congressional insider-trading was totally legal."¹⁰⁵ However, persistent accusations of congressional insider trading eventually embarrassed Congress into affirmatively legislating the fact that it owed the public a duty of trust or confidence with regard to material nonpublic information gained through government service.¹⁰⁶ In 2012, Congress passed the Stop Trading on Congressional Knowledge ("STOCK") Act,¹⁰⁷ which stated,

99. *See id.*

100. *See id.* at 339.

101. *See* JAMES HAW ET AL., *STORMY PATRIOT: THE LIFE OF SAMUEL CHASE* 215–16 (1980).

102. Perino, *Scandalous Perversion*, *supra* note 96, at 341.

103. *See* Jonathan R. Macey & Maureen O'Hara, *Regulation and Scholarship: Constant Companions or Occasional Bedfellows?*, 26 *YALE J. ON REG.* 89, 108 (2009).

104. H.R. Con. Res. 175, 85th Cong., 72 Stat. B12, at 8 (1958).

105. Kevin Roose, *Paul Ryan Is Not an Insider Trader*, *N.Y. MAG.* (Aug. 13, 2012), <https://nymag.com/intelligencer/2012/08/paul-ryan-not-an-insider-trader.html>.

106. *See* Schroeder, *supra* note 38, at 165.

107. Stop Trading on Congressional Knowledge (STOCK) Act of 2012, Pub. L. No. 112-105, 126 Stat. 291.

[S]olely for purposes of the insider trading prohibitions arising under this Act, including section 10(b) and Rule 10b-5 thereunder, each Member of Congress or employee of Congress owes a duty arising from a relationship of trust and confidence to the Congress, the United States Government, and the citizens of the United States with respect to material, nonpublic information derived from such person's position as a Member of Congress or employee of Congress or gained from the performance of such person's official responsibilities.¹⁰⁸

The STOCK Act was a superfluous public-relations stunt,¹⁰⁹ as both the classical and misappropriation insider trading theories already applied to members of Congress.¹¹⁰ Yet, inexplicably, debate still exists as to whether, or to what extent, regulators can hold members of Congress liable for their trading activity.¹¹¹

Nonetheless, a wider public recognition of this historical and legislative clarity might go a long way in preventing misinformed statements, like those of former SEC Chairman Arthur Levitt, claiming that Congress was “immune from insider trading laws.”¹¹² Putting an end to this rather curious debate on the issue of whether insider trading laws apply to congressional securities transactions will hopefully eliminate the “corrosive belief” that lawmakers have legal license to “place their personal financial interests ahead of the public they serve.”¹¹³ Members of Congress cannot trade securities based on material nonpublic government information.

Given the historical and legislative certainty on this issue, one might reasonably interpret the fact that the government has never prosecuted a member of Congress for insider trading based on congressional knowledge as evidence that such trading does not occur. However, as the next Part demonstrates, both anecdotal and empirical evidence indicates

108. *Id.* § 4(b)(2).

109. See Schneider, *supra* note 8, at 297 (discussing the “broad consensus” that Congress passed the STOCK Act “merely to appease the public”).

110. Nagy, *supra* note 39, at 1130; see also Perino, *Scandalous Perversion*, *supra* note 96, at 350 (“In Congress’s earliest days, were members expected to keep information confidential? Were those who violated that expectation subject to scorn? Was exploiting confidential information for personal gain regarded as unethical and outrageous conduct? The answer to all of those questions is ‘yes.’”).

111. See *infra* Part III.1.

112. See Kim, *supra* note 96, at 847–48, 848 n.11 (recounting Levitt’s 2010 statement that members of Congress “benefit from an exemption that the average investor doesn’t benefit from. They’re immune from insider trading laws”).

113. Donna M. Nagy, *Owning Stock While Making Law: An Agency Problem and a Fiduciary Solution*, 48 WAKE FOREST L. REV. 567, 569 (2013).

that members of Congress routinely—and quite egregiously—commit insider trading under both the classical and misappropriation liability theories.

II. THE CASE AGAINST CONGRESS

This Part presents compelling evidence that members of Congress routinely exploit material nonpublic information gleaned through government service to profit via insider trading. Congress is not only the largest generator of market-moving information, but it is also the nexus of all corporate and industry disclosure that passes through federal and executive agencies.¹¹⁴ The temptation to profit from this profound access to material nonpublic information is great, and this Part provides anecdotal and empirical analysis of how members of Congress appear to have succumbed to this temptation and “made politics a business.”¹¹⁵

A. *Anecdotal Evidence of Congressional Insider Trading*

Members of Congress have a long history of trading securities suspiciously close to economic shocks that disrupt U.S. financial markets. From the nation’s inception, “[c]ongressional use of nonpublic information for the purpose of individual financial gain has plagued” the United States.¹¹⁶ Public officials have lined their pockets using material nonpublic information since, at least, the Revolutionary War.¹¹⁷ During World War I, accusations likewise arose that members of Congress and Wall Street investors routinely colluded to trade on nonpublic government information related to the war effort.¹¹⁸ In the 1960s, book-length studies detailed the assorted ways politicians have exploited their positions of trust or confidence for personal financial gain.¹¹⁹ In the 1990s, Senator Lloyd Bentsen (D-TX) traded dairy stock days before the

114. See Bainbridge, *supra* note 35, at 283; see also Bud W. Jerke, *Cashing in on Capitol Hill: Insider Trading and the Use of Political Intelligence for Profit*, 158 U. PA. L. REV. 1451, 1456 (2010) (discussing how Congress, lobbyists, and the political intelligence apparatus work together to “translate political knowledge into economic profit”).

115. SCHWEIZER, *supra* note 21, at xv.

116. Kevin W. Fritz, Comment, *The STOCK Act is Inadequate: U.S. Index Funds Are the Solution to Political Insider Trading*, 7 LIBERTY U. L. REV. 275, 277 (2013) (discussing congressman Jeremiah Wadsworth and Senator Robert Morris manipulating early U.S. legislation to profit from Revolutionary War bonds).

117. See *supra* notes 98–103 and accompanying text.

118. See JAMES GRANT, BERNARD M. BARUCH: THE ADVENTURES OF A WALL STREET LEGEND 75–76 (1983).

119. See, e.g., DREW PEARSON & JACK ANDERSON, THE CASE AGAINST CONGRESS: A COMPELLING INDICTMENT OF CORRUPTION ON CAPITOL HILL 184–86 (1968).

government began investigating the dairy processor for bid rigging, Senator Bob Dole (R-KS) purchased data processing stock days before new rules for military data processing came into effect, and Representative Newt Gingrich (R-GA) purchased Boeing stock immediately before he helped Boeing secure a large government contract.¹²⁰ This Section focuses on more recent congressional trading in connection with two significant economic shocks: the 2008 financial crisis and the COVID-19 pandemic.¹²¹

1. 2008 Financial Crisis

Many insiders were aware of the looming financial crisis years before markets unraveled in 2008; indeed, Treasury Secretary (and former Goldman Sachs chief executive) Henry Paulson played a significant role in *causing* the crisis.¹²² In the buildup to the catastrophe, more than thirty members of Congress “took steps to recast their financial portfolios during the financial crisis after phone calls or meetings” with Treasury Secretary Paulson and other top officials at the Treasury and Federal Reserve Bank (“Fed”).¹²³ Senator Ben Nelson (D-NE) spoke with Paulson on January 10, 2007, regarding Fannie Mae and Freddie Mac; he purchased up to \$200,000 of Treasury notes the very next day.¹²⁴ Nelson spoke with Paulson again on February 12, 2007, and that same day he purchased up to \$100,000 in Treasury bills.¹²⁵ Nelson denied that his private conversations with Paulson influenced his decisions to pivot into safer government securities leading up to the crisis.¹²⁶

Representative John Boehner (R-OH), the House minority leader and President Bush’s “point person” during the financial crisis, met with

120. Paul D. Brachman, *Outlawing Honest Graft*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 261, 271 (2013).

121. This Article does not address the equally large insider trading problem related to the so-called “political intelligence industry,” through which Congress “tips” material nonpublic government information to hedge funds, lobbyists, and other interested parties in exchange for campaign contributions. This issue could easily fill the pages of another contemporaneous proposal to mitigate congressional corruption. See *generally* Jerke, *supra* note 114, at 1451–52.

122. See Eugene McCarthy, *Corporate Law, Business Schools, and White-Collar Crime*, 67 ST. LOUIS U. L. REV. 245, 257–61 (2023) (detailing Treasury Secretary Henry Paulson’s many causal connections to the 2008 financial crisis).

123. Kimberly Kindy et al., *Lawmakers Reworked Financial Portfolios After Talks with Fed, Treasury Officials*, WASH. POST (June 24, 2012, 10:57 PM), https://www.washingtonpost.com/politics/lawmakers-reworked-financial-portfolios-after-talks-with-fed-treasury-officials/2012/06/24/gJQAnQPg0V_story.html.

124. *Id.*

125. *Id.*

126. See *id.*

Secretary Paulson on January 23, 2008.¹²⁷ That same day, Boehner transferred up to \$100,000 of securities into lower-risk funds.¹²⁸ He had over forty additional calls with Paulson that year, and rather symmetrically reported over forty additional securities transactions during that period.¹²⁹ Incidentally, Boehner again made impeccably timed healthcare and pharmaceutical industry trades in 2009, just five days before he helped defeat the public-option healthcare plan in Congress.¹³⁰ In 2008, Democratic Whip Dick Durbin (D-IL) met with Paulson on September 16th and 18th, and he sold over \$100,000 in securities on September 17th and 18th, respectively.¹³¹ Representative Shelley Capito (R-WV) met with Paulson on September 17, 2008, and sold up to \$250,000 in bank shares that same day.¹³² Senator Sheldon Whitehouse (D-RI) likewise liquidated up to \$600,000 in securities between September 18th and 24th after similar meetings.¹³³

However, the prize for fortuitous speculation goes to Representative Spencer Bachus (R-AL), the ranking member of the House Financial Services Committee (and “rogue trader”) during the financial crisis.¹³⁴ Bachus made a series of risky options trades to short the market as the financial crisis unfolded.¹³⁵ On the evening of September 18, 2008, Bachus participated in a private briefing with Paulson and Fed Chairman Ben Bernanke, in which the officials sounded the alarm about the economy and left members of Congress “ashen-faced” with fear.¹³⁶ The next day, “Bachus bought contract options on Proshares Ultra-Short QQQ, an index fund that seeks results that are 200% of the inverse of the Nasdaq 100 index,” which is a risky but inexpensive way to bet that the market will fall.¹³⁷ And, as luck would have it, the dice fell in Bachus’s favor—he nearly doubled his money overnight.¹³⁸ The list goes on,¹³⁹ but the point should now be clear: members of Congress attempted to profit

127. *Id.*

128. See Schneider, *supra* note 8, at 304–05.

129. See Kindy et al., *supra* note 123.

130. See SCHWEIZER, *supra* note 21, at 20.

131. Schneider, *supra* note 8, at 307.

132. SCHWEIZER, *supra* note 21, at 33–34.

133. Schneider, *supra* note 8, at 307.

134. See David Weigel, *Spencer Bachus, Rogue Trader*, SLATE (Nov. 14, 2011, 10:30 AM), <https://slate.com/news-and-politics/2011/11/spencer-bachus-rogue-trader.html>.

135. See SCHWEIZER, *supra* note 21, at 27–32.

136. Weigel, *supra* note 134.

137. *Id.*

138. See *id.*

139. See SCHWEIZER, *supra* note 21, at 23–39 (detailing additional congressional malfeasance during the financial crisis, including Senator John Kerry, Congressman Rahm Emanuel, and others).

by trading on material nonpublic information during a financial crisis that decimated middle-class Americans.¹⁴⁰ The U.S. government did not prosecute any of these members of Congress for insider trading.¹⁴¹ As is typically the case, Congress instead enacted legislation to appease the public and prevent future occurrences of similar behavior—legislation that proved entirely counterproductive.¹⁴²

2. COVID-19 Pandemic

During the early days of the COVID-19 pandemic, forty-nine members of Congress made over 1,500 securities trades worth as much as \$158 million as they simultaneously awarded bailout and relief funding to specific companies and industries.¹⁴³ After confidential briefings and before initiating government lockdowns, members of Congress tried to cut their stock market losses.¹⁴⁴ Senator Diane Feinstein (D-CA) sold up to \$6 million in stock in a roughly two-week span as the government prepared to impose COVID-19 restrictions that would cause markets to tumble.¹⁴⁵ Senator Kelly Loeffler (R-GA), immediately following a confidential briefing with Dr. Anthony Fauci, sold substantial securities holdings.¹⁴⁶ Loeffler sold up to \$3.1 million to

140. See Brad Hershbein, *How the Great Recession Hurt the Middle Class—Twice*, BROOKINGS INST. (Dec. 4, 2018), <https://www.brookings.edu/blog/up-front/2018/12/04/how-the-great-recession-hurt-the-middle-class-twice/>.

141. See Schneider, *supra* note 8, at 314–15. One former member of Congress, Chris Collins, has been convicted of insider trading, but this was related to information Collins learned as an insider sitting on a corporate board of directors, not from congressional insider trading. See Jonathan Allen, *Former U.S. Congressman Collins Sentenced to 26 Months for Insider Trading*, REUTERS (Jan. 17, 2020, 6:07 AM), <https://www.reuters.com/article/us-usa-congressman-insidertrading/former-u-s-congressman-collins-sentenced-to-26-months-for-insider-tradingidUSKBN1ZG16N>.

142. See *infra* Section III.B. (discussing the failure of the STOCK Act and additional legislative proposals to mitigate congressional insider trading; also discussing the potential that Congress designs these legislative proposals to fail in the first place, knowing that the general public will soon lose interest after the next manufactured distraction arises).

143. See Nicholas Fandos, *To Gain Public's Trust, Should Members of Congress Stop Trading Stock?*, N.Y. TIMES (June 15, 2020), <https://www.nytimes.com/2020/06/15/us/politics/congress-trading-stock-loeffler-burr.html>.

144. See Kristen Kelbon, *Creating an Effective Vaccine to Prevent Congressional Insider Trading: Legislation Is Needed to Cure Deficiencies of the STOCK Act*, 55 CREIGHTON L. REV. 145, 146–47 (2022).

145. See Jack Kelly, *Senators Accused of Insider Trading, Dumping Stocks After Coronavirus Briefing*, FORBES (Mar. 20, 2020, 12:41 PM), <https://www.forbes.com/sites/jackkelly/2020/03/20/senators-accused-of-insider-trading-dumping-stocks-after-coronavirus-briefings/?sh=23596b554a45>.

146. See Katelyn Burns, *Kelly Loeffler and 2 Other Senators Are No Longer Being Investigated for Insider Trading*, VOX (May 27, 2020, 12:20 PM), <https://www.vox.com>

avoid steep losses, while serendipitously purchasing shares in a technology company that provides teleconferencing software to assist individuals working from home.¹⁴⁷ The U.S. government did not bring charges against Loeffler,¹⁴⁸ who, combined with her husband, has a reported net worth over \$500 million.¹⁴⁹ Senators David Perdue (R-GA) and Jim Inhofe (R-OK) also made highly suspicious trades immediately after receiving classified COVID-19 briefings, but both denied the briefings motivated their sudden decisions to trade in industries heavily impacted by forthcoming virus restrictions.¹⁵⁰

Senator Richard Burr (R-NC), the Chairman of the Senate Intelligence Committee, is perhaps the most egregious example of congressional COVID-19-era trading.¹⁵¹ A week before the COVID-19 market crash and immediately after participating in confidential intelligence briefings, Burr sold \$1.6 million in shares.¹⁵² That same day, he called his brother-in-law Gerald Fauth (they spoke for fifty seconds).¹⁵³ One minute later, Fauth called his own broker and liquidated shares.¹⁵⁴ Days before these sales, Senator Burr co-authored an opinion piece reassuring the public not to panic about the virus.¹⁵⁵ However, shortly after offering these public reassurances, he privately warned “well-connected constituents” that COVID-19 was “more aggressive in its transmission than anything we have seen in recent history.”¹⁵⁶ The U.S. government did not charge Burr with insider trading.¹⁵⁷ Notably, Burr’s lawyer, Jonathan Su, is a revolving-door specialist who served as White House counsel to Barack Obama, returned to his white-collar defense

/policy-and-politics/2020/5/27/21271726/kelly-loeffler-senators-investigation-insider-trading.

147. Kelly, *supra* note 145.

148. See Burns, *supra* note 146.

149. Patricia Zengerle, *Insider-trading Investigation Against U.S. Senator Dismissed*, REUTERS (June 17, 2020, 12:21 PM), <https://www.reuters.com/article/us-health-coronavirus-usa-senator/insider-trading-investigation-against-u-s-senator-dismissed-idUSKBN23O2MZ>.

150. See Schneider, *supra* note 8, at 310–11.

151. See Kelly, *supra* note 145.

152. Robert Faturechi, *Burr’s Brother-in-Law Called Stock Broker, One Minute After Getting Off Phone with Senator*, PROPUBLICA (Oct. 28, 2021, 12:05 PM), <https://www.propublica.org/article/burrs-brother-in-law-called-stock-broker-one-minute-after-getting-off-phone-with-senator>.

153. *Id.*

154. See *id.*

155. Vanessa Romo, *DOJ Drops Insider Trading Investigation Into Sen. Richard Burr*, NPR (Jan. 19, 2021, 9:12 PM), <https://www.npr.org/2021/01/19/958622574/doj-drops-insider-trading-investigation-into-sen-richard-burr>.

156. *Id.*

157. *Id.*

practice at Latham & Watkins where he represented Burr, and then returned to serve as White House counsel to President Biden.¹⁵⁸ More recently, Congress members made another flurry of well-timed banking trades immediately prior to and just after the Silicon Valley Bank collapse in 2023.¹⁵⁹

The two greatest financial crises of the twenty-first century produced egregious instances of opportunistic trading by members of Congress, which should have given the SEC ample evidence upon which to act. The SEC typically brings insider trading cases against middle-class Americans based on precisely this kind of circumstantial evidence.¹⁶⁰ Perhaps regulators are seeking more scientific and empirical evidence before taking action.¹⁶¹ The next Section deploys empirical data to support the conclusion that members of Congress may be engaging in illegal insider trading during periods of economic shock.

B. Empirical Evidence of Congressional Insider Trading

In 2004, finance professor Alan Ziobrowski and his co-authors found that U.S. senators outperformed the market by 12% between 1993 and 1998.¹⁶² Ziobrowski's subsequent study in 2011 found that the stock portfolios of U.S. Representatives likewise outperformed the market by approximately 6%.¹⁶³ Critiquing Ziobrowski's broader conclusions, Professors Andrew Eggers and Jens Hainmueller argued, in 2013, that the financial data only supported the narrower claim that a "handful" of members of Congress may have traded on an informational advantage.¹⁶⁴

This Section provides a contemporary snapshot of congressional trading during a recent economic shock to resolve the scholarly

158. See VISHAL SHANKAR, BIGLAW REVOLVING DOOR REPORT: LATHAM & WATKINS 19 (2021), <https://therevolvingdoorproject.org/wp-content/uploads/2021/07/Latham-Watkins-BigLaw-Report.pdf>.

159. See Kate Kelly, *As Fears of Banking Crisis Surged, Members of Congress Sold Bank Shares*, N.Y. TIMES (Apr. 19, 2023), <https://www.nytimes.com/2023/04/19/us/politics/congress-stock-trading-banks.html>.

160. See Nagy, *supra* note 39, at 1135; Perino, *supra* note 30, at 1655.

161. See Brittany Bernstein, *Pelosi Scolds 'Faith-Oriented' People Who 'Don't Believe in Science'*, NAT'L REV. (Dec. 21, 2020, 11:02 AM), <https://www.nationalreview.com/news/pelosi-scolds-faith-oriented-people-who-dont-believe-in-science/> (demonstrating the importance of science-based decision making to some government officials).

162. See Alan J. Ziobrowski et al., *Abnormal Returns from the Common Stock Investments of the U.S. Senate*, 39 J. FIN. & QUANTITATIVE ANALYSIS 661, 661 (2004).

163. Alan J. Ziobrowski et al., *Abnormal Returns from the Common Stock Investments of Members of the U.S. House of Representatives*, 13 BUS. & POL. 1, 19 (2011).

164. Andrew C. Eggers & Jens Hainmueller, *Capitol Losses: The Mediocre Performance of Congressional Stock Portfolios*, 75 J. POL. 535, 536 (2013).

uncertainty surrounding this issue, while also updating outmoded financial analyses upon which the scholarly legal discourse frequently relies.¹⁶⁵ In providing a contemporaneous financial analysis of COVID-19-era congressional trading, this Section concludes that, during the crisis, members of Congress generated an abnormal return of 9.88% on an annualized basis.¹⁶⁶ This performance defies the efficient-capital-markets theory, which posits that even professional fund managers will not consistently outperform the market.¹⁶⁷ This sustained financial performance indicates that some members of Congress may be trading on material information about which the general public remains ignorant.¹⁶⁸

1. Congressional Trading Sample & Data

The Ethics in Government Act of 1978 (“Ethics Act”) requires members of Congress, their spouses, and their dependent children to make annual financial disclosures.¹⁶⁹ The STOCK Act also requires members of Congress to report securities transactions within forty-five days.¹⁷⁰ Members of Congress make these disclosures on Periodic Transaction Reports (“PTR”s).¹⁷¹ This analysis derives its data from the

165. See, e.g., Schroeder, *supra* note 38, at 164 (relying on the 2004 Ziobrowski study in 2014 and noting that “[p]erhaps the most well-known evidence of this, albeit circumstantial, is a study led by Alan J. Ziobrowski indicating that a group of senators beat the market by an average of 12 percent over a five year period”); Perino, *Scandalous Perversion*, *supra* note 96, at 389 (relying on these studies in 2015); Shivaram Rajgopal & Roger M. White, *Stock Trades of Securities and Exchange Commission Employees*, 60 J.L. & ECON. 441, 444 (2017) (relying on these studies in 2017); Schneider, *supra* note 8, at 296 (using the Ziobrowski studies as primary evidence in 2021).

166. See *infra* Figure 2 (detailing abnormal market returns over a two year period); see also RICHARD A. DEFUSCO ET AL., *QUANTITATIVE INVESTMENT ANALYSIS* 28 (3d ed. 2020) (outlining the standard equation for calculating compounded annual growth rates: $g = (FV_n/PV)^{\frac{1}{n}} - 1$).

167. See BOB RYAN, *CORPORATE FINANCE AND VALUATION* 84 (Alissa Chappell & Laura Priest eds., 2007) (discussing the extensive empirical evidence that demonstrates that fund managers cannot consistently outperform the market); see also Bainbridge, *supra* note 35, at 282–83 (2011) (“This basic premise of efficient capital markets theory has been confirmed by many academic studies. . . . The obvious and generally accepted explanation for insiders’ ability to beat the market is their access to and use of material nonpublic information about their company.”).

168. See *supra* note 162 and accompanying text.

169. See 5 U.S.C. app. § 101(a) (detailing general reporting requirements); see also 5 U.S.C. app. § 102(a) (breaking down the reporting requirements by monetary value and price tranches).

170. STOCK Act, Pub. L. No. 112-105, § 6(a)(1), 126 Stat. 291, 293 (2012).

171. See, e.g., U.S. HOUSE OF REPRESENTATIVES, *ETHICS IN GOVERNMENT ACT PERIODIC TRANSACTION REPORT* (n.d.), <https://ethics.house.gov/sites/ethics.house.gov/files/documents/Periodic%20Transaction%2>

publicly available online repository of these annual financial disclosures and PTRs.¹⁷² In addition to analyzing data on congressional stock transactions, this study also collected daily stock price data from January 2020 until January 2022 from the Center for Research in Securities Prices (“CRSP”) for each of the stocks that a member of Congress traded.¹⁷³

The sample included 25,228 reported stock transactions, which consists of 18,246 House of Representative transactions and 6,982 Senate transactions.¹⁷⁴ During the sample period, a total of 202 members of Congress reported transactions across 2,484 different equities.¹⁷⁵ In accordance with the Ethics Act, members of Congress must report transactions in designated price ranges.¹⁷⁶ For example, a member of Congress would report an \$80,000 trade as a transaction in the range of \$50,001 to \$100,000.¹⁷⁷

0Report%20%28PTR%29%20Form_CY%202020_1.pdf (providing detailed instructions related to PTRs).

172. See *Financial Disclosure Reports*, CLERK: U.S. HOUSE OF REPRESENTATIVES, <https://disclosures-clerk.house.gov/PublicDisclosure/FinancialDisclosure> (last visited Nov. 17, 2023), and *United States Senate Financial Disclosures (eDF)*, U.S. SENATE FINANCIAL DISCLOSURES, <https://efdsearch.senate.gov/search/home/> (last visited Nov. 17, 2023) [together, hereinafter *Financial Disclosures*] (providing the required House and Senate financial disclosures). The analysis relies on aggregated data accessed through a subscription to the data vendor Quiver Quantitative. See *Congress Trading Dashboard*, QUIVER QUANTITATIVE, <https://www.quiverquant.com/congresstrading/> (last visited Nov. 17, 2023) (providing access to the data set used in this study). The data set and analytical programs are on file with the author.

173. *CRSP Stock & Indexes Databases*, CTR. FOR RESEARCH IN SEC. PRICES, <https://www.crsp.org/products/research-products/crsp-us-stock-databases> (last visited Nov. 17, 2022); see, e.g., Peter N. Dixon et al., *To Own or Not to Own: Stock Loans Around Dividend Payments*, 140 J. FIN. ECON. 539, 544 (2021) (providing an example of CRSP data in a sophisticated financial analysis).

174. See *Financial Disclosures*, *supra* note 172. This data includes PTRs by a member of Congress, their spouses, and their dependent children as required by 5 U.S.C. app. § 102(e).

175. See *id.*

176. See, e.g., 5 U.S.C. app. § 102(a)(1)(B)(i–ix) (breaking down the tranches into the following reporting categories: not more than \$1,000; greater than \$1,000 but not more than \$2,500; greater than \$2,500 but not more than \$5,000; greater than \$5,000 but not more than \$15,000; greater than \$15,000 but not more than \$50,000; greater than \$50,000 but not more than \$100,000; greater than \$100,000 but not more than \$1,000,000; greater than \$1,000,000 but not more than \$5,000,000; or, greater than \$5,000,000).

177. See *id.*; see, e.g., *Periodic Disclosure of Financial Transactions: Richard M. Burr*, U.S. SEN. FIN. DISCLOSURES, <https://efdsearch.senate.gov/search/view/paper/156b69ba-6f48-4a32-b796-707093c476c6/> (last visited Nov. 17, 2023) (detailing Senator Burr’s transactions during the COVID crisis that drew public attention).

2. Congressional Portfolio Construction

The analysis establishes a two-year window, from January 2020 through December 2021, to evaluate the performance of the congressional stock-trading portfolio. This window aligns closely with the government's COVID-19 restrictions, economic stimuli packages, and the resulting economic shock and market volatility they produced.¹⁷⁸ This trading window also directly coincides with the anecdotal congressional COVID-19-era trading discussed in the previous section.¹⁷⁹ The analysis examines all reported congressional stock trades prior to 2020 to establish a known portfolio of holdings as of January 1, 2020 ("Congress Portfolio").¹⁸⁰ The analysis updates the Congress Portfolio on a daily basis as members buy and sell stocks.¹⁸¹

The analysis merges real-time stock price data from CRSP for every position in the Congress Portfolio.¹⁸² It uses the stock price data to calculate the cumulative daily return for each stock.¹⁸³ The analysis calculates the total dollar amount of gain and loss by multiplying the return by the position's dollar amount.¹⁸⁴ This results in a total dollar gain or loss for each daily portfolio entry, across all stocks. The analysis then compares the gain or loss for each day to the amount of capital invested in the portfolio and calculates the cumulative return of the entire portfolio for each day of the sample window.¹⁸⁵

178. See *CDC Museum COVID-19 Timeline*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/museum/timeline/covid19.html> (Mar. 15, 2023) (designating early January 2020 as the beginning of governmental-agency COVID awareness and January 2022 as the period of less severe COVID strains and widespread vaccine availability).

179. See *supra* Section II.A.2.

180. Using the lower bound of the range of transaction size, we take all buy transactions and net out all sell transactions to form an initial portfolio of congressional stock holdings. In addition, if we observe a sell transaction that is larger than the position up to that point, we remove the stock from the portfolio on that day. These inconsistencies typically occur because members of Congress failed to report their initial buy transactions or the purchase pre-dates the beginning of the data collection period.

181. See *Financial Disclosures*, *supra* note 172.

182. In particular, for each day's portfolio we merge each stock's daily price as well as the stock price from the initiation of the position. See DEFUSCO ET AL., *supra* note 166, at 27–28 (providing the equation and methodology for calculating portfolio returns, which requires the stock price at the initiation of the position).

183. See *id.* at 61 (" $HPY = \frac{P_1 - P_0 + D_1}{P_0}$ where P_0 = the initial purchase price of the instrument. P_1 = the price received for the instrument at its maturity. D_1 = the cash distribution paid by the instrument at its maturity (i.e., interest).").

184. See *id.* at 16 (calculation consistent with $FV_n = PV(1 + r)^n$, where FV is future value, PV is present value, and r is the return).

185. See *id.* at 61.

To determine whether Congress's trading performance is abnormal, the analysis creates and analyzes a benchmark market portfolio ("Market Portfolio"). The Market Portfolio mimics daily congressional trades as outlined above, except instead of buying or selling *individual* stocks, the portfolio invests the same dollar amounts that Congress invests in an index fund that mimics the S&P 500.¹⁸⁶ This portfolio construction isolates the ability of members of Congress to pick the right stocks at the right time, as opposed to just timing the overall market.

3. Performance Analysis

Using the cumulative daily performance of the Congress Portfolio, the analysis calculates the value of a \$1 investment in the Congress Portfolio over the study's two-year window.¹⁸⁷ The analysis also calculates the value of a \$1 investment in the Market Portfolio, which tracks the S&P 500. Figure 1 provides a time-series plot of these values over the two-year window. Figure 1 demonstrates that \$1 invested in the Congress Portfolio would yield approximately \$1.65 at the end of the two-year window. In comparison, a \$1 investment in the Market Portfolio would yield approximately \$1.44 at the end of the two-year window. Figure 1 shows that the Congress Portfolio significantly outperforms the Market Portfolio, which is tied to the S&P 500. This suggests that members of Congress are driving abnormal performance by knowing which individual stocks to buy and sell, and not simply by adhering to general market trends.

186. See Kent Thune, *SPDR S&P 500 SPY ETF: What It Is & How It Works*, SEEKING ALPHA, <https://seekingalpha.com/article/4443320-what-is-spy-etf> (June 12, 2022) (describing the index fund and how it tracks the S&P 500).

187. See DEFUSCO ET AL., *supra* note 166, at 16.

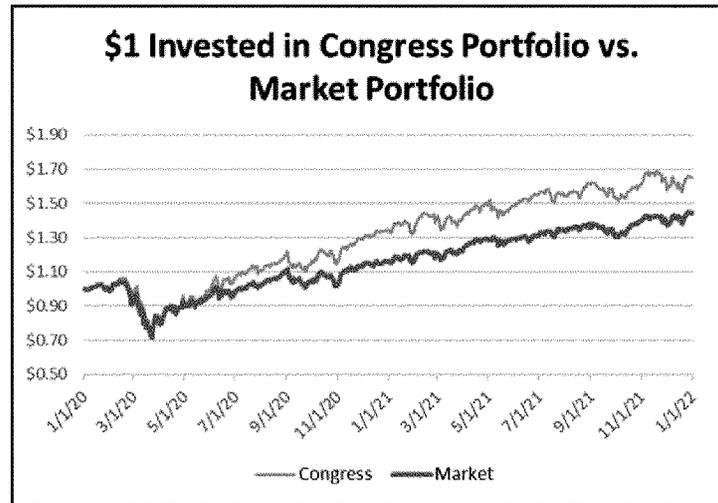


Figure 1: \$1 Invested in Congress Portfolio vs. Market Portfolio

Figure 2 plots the gap in cumulative abnormal returns between the portfolios during the two-year window.¹⁸⁸ Figure 2 demonstrates that by the end of 2021, the Congress Portfolio outperformed the Market Portfolio by over 20%. This equals an annualized abnormal return of 9.88%.¹⁸⁹ Based on these annualized abnormal returns, Congress outperformed top hedge funds during a similar period.¹⁹⁰ Notably, congressional abnormal returns are similar to the capital gains that Bernie Madoff promised investors in his notorious (and criminal) Ponzi scheme.¹⁹¹

188. The analysis calculates the return gap by subtracting the cumulative return of the Market Portfolio from the cumulative return of the Congress Portfolio. See *Financial Disclosures*, *supra* note 172.

189. See DEFUSCO ET AL., *supra* note 166, at 28.

190. See Kate Marino, *Charted: Hedge Funds Still Can't Match the S&P 500*, AXIOS (Jan. 13, 2022), <https://www.axios.com/2022/01/13/hedge-funds-sp-passive-investing> (showing hedge funds not only underperform Congress, but also that these professional investors underperform the S&P 500). One caveat of the abnormal performance and of the portfolio analysis is that this does not provide a tradable strategy for investors due to the forty-five-day reporting delay of congressional stock transactions. See STOCK Act, Pub. L. No. 112-105, § 6(a)(1), 126 Stat. 291 (2012).

191. See Schroeder, *supra* note 38, at 164, 164 n.14 (discussing Madoff's unrealistic promise of 10% returns to investors).

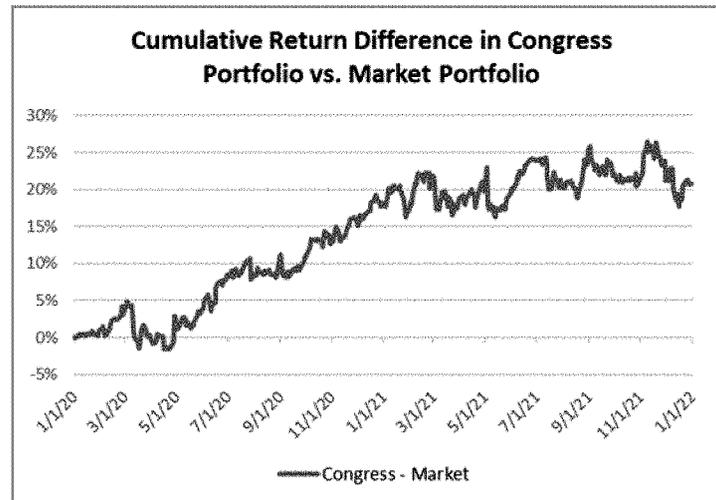


Figure 2: Cumulative Return Difference in Congress Portfolio vs. Market Portfolio

Eggers and Hainmueller accurately observe that it may only be a “handful” of members of Congress who drive abnormal congressional returns.¹⁹² However, this critique has little bearing on our analysis. This analysis does not attempt to prove how *many* members of Congress may trade on material nonpublic government information, but rather simply that *some* members of Congress may be trading with an illegal informational advantage. A 9.88% abnormal return suggests that at least some members of Congress may have used material nonpublic government information to trade securities during the COVID-19 crisis.¹⁹³ The anecdotal and empirical evidence create a strong circumstantial case against Congress.¹⁹⁴ However, as Part III demonstrates, the past, present, and proposed measures that the government has taken to address this problem are ineffective and possibly even counterproductive.

192. Eggers & Hainmueller, *supra* note 164, at 536.

193. See Bainbridge, *supra* note 35, at 282.

194. See *supra* Part I.

III. THE CURRENT PROPOSALS TO END CONGRESSIONAL INSIDER TRADING

The anecdotal and empirical evidence strongly indicates that some members of Congress engage in prohibited insider trading.¹⁹⁵ The current safeguard and proposals for preventing this illegal conduct are anemic, at best. This Part examines how the contemporary proposals and solutions to the congressional insider trading problem are counterproductive. These proposals entail Congress deploying a self-policing system and enacting additional legislation to persuade the public that members are not engaging in insider trading, while, in fact, they are.

A. *The Self-Policing Policy*

The SEC states that a primary part of its mission is protecting investors by ensuring that all parties have equal access to market facts and information.¹⁹⁶ As such, it places a “high priority” on investigating and prosecuting insider trading violations.¹⁹⁷ However, despite this stated “high priority,” the SEC often ignores high-profile targets despite evidence of guilt, while targeting mostly small-time traders who lack wealth and social privilege.¹⁹⁸ Indeed, median profits in typical SEC insider trading cases are less than \$50,000, not “the millions typically trumpeted in enforcement rhetoric.”¹⁹⁹ For the SEC, insider trading is decidedly “a middle-class violation.”²⁰⁰

In addition, Professors Jonathan Macey and Erin O’Hara identify the troubling trend that the SEC is “willing to stretch the contours” of insider trading rules to target private citizens, but it is not at all willing to do so for members of Congress.²⁰¹ Instead, the SEC turns a “blind eye” toward congressional insider trading.²⁰² To reiterate, there has *never* been an SEC insider trading case against a member for trading on congressional knowledge.²⁰³ Congress instead deploys a “self-policing” system to prevent congressional insider trading, which, to put it mildly, “has not

195. See *supra* Part II.

196. See *About the SEC: Mission*, U.S. SEC. & EXCH. COMM’N (Aug. 29, 2023), <https://www.sec.gov/about/what-we-do#section1>.

197. Nagy, *supra* note 39, at 1113.

198. See Perino, *supra* note 30, at 1653.

199. *Id.* at 1655.

200. *Id.* at 1656.

201. Macey & O’Hara, *supra* note 103, at 107.

202. See Bainbridge, *supra* note 35, at 307.

203. See Perino, *Scandalous Perversion*, *supra* note 96, at 348–49 (noting that the House did once “reprimand” a member for insider trading).

been a success.”²⁰⁴ Congress, after all, has “never been very effective at applying its ethics rules to itself.”²⁰⁵ This Section examines why the SEC allows congressional self-policing, and it determines that the justifications range from evidentiary challenges and funding issues to more concerning questions of overall SEC competence and ideological complicity. In any event, none of these potential justifications warrant SEC inaction regarding congressional insider trading.

B. SEC Justifications for Congressional Non-Enforcement

The SEC has strong institutional incentives to pursue fast and easy insider trading cases.²⁰⁶ To maintain the appearance of effective enforcement, the SEC pursues easy cases against unsophisticated traders to bolster agency enforcement statistics with strong win rates.²⁰⁷ The agency routinely investigates low-profile targets who lack the resources to litigate and who are, therefore, more likely to settle insider trading cases.²⁰⁸ The plan works, as the SEC has a 93% case win rate, and nearly 90% of its insider trading cases settle.²⁰⁹ Most of these cases settle within days of the SEC filing suit.²¹⁰ In the rare cases that the SEC targets wealthy or sophisticated traders, such as its case against billionaire Mark Cuban, the defendant typically mounts a strong defense, and the SEC sometimes suffers embarrassing losses.²¹¹ As such, the SEC diverges from its rhetorical mandate of policing “economic elites,”²¹² instead targeting the equivalent of “street criminals” in its insider trading enforcement.²¹³ The SEC enforcement policy is concerned with keeping up appearances, and the average citizen-investor is the mark it uses to inflate its statistics.²¹⁴

204. Macey & O’Hara, *supra* note 103, at 108.

205. Len Costa, *A Wink and a Nod*, LEGAL AFF. (Jan.–Feb. 2006), https://www.legalaffairs.org/issues/January-February-2006/toa_costa_janfeb06.msp.

206. Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 HARV. J. L. & PUB. POL’Y 639, 644, 646–47 (2010).

207. *See* Perino, *supra* note 30, at 1656.

208. *See id.* at 1676–77.

209. *Id.* at 1719.

210. *See id.* at 1740.

211. *See* SEC v. Cuban, 620 F.3d 551, 557–58 (5th Cir. 2010); *see also* Andrew Harris & Tom Korosec, *SEC Loses as Mark Cuban Triumphs in Insider-Trading Trial*, BLOOMBERG (Oct. 17, 2013, 7:48 PM), <https://www.bloomberg.com/news/articles/2013-10-16/billionaire-mark-cuban-found-not-liable-in-sec-lawsuit#xj4y7vzkg> (discussing Cuban’s trial victory against the SEC).

212. *See supra* Section I.2.C.

213. Perino, *supra* note 30, at 1676–77.

214. *See id.* at 1656.

Adding to the enforcement disincentives of wealth and sophistication, the SEC might face additional evidentiary hurdles in bringing insider trading cases against members of Congress. Foremost among these evidentiary challenges is the U.S. Constitution's Speech or Debate Clause.²¹⁵ The Speech or Debate Clause states that members of Congress "shall not be questioned in any other Place," with connection to "any Speech or Debate in either House."²¹⁶ The Clause provides broad evidentiary privileges to members of Congress for information, documents, and testimony connected to their legislative behavior.²¹⁷ Some scholars have suggested that this privilege "may" pose a barrier to SEC congressional insider trading investigations; however, considering that the government has never attempted to prosecute a member of Congress for trading on government information, these are speculative concerns.²¹⁸ In fact, many scholars agree that the Speech or Debate Clause will not present a significant enforcement barrier in congressional cases.²¹⁹ Recall, the SEC builds insider trading cases almost entirely on circumstantial evidence—and there is seldom a smoking gun.²²⁰

As Part II demonstrates, there is no shortage of strong circumstantial evidence implicating members of Congress in criminal trading activity.²²¹ The case law is clear that the Speech or Debate Clause "does not exempt Members of Congress from the operation of the ordinary criminal laws."²²² The pertinent case on this issue, *United States v. Brewster*, states that the Speech or Debate Clause does not insulate Congress from prosecutions for financial crimes such as bribery, and that reasoning

215. U.S. CONST. art. I, § 6, cl. 1.

216. *Id.*

217. See Brachman, *supra* note 120, at 287.

218. See, e.g., Nagy, *supra* note 39, at 1135 (stating that the Speech or Debate Clause "could afford some protection from investigations involving interviews and testimony from members of Congress and their staffs, or documents and records, with respect to legislative acts"); Brachman, *supra* note 120, at 298 (noting that the Speech or Debate Clause "may pose" an evidentiary barrier).

219. See, e.g., Austin, *supra* note 27, at 292 ("Although most scholars have concluded that the Speech or Debate Clause would not conflict with legislators' trading on insider information, there has not yet been a firm governmental verdict on the issue."); Matthew Barbabella et al., *Insider Trading in Congress: The Need for Regulation*, 9 J. BUS. & SEC. L. 199, 218–19 (2009) ("Therefore, it seems unlikely the Speech or Debate Clause would conflict with attempts to formally regulate Congressional insider trading."); Bainbridge, *supra* note 35, at 303 ("Just as the Speech and Debate Clause does not prohibit members of Congress from being prosecuted for accepting bribes, it should not bar regulation of congressional insider trading.")

220. See *supra* Section I.2.C.

221. See *supra* Part II.

222. *Gravel v. United States*, 408 U.S. 606, 614–15 (1972).

would logically apply to insider trading cases, too.²²³ As the *Brewster* Court explained, the clause's pragmatic evidentiary protections do not make "[m]embers of Congress super-citizens, immune from criminal responsibility."²²⁴ Given the relevant case law and readily available evidence related to congressional trading, concerns related to the Speech or Debate Clause appear overblown.

Frankly, the SEC's reluctance to bring cases against members of Congress may stem from the far more pragmatic (and problematic) fact that Congress controls the SEC's budget and funding.²²⁵ As Professor Stephen Bainbridge frames it, the SEC is "reluctant to bite the budgetary hand that feeds it."²²⁶ Related to these funding issues lurks another potential justification for SEC inaction on congressional insider trading: a lack of agency capacity and competence. SEC enforcement relies on surveillance tools that monitor straightforward common stock trades prior to major market announcements.²²⁷ Almost all SEC insider trading cases involve common stock trades surrounding impending mergers, quarterly financial announcements, and the disclosure of pharmaceutical trial results.²²⁸ Sophisticated traders are aware of these basic enforcement protocols, and they avoid SEC detection and enforcement by using staggered timing strategies or by trading more complex securities such as call options and straddles.²²⁹ The SEC also suffers from well-known coordination issues between its investigative and enforcement units.²³⁰ Funding, capacity, and competency shortcomings likely play a role in the SEC's lack of enforcement against Congress.

Another potential explanation for SEC inaction related to congressional insider trading is the phenomenon of regulatory capture. Regulatory capture occurs when lobbying and the revolving door enable private industry to capture and then control the regulatory apparatus.²³¹ The revolving door, or when regulators rotate between government and

223. 408 U.S. 501, 526 (1972).

224. *Id.* at 516.

225. See Nagy, *supra* note 39, at 1136–37.

226. Bainbridge, *supra* note 35, at 304. Sticking with the biting terminology, Paul Brachman observes that the SEC "has no appetite for prosecuting those who are ultimately responsible for the agency's funding." Brachman, *supra* note 120, at 264.

227. See Perino, *supra* note 30, at 1706.

228. *Id.* at 1654.

229. *Id.* at 1705–06.

230. *Id.* at 1671.

231. See Eugene McCarthy, *The Commercial Determinants of U.S. Public Health Law*, 74 RUTGERS U. L. REV. 55, 66–67 (2021) (describing and providing examples of government agency regulatory capture via lobbying and the revolving door).

private industry, is common at the SEC.²³² This problem is particularly acute at the SEC's leadership level, where appointed officials routinely pivot to government service from Wall Street, and vice versa.²³³ This creates the possibility that regulators cater to the powerful financial industry from which they came, or to which they hope to return.²³⁴ Hundreds of SEC alumni go to work for Wall Street to help financial actors secure special SEC waivers and no-action letters to bypass government regulation.²³⁵

This SEC and financial industry blurring also results in “cognitive capture,” or the phenomenon where the finance industry's mindset pervades the regulatory apparatus, resulting in Wall Street's ethical norms shaping enforcement decisions.²³⁶ As many are aware, the financial industry's ethical norms regarding honesty and fair-dealing are complicated, to say the least.²³⁷ Some observers have blamed cognitive capture at the SEC for failed money market regulation, banking scandals, and even Bernie Madoff's notorious Ponzi scheme.²³⁸ It is not unreasonable to think that this industry-first mindset contributes to SEC inaction regarding congressional financial malfeasance, as such behavior coincides with long-standing Wall Street norms of amoral profit maximization.²³⁹

The final and most troubling explanation for the SEC's permissive approach toward members of Congress is that some SEC regulators are also engaging in insider trading. A recent *Wall Street Journal* investigation found that SEC employees engage in substantial stock trading activity during their tenure.²⁴⁰ In one instance, an SEC regulator failed to report six-years' worth of prohibited stock transactions that

232. See James D. Cox & Randall S. Thomas, *Revolving Elites: The Unexplored Risk of Capturing the SEC*, 107 GEO. L.J. 845, 848–49 (2019).

233. See *id.* at 848 (discussing the SEC's “disquieting” approach to appointing directors, who lead the SEC, from private industry and Wall Street).

234. See Perino, *supra* note 30, at 1671.

235. See Arthur E. Wilmarth, Jr., *Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 U. CIN. L. REV. 1283, 1411–12 (2013).

236. See JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 92–94 (2010).

237. See McCarthy, *supra* note 122, at 257–61 (discussing the ethical shortcomings in the finance industry leading up to and during the 2008 financial crisis).

238. See Cox & Thomas, *supra* note 232, at 850–52.

239. See McCarthy, *supra* note 122, at 279–81 (discussing the business school mantra of shareholder primacy and profit maximization).

240. See Brody Mullins et al., *The Regulators of Facebook, Google and Amazon Also Invest in the Companies' Stocks*, WALL ST. J. (Oct. 13, 2022, 10:10 AM), <https://www.wsj.com/articles/the-regulators-of-facebook-google-and-amazon-also-invest-in-the-companies-stocks-11665670207> (finding that between 2016 and 2021, SEC employees each conducted, on average, thirty-one stock transactions).

directly conflicted with their regulatory duties.²⁴¹ Shivaram Rajgopal and Roger White tracked SEC employee stock trades with a hedge portfolio that revealed SEC employees earned positive risk-adjusted abnormal returns of 8.5%.²⁴² For some, these abnormal returns create the “appearance of financial impropriety,” undermining the SEC’s credibility.²⁴³ SEC officials no doubt face temptations to trade on advanced knowledge of forthcoming SEC enforcement actions.²⁴⁴ In fact, two SEC enforcement attorneys engaged in trades that involved liquidating stock holdings in target companies immediately prior to SEC enforcement announcements.²⁴⁵ As such, SEC regulators might be reluctant to discipline members of Congress for engaging in prohibited conduct in which they are also participating.²⁴⁶ In the most pragmatic terms, the SEC may not be highlighting congressional misbehavior so that Congress does not highlight SEC misbehavior.

Due to one or more of these justifications, the SEC seems content to allow Congress to self-police insider trading amongst its members. Besides the fact that this system is quite clearly not working,²⁴⁷ SEC non-enforcement causes “enforcement dissonance,” whereby regulators are not doing what they publicly state they are doing.²⁴⁸ This dissonance undermines the entire regulatory apparatus.²⁴⁹

C. Legislation to Address Congressional Insider Trading

The law already prohibits congressional insider trading.²⁵⁰ Additional legislation to prohibit congressional insider trading would appear triply redundant, considering that Congress previously passed the STOCK Act in 2012.²⁵¹ The STOCK Act states that members of Congress have a duty of trust or confidence to Americans and cannot

241. See Rebecca Ballhaus et al., *Federal Officials Trade Stock in Companies Their Agencies Oversee*, WALL ST. J. (Oct. 11, 2022, 8:00 AM), <https://www.wsj.com/articles/government-officials-invest-in-companies-their-agencies-oversee-11665489653>.

242. Rajgopal & White, *supra* note 165, at 442.

243. See *id.* at 443.

244. See *id.* at 445.

245. *Id.* at 445–46.

246. See *infra* Section IV.B (discussing widespread insider trading in U.S. regulatory agencies).

247. See *supra* Part II.

248. Perino, *supra* note 30, at 1709.

249. See *id.*

250. See *supra* Section I.A.

251. See *supra* notes 106–10 and accompanying text.

trade on material nonpublic congressional knowledge.²⁵² The STOCK Act also requires members to report their securities transactions within forty-five days of a securities trade.²⁵³ However, there is a critical consensus that Congress passed the STOCK Act simply to “appease the public,”²⁵⁴ and that “shady trading by public officials continues.”²⁵⁵ Shortly after passing the STOCK Act with much fanfare, Congress (and President Obama) systematically—and *quietly*—gutted the bill to limit reporting requirements and narrow the scope of liability.²⁵⁶

As such, the penalty for failure to report a financial transaction is a \$200 fine (which the congressional ethics committees can waive), resulting in inconsistent compliance.²⁵⁷ In criticizing the STOCK Act, Jonathan Macey concludes that “what Congress really wants is to keep making the big bucks that come from trading on inside information but to trick those outside of the Beltway into believing they are doing something about this corruption.”²⁵⁸ In creating a false appearance of accountability, the STOCK Act may actually function as a counterproductive measure.²⁵⁹ This Section discusses contemporary legislative proposals to end congressional insider trading, and it demonstrates that these proposals are likewise nothing more than “Beltway tricks” to dupe the public.

252. Stop Trading on Congressional Knowledge Act of 2012, Pub. L. No. 112-105, § 4(a)–(b), 126 Stat. 291, 292 (2012).

253. *See id.* § 6, 126 Stat. at 293–94.

254. Schneider, *supra* note 8, at 297.

255. Jon Hartley, *No More Insider Trading in Congress*, WALL ST. J. (Feb. 9, 2022, 7:04 PM), <https://www.wsj.com/articles/no-more-insider-trading-in-congress-stocks-prices-sasse-pelosi-mccarthy-boston-dallas-fed-scandal-11644447705>.

256. *See* Tamara Keith, *How Congress Quietly Overhauled Its Insider-Trading Law*, NPR (Apr. 16, 2013, 5:12 PM), <https://www.npr.org/sections/itsallpolitics/2013/04/16/177496734/how-congress-quietly-overhauled-its-insider-trading-law> (describing how Congress used a fast-track procedure to “gut” the bill and make the STOCK Act much less effective).

257. *See* Dave Levinthal & Madison Hall, *78 Members of Congress Have Violated a Law Designed to Prevent Insider Trading and Stop Conflicts-of-Interest*, BUS. INSIDER (Jan. 3, 2023, 11:29 AM), <https://www.businessinsider.com/congress-stock-act-violations-senate-house-trading-2021-9> (discussing widespread congressional noncompliance with the STOCK Act).

258. Jonathan Macey, *Congress’s Phony Insider-Trading Reform*, WALL ST. J., <https://www.wsj.com/articles/SB10001424052970203413304577088881987346976> (Dec. 13, 2011).

259. *See* Nagy, *supra* note 39, at 1134–35.

1. Contemporary Legislative Proposals to End Congressional Insider Trading

Perhaps reflecting the widespread belief that the STOCK Act is inadequate, members of Congress have continued proposing bills to curtail congressional trading on government information. Most recently, members of Congress proposed the PELOSI Act,²⁶⁰ the Transparent Representation Upholding Service and Trust in Congress (“TRUST”) Act,²⁶¹ and the Bipartisan Restoring Faith in Government Act.²⁶² In each case, the proposed legislation would require members of Congress to hold their assets in a “qualified blind trust” during their congressional tenure.²⁶³ In theory, the blind trust solution strikes a policy balance between encouraging qualified individuals to serve in Congress while ensuring that an elected official’s personal financial interests are not influencing their legislative decisions.²⁶⁴

The Ethics Act establishes the qualified blind trust as a formal option for government officials to use in holding their assets.²⁶⁵ According to the blind trust protocols, a member of Congress, and their family members, can transfer their assets into a trust managed by an independent trustee.²⁶⁶ In managing the blind trust assets, the trustee cannot consult the member of Congress (or their family members) with regard to asset management or the sources of the trust’s income.²⁶⁷ This “blindness” prevents members of Congress and their families from knowing the identity or position of the assets in the trust, which in turn prevents opportunistic legislative behavior that might impact the value of those

260. Preventing Elected Leaders from Owning Securities and Investments (PELOSI) Act, S. 58, 118th Cong. (2023).

261. Transparent Representation Upholding Service and Trust in Congress (TRUST) Act, H.R. 336, 117th Cong. (2021).

262. Bipartisan Restoring Faith in Government Act, H.R. 3003, 118th Cong. (2023).

263. See H.R. 6490, 117th Cong. § 202(b)(2) (2022) (allowing ownership of “a covered financial instrument held in a qualified blind trust operated on behalf of, or for the benefit of, the Member of Congress or spouse of the Member of Congress”); see also H.R. 336 § 2(a)(1) (requiring that “[n]ot later than 90 days after the date of enactment of this Act, a Member of Congress and any spouse or dependent child of such Member shall place any covered investment owned by such Member, spouse, or dependent child into a qualified blind trust”); H.R. 3003 § 13152(b)(1) (“To comply with the requirement under subsection (a), a covered individual shall divest of a covered financial instrument through sale or placement in a qualified blind trust in accordance with subsection (c).”).

264. Megan J. Ballard, *The Shortsightedness of Blind Trusts*, 56 U. KAN. L. REV. 43, 45–46 (2007).

265. See generally Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824, 1828.

266. See 5 U.S.C. app. § 102(f)(3)(A)(i)(I)–(III).

267. See *id.* § 102(f)(3)(C)(i)–(v).

assets.²⁶⁸ Although the member of Congress chooses the trustee, a congressional ethics committee must approve the trustee and monitor the limited communications between the parties to ensure they are not coordinating asset management or otherwise discussing trust investment strategies.²⁶⁹ The trustee and the beneficiary (i.e., the government official) are subject to civil penalties for violating the blind trust agreement.²⁷⁰ Importantly, after members of Congress transfer assets into a blind trust, they no longer have to individually disclose those assets in their annual financial disclosure statements (because, theoretically, they do not know which assets are in the trust).²⁷¹

Many scholars are proponents of the qualified blind trust solution to the congressional insider trading problem.²⁷² After all, at first glance the qualified blind trust seems to be an equitable and simple remedy to address the problem. However, a closer inspection reveals the qualified blind trust to be just another congressional smokescreen. In fact, the qualified blind trust might make the congressional insider trading problem even worse.

2. Problems with the Blind Trust Proposal

As Congress pushes various forms of legislation related to blind trusts, it is notable that Senator Mitt Romney (R-UT) once dismissed the blind trust as “an age-old ruse.”²⁷³ That is, many blind trusts are, in fact, “nearsighted”²⁷⁴ or have a “seeing-eye component.”²⁷⁵ First, the member of Congress knows the underlying assets that they transfer into the blind

268. See Ballard, *supra* note 264, at 43.

269. See 5 U.S.C. app. § 109(18)(A)–(B).

270. *Id.* §§ 102(f)(6)(A)(i)–(iv), (B)(i)–(ii); see also *id.* § 102(f)(6)(C)(i)–(ii) (describing that knowing and willful violations carry a potential \$10,000 penalty, while negligent violations carry a potential \$5,000 penalty).

271. See 5 C.F.R. § 2634.401(a) (1978).

272. See, e.g., Kelbon, *supra* note 144, at 149 (suggesting blind trusts as the solution to congressional insider trading); see also Kimberly Breedon & A. Christopher Bryant, *Restoring Trust with Trusts: Constructive and Blind Trusts as Remedies for Presidential Violations of the Constitution’s Emoluments Clauses*, 11 ALB. GOV’T L. REV. 284, 305–06 (2018) (suggesting that blind trusts will reduce financial self-dealing amongst elected officials); Brachman, *supra* note 120, at 313–14 (discussing the advantages of the blind trust in reducing incentives for insider trading and aligning legislative interests with broad market health).

273. Robert Smith, *Just How Blind Are Blind Trusts, Anyway?*, NPR (July 20, 2012, 4:11 PM), <https://www.npr.org/sections/money/2012/07/20/157119003/just-how-blind-are-blind-trusts-anyway>.

274. *Id.*

275. Costa, *supra* note 205.

trust.²⁷⁶ The elected official does not suddenly forget the primary assets they held prior to establishing the blind trust. In addition, since the member of Congress still selects, compensates, and can remove the trustee who manages their blind trust assets, the possibility remains that the parties will continue to coordinate investment decisions.²⁷⁷ In fact, there is no way to adequately police communications between the politician and the trustee (i.e., they are not under surveillance)—so the public must simply take the parties at their word.²⁷⁸ This is concerning, since the blind trust proposal arises in the first place because of the widespread acknowledgement that Americans cannot currently take members of Congress at their word with respect to securities trading. Moreover, the laws governing trusts actually incentivize the blind trust's trustee to coordinate investments with the politician to avoid future personal liability for mismanaging the assets.²⁷⁹ As such, the blind trust may simply enable members of Congress to dismiss conflict-of-interest accusations and mislead the public about their legislative motives.²⁸⁰ Finally, members of Congress will no longer have to identify individual assets in financial disclosure forms, thus allowing them to conceal their financial interests from the public eye.²⁸¹

There are plenty of examples of politicians hiding behind the shield of the blind trust while engaging in financial self-dealing. Romney's blind trust is managed by his personal lawyer and friend, and despite its "blind[ness]," the trustee conveniently invests \$10 million in Romney's son's investment fund.²⁸² Illinois Governor J.B. Pritzker's (D-IL) blind trust purchased stock in Centene, a company which collects billions

276. See Ballard, *supra* note 264, at 52 ("When a public official first establishes a qualified blind trust, it cannot actually be 'blind.' By virtue of the newness of the trust, the official knows what assets he transferred into it until a trustee notifies him that the trust no longer holds the asset.").

277. See *id.* at 63.

278. See Daniel Beizsley, *Blind Trusts: Are They Enough to Avoid Conflicts of Interest?*, SPOTLIGHT ON CORRUPTION (Sept. 16, 2020), <https://www.spotlightcorruption.org/blind-trusts-are-they-enough-to-avoid-conflicts-of-interest/>.

279. See Ballard, *supra* note 264, at 59 ("The lack of trustee oversight may also tend to erode incentives for blindness. A trustee who wants to avoid an after-the-fact claim for breach of fiduciary duty may be inclined to share proscribed information regarding trust assets."). In addition, the Uniform Trust Code holds a trustee accountable for breaching trustee fiduciary duties and may result in the trustee paying money to the beneficiary out of their own pocket. See UNIF. TR. CODE § 1001(b)(3).

280. See Ballard, *supra* note 264, at 47–48.

281. See *supra* note 271 and accompanying text.

282. See Todd S. Purdum, *An Age-Old Ruse*, VANITY FAIR (July 12, 2012), <https://www.vanityfair.com/news/2012/07/mitt-romney-age-old-ruse-blind-trust>.

through Illinois state contracts.²⁸³ Despite previously disclosing knowledge of his Centene stock ownership, Pritzker pointed to the blind trust and reiterated: “I am not involved in making any investment decisions.”²⁸⁴ Barack Obama (D-IL), while a senator, utilized a blind trust to hold shares in a company that developed avian flu treatments; simultaneously, Obama introduced a bill to secure more funding for avian flu treatments.²⁸⁵ Former Senate majority leader Bill Frist (R-TN) held HCA Healthcare, Inc. stock in a blind trust, yet received regular investment updates from the trustee and dumped shares immediately prior to a negative earnings announcement about which he had advanced knowledge.²⁸⁶ When pressed on his opportunistic timing, Frist responded that the trust was “totally blind.”²⁸⁷

Perhaps not surprisingly, the congressional solution to government insider trading appears once again to be counterproductive. Indeed, the qualified blind trust would actually help members of Congress hide insider trading in plain sight.²⁸⁸ The blind trust solution creates the appearance of eliminating congressional conflicts of interest, while in fact keeping those conflicts very much alive—only now hidden from public oversight.²⁸⁹ Like the STOCK Act, the current proposed legislation to end congressional insider trading via blind trusts might be “the worst of all options,” with “limited public disclosure, ample room for abuse, and a legal stamp of approval.”²⁹⁰ Government officials routinely attempt to maintain public confidence by “taking care of appearances.”²⁹¹ After a public scandal or crisis, Congress and other regulators rush to create the appearance of reform, only to claw back any meaningful changes once the public loses interest or becomes distracted by the next big issue.²⁹² This

283. See Tahman Bradley, *I Am Not Involved: Pritzker Denies Knowledge of Blind Trust Investments after Report*, WGN NEWS, (Mar. 1, 2022, 9:38 AM) <https://wgntv.com/news/politics/i-am-not-involved-pritzker-denies-knowledge-of-blind-trust-investments-after-report/>.

284. *Id.*

285. See Ballard, *supra* note 264, at 45.

286. See Costa, *supra* note 205.

287. See *id.* The blind trust trustees say they sold the shares at Frist’s orders and as the Senator instructed. See Carrie Johnson, *Frist Not Charged as Investigators Close Probe of His Hospital Stock Sales*, WASH. POST (Apr. 27, 2007), <https://www.washingtonpost.com/wp-dyn/content/article/2007/04/26/AR2007042602343.html?hpid=moreheadlines>.

288. See Ballard, *supra* note 264, at 51.

289. See *id.* at 59.

290. Costa, *supra* note 205.

291. See Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563, 1566 (2012).

292. See John C. Coffee, *The Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1029

is all to say, Congress appears to believe that the general public is easy to trick—and the past and present congressional insider trading legislation does not disprove this hypothesis.

IV. THE MODEST PROPOSAL

There is strong anecdotal and empirical evidence suggesting that members of Congress engage in insider trading. The current law—without any additional changes—makes this conduct illegal.²⁹³ Past and present legislative proposals are unnecessarily complex and ultimately counterproductive.²⁹⁴ The totality of circumstances suggests that the solution to the problem of congressional insider trading is actually quite simple, pragmatic, and just. This Part sets forth a modest proposal asking the current presidential administration to issue an executive order directing the SEC to enforce insider trading laws against members of Congress using the same standards it routinely and successfully uses to target middle-class Americans. This order will initiate a chain reaction greatly mitigating not only congressional insider trading, but also insider trading in the executive and judicial branches, as well. This Part deliberately deploys a “modest proposal,” which is a multifarious, rhetorical template through which the writer challenges the reader to face an unpleasant reality that most people would prefer to ignore.²⁹⁵ The proposal participates in Peter Goodrich’s “satirical legal studies” by offering a very serious suggestion while recognizing that those in power will resist implementing this simple and obvious solution.²⁹⁶

(2012); see also Mary Kreiner Ramirez, *Oversight and Rule Making as Political Conflict*, in THE OXFORD HANDBOOK OF WHITE-COLLAR CRIME 479, 493 (Shanna R. Van Slyke, et al., eds. 2016) (“The revolving door—and the support of powerful members of both political parties with financial favors—creates a sympathetic cartel of actors eager to distract the general public from the misconduct of the few by redirecting the focus of the American public to external risks.”).

293. See *supra* Part I.

294. See *supra* Section III.B.

295. See Elizabeth Hedrick, A Modest Proposal in Context: Swift, Politeness, and A Proposal for Giving Badges to the Beggars, 114 *STUD. IN PHILOLOGY* 852, 874 (2017).

296. See Peter Goodrich, *Satirical Legal Studies: From the Legists to the Lizard*, 103 *MICH. L. REV.* 397, 447 (2004). Jonathan Swift developed this template with his original *A Modest Proposal for Preventing the Children of Ireland from Being a Burden to Their Parents or Country*, in, *SATIRES AND PERSONAL WRITINGS* 19 (William Alfred Eddy ed., 1932). Swift’s biting satire makes a horrific suggestion to resolve the issue of Irish poverty, one that forces the reader to look at their own complicity in a barbaric colonial and economic system. See DUSTIN GRIFFIN, *SATIRE* 67 (1994) (“If the existing conditions in Ireland are in fact ‘morally worse’ than cannibalism . . . then perhaps the speaker is *not* ironic after all. Perhaps he gives voice to Swift’s anger and despair. . . . Instead, they represent an impossibility: ‘what you must do—of course, I know you won’t do it.’”).

In the end, the modest proposal asks the reader to consider *why* the government is unlikely to implement this pragmatic solution. The answer resides in the fact that insider trading is a government-wide problem that infects all three branches of government—not just Congress.²⁹⁷ As such, the unspoken fact remains that insider trading prohibitions (like so many other rules and regulations) apply to rank-and-file Americans, not to the political elite. Public confusion and inertia allow this unfortunate reality to persist. This Part asks the reader to allow these implications to guide future discussions on the topic of congressional insider trading.

A. *The Executive Order*

U.S. presidents routinely issue strong executive orders that have the force and effect of law.²⁹⁸ U.S. presidents have issued up to 50,000 executive orders since the nation's founding.²⁹⁹ Indeed, presidential unilateralism in the form of executive orders is an essential, and appropriate, tool for guiding the administrative state.³⁰⁰ The president derives the power to issue executive orders, in the general sense, from Article II of the U.S. Constitution, which vests the executive power in the Office of the President.³⁰¹ In addition, the Take Care Clause states that the president “shall take Care that the Laws be faithfully executed,” which provides a more specific constitutional basis for executive orders.³⁰² These orders allow for “presidential influence over agency enforcement activity” and serve as the “primary mechanism for effecting

297. See *infra* Section IV.B.

298. See VIVIAN S. CHU & TODD GARVEY, CONG. RSCH. SERV., EXECUTIVE ORDERS: ISSUANCE, MODIFICATION, AND REVOCATION 1 (2014), <https://sgp.fas.org/crs/misc/RS20846.pdf> (discussing presidential authority to issue executive orders that carry the force and effect of law when based in constitutional authority); see also Alissa C. Wetzel, *Beyond the Zone of Twilight: How Congress and the Court Can Minimize the Dangers and Maximize the Benefits of Executive Orders*, 42 VAL. U. L. REV. 385, 393, 398, 402–03 (2007) (discussing strong and controversial executive orders from President John Tyler (related to investigation customs-related corruption), President Warren Harding (related to the Teapot Dome Scandal land grants) and President Franklin Roosevelt (related to World War II orders)).

299. *Executive Orders*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/statistics/data/executive-orders> (last visited Nov. 17, 2023) (noting that “[e]stimates have reportedly ranged as high as 50,000” issued executive orders).

300. See Matthew Chou, Recent Developments, *Agency Interpretations of Executive Orders*, 71 ADMIN. L. REV. 555, 556 (2019).

301. U.S. CONST., art. II, § 1; see also CHU & GARVEY, *supra* note 298 (discussing the constitutional authority for presidential executive orders).

302. U.S. CONST. art. II, § 3, cl. 5; see also Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1034–35 (2013) (discussing the Take Care Clause as it relates to executive orders).

national regulatory policy.”³⁰³ Executive orders also come in the form of presidential directives, proclamations, and memoranda; for all practical purposes, there are no meaningful distinctions between these executive actions.³⁰⁴ For all of the controversy underlying executive orders, it is clear that the president has the power and authority to use these orders to control agency enforcement and prosecutorial discretion.³⁰⁵ Ever since President Washington’s first executive order to regulate government employees, the presidential order has been “an indispensable” constitutional power.³⁰⁶

Importantly, recent presidential administrations from both political parties have demonstrated a willingness to issue bold (and controversial) executive orders to enact their respective notions of equity and justice.³⁰⁷ Recent administrations have likewise made it evident that investigating and prosecuting elected officials, past or present, is an appropriate role for the executive branch of government.³⁰⁸ As such, it would be entirely

303. Andrias, *supra* note 302, at 1034.

304. See Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 6–7 (2002) (noting the difference between these presidential decrees as one of form, not substance).

305. See Andrias, *supra* note 302, at 1124; see also Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2290, 2299–2302 (2001) (discussing the role of presidential directives in influencing executive agency behavior).

306. See Branum, *supra* note 304, at 21–23.

307. Former President Trump, for instance, issued Executive Order 13767 to build a “border wall” between the United States and Mexico to address what he believed was a problem with undocumented immigration. See Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017). President Biden has likewise issued a host of bold executive orders related to immigration, vaccines, and student loans. See 2021 Joseph R. Biden Jr. Executive Orders, FED. REG., <https://www.federalregister.gov/presidential-documents/executive-orders/joe-biden/2021> (last visited Nov. 17, 2023); see also Ron Lieber & Tara Siegel Bernard, *What You Need to Know About Biden’s Student Loan Forgiveness Plan*, N.Y. TIMES (Mar. 1, 2023), <https://www.nytimes.com/article/biden-student-loan-forgiveness.html> (discussing President Biden’s order and plan to forgive up to \$20,000 in student loan debt for qualified borrowers); Katie Rogers & Sheryl Gay Stolberg, *Biden Mandates Vaccines for Workers, Saying, ‘Our Patience Is Wearing Thin’*, N.Y. TIMES (Nov. 12, 2021), <https://www.nytimes.com/2021/09/09/us/politics/biden-mandates-vaccines.html> (discussing President Biden’s vaccine order and noting that his “patience is wearing thin” with the unvaccinated, and further discussing how Biden will “use [his] power as president” to challenge politicians who resist the order and “get them out of the way”).

308. See Brett Samuels, *Trump Says He Agrees ‘100 Percent’ with ‘Lock Her Up’ Chants about Clinton*, HILL (Oct. 16, 2020), <https://thehill.com/homenews/administration/521436-trump-says-he-agrees-100-percent-with-lock-her-up-chants-about/> (addressing former President Trump’s repeated threat to prosecute Hilary Clinton); see also Zeke Miller, *Biden Is Determined to Say as Little as Possible About Trump’s Indictment*, AP NEWS (June 13, 2023, 2:49 PM), <https://apnews.com/article/biden-trump-indictment-2024-classified-documents-46432cb6123a5d6ced4c4de6bbfa6e6c> (“The reticence reflects the precarious and unprecedented situation in which Biden finds himself: Just as Trump is the first former

within recent political norms for the president to issue an executive order, directive, memorandum, or to simply make a strong public statement instructing the SEC to immediately enforce insider trading laws against any and all members of Congress based on the same circumstantial evidence it deploys against middle-class traders.³⁰⁹ It would therefore be appropriate, efficient, and noncontroversial (indeed, popular) among the public for the current administration to issue an executive order mandating SEC action with regard to congressional insider trading.

B. *The Chain Reaction*

While still serving as Speaker of the House, Nancy Pelosi stated that to garner widespread congressional support, any law limiting congressional insider trading would have “to be governmentwide.”³¹⁰ Implicitly, Pelosi was declaring that if Congress must stop exploiting material nonpublic information for personal gain, so too must executive and judicial branch officials. This intractable position suggests that, in response to the proposed executive order, an indignant Congress will respond to SEC enforcement by ensuring government-wide accountability. This would likewise be a noncontroversial (and popular) government action amongst the U.S. citizenry. Indeed, it might restore confidence in a system of meaningful checks and balances with regard to criminal accountability between the three branches of government.

Pelosi’s implication of government-wide complicity has evidentiary support, as executive branch administrative officials likewise appear to engage in systemic insider trading. Over 2,600 administrative officials (one in five senior federal employees) disclosed stock investments in

president to be *charged by the federal government*. Biden is the first incumbent to have his own administration indict his chief political rival.”)

309. See *supra* notes 198–200 and accompanying text. This Executive Order would likewise be noncontroversial under the Jackson Test, the generally accepted standard of review for presidential authority in issuing such orders. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (establishing the Jackson Test for executive authorization to issue an order on a particular subject: “[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.”); see also Wetzel, *supra* note 298, at 407–08 (explaining the Jackson Test). 310; Darragh Roche, *Nancy Pelosi Makes Huge Flip-Flop over Stock Trading Ban*, NEWSWEEK (Feb. 9, 2022, 12:30 PM), <https://www.newsweek.com/nancy-pelosi-makes-flip-flop-stock-trading-ban-1677587>.

companies that were currently lobbying their agencies.³¹¹ Many of these administrative officials engaged in “rapid-fire trading” reminiscent of aggressive Wall Street traders.³¹² At least sixty officials at the Federal Trade Commission (FTC) and the DOJ reported trades in companies shortly before FTC and DOJ enforcement announcements.³¹³ At least one-third of FTC officials owned or traded shares in companies undergoing FTC merger review or investigation.³¹⁴ Over 200 senior Environmental Protection Agency (EPA) officials and their families collectively reported owning almost \$2 million in shares of oil and gas companies that the EPA regulates.³¹⁵ Nearly 240 officials at health agencies and the Pentagon reported owning \$28 million worth of shares in healthcare companies that won federal COVID-19 contracts in 2020 and 2021.³¹⁶ In addition, high-ranking officials at the Fed likewise engaged in COVID-era stock trading based on material nonpublic government information.³¹⁷

The judicial branch also appears to have a serious problem with inappropriate stock trading based on material nonpublic government information. A recent investigation found that 152 federal judges violated legal and ethical regulations by hearing 1,076 cases that involved companies in which the judges (or their families) inappropriately owned stock.³¹⁸ The judges ruled in favor of their ownership interests in two-thirds of the cases, and they even reported real-time trading activity while presiding over these cases.³¹⁹ If the SEC begins cracking down on congressional insider trading, it stands to reason that Congress will

311. Ballhaus et al., *supra* note 241.

312. See James V. Grimaldi, *Wall Street Traders or Washington Officials? Sometimes It's Hard to Tell*, WALL ST. J. (Oct. 18, 2022), <https://www.wsj.com/articles/wall-street-traders-or-washington-officials-sometimes-its-hard-to-tell-11666103385>.

313. Ballhaus et al., *supra* note 241.

314. Mullins et al., *supra* note 240.

315. See Ballhaus et al., *supra* note 241.

316. See Rebecca Ballhaus et al., *As Covid Hit, Washington Officials Traded Stocks with Exquisite Timing*, WALL ST. J. (Oct. 19, 2022), <https://www.wsj.com/articles/covid-washington-officials-stocks-trading-markets-stimulus-11666192404?page=1>.

317. See e.g., Michael S. Derby, *Dallas Fed's Robert Kaplan Was Active Buyer and Seller of Stocks Last Year*, WALL ST. J. (Sept. 7, 2021, 3:48 PM), https://www.wsj.com/articles/dallas-feds-robert-kaplan-was-active-buyer-and-seller-of-stocks-last-year-11631044094?mod=article_inline (discussing Robert Kaplan's inappropriate trading); Nick Timiraos, *Fed Vice Chairman Richard Clarida to Resign Amid Questions Over Stock Trades*, WALL ST. J., (Jan. 10, 2022), https://www.wsj.com/articles/fed-vice-chairman-richard-clarida-to-resign-11641849285?mod=article_inline (discussing Richard Clarida's inappropriate trading).

318. See Michael Siconolfi et al., *Dozens of Federal Judges Had Financial Conflicts: What You Need to Know*, WALL ST. J. (Apr. 27, 2020), <https://www.wsj.com/articles/dozens-of-federal-judges-broke-the-law-on-conflicts-what-you-need-to-know-11632922140>.

319. See *id.*

move, in short order, to address what appears to be a systemic government-wide problem that Americans are collectively ignoring. That is, if members of Congress have to take their hands out of the cookie jar, they will likely take steps to ensure that regulators and judges stop profiteering, as well.

C. *Additional Positive Outcomes*

In addition to curbing financial opportunism among government officials, the modest proposal to prosecute members of Congress for obvious financial crimes may also produce de facto congressional term limits. Americans have long sought legislative term limits for Congress, which is a rare political issue that garners “vast support amongst all demographic and political groups.”³²⁰ Some members of Congress have served for over fifty years, and due to election rules that favor incumbents, many politicians seem to enjoy a “virtual lifetime job.”³²¹ Despite a groundswell of popular support in the 1990s, the Supreme Court has held that unless Americans amend the Constitution, popular attempts to impose term limits on members of Congress are unconstitutional.³²²

Congress has little incentive to initiate the constitutional amendment process to impose congressional term limits on itself.³²³ In fact, members of Congress routinely promise to impose term limits during election campaigns, only to renege on those promises after joining the congressional ranks.³²⁴ The modest proposal resolves this tension. If congressional millionaires can no longer profit from their government service via insider trading, they may voluntarily shorten their tenure and leave for more lucrative ventures.³²⁵ If the SEC begins enforcing insider

320. Ashley Oravetz, *Congressional Term Limits: The Right Idea, The Wrong Numbers. A Proposal in Favor of Increased Term Limits for Congress*, 46 U. DAYTON L. REV. 55, 56 (2020). Many critics also believe that congressional term limits will produce a better, popular democracy for more Americans. *See id.* at 67. *See generally* Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. CHI. L. REV. 83, 83–90 (1997) (discussing the many benefits to term limits in a constitutional democratic republic).

321. *See* Oravetz, *supra* note 320, at 56, 67 (discussing congressional career longevity and the “incumbent advantage” inherent in U.S. election laws).

322. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 783 (1995) (holding that if “the qualifications set forth in the text of the Constitution are to be changed, that text must be amended”).

323. *See* Keith J. Larson, *Republican Revolutionaries and Tea Party Patriots: A Public Choice Analysis of Congressional Term Limits*, 86 ST. JOHN’S L. REV. 761, 813–14 (2012) (discussing congressional avoidance of term limits).

324. *Id.* at 804.

325. *See supra* notes 21–25 and accompanying text (discussing the congressional median net worth).

trading laws against members of Congress using the same flexible standards it applies to the middle class, the congressional “lifetime job” suddenly looks less appealing to financially motivated members of the political class.

These de facto term limits may result in another positive socio-political outcome: congressional diversity. Congress is currently bereft of working class representation; indeed, “[w]orking-class people almost never become politicians.”³²⁶ In U.S. history, a Congress dominated by the rich is, in fact, “a rare historical constant.”³²⁷ Working-class Americans constitute less than 3% of state legislatures, and the average member of Congress has spent less than 2% of her career engaged in working-class labor.³²⁸ Yet, the working-class constitutes more than half of the U.S. population.³²⁹ This plutocratic leadership structure inverts America’s democratic credo of a “government of the people, by the people, for the people.”³³⁰ Instead, as Duke University Political Scientist Nick Carnes puts it, the congressional plutocracy creates a reality where “[a] [g]overnment by the rich is [a] government for the rich.”³³¹ Regular Americans simply do not have a voice at the table.³³² Perhaps disambiguating public service from private profit via securities trading will disrupt these plutocratic trends and produce a more diverse legislative body.³³³

After all, congressional diversity is an outcome for which privileged members of Congress repeatedly claim they have devoted their careers.³³⁴

326. Nicholas Carnes, *Working-Class People Are Underrepresented in Politics. The Problem Isn't Voters*, VOX (Oct. 24, 2018), <https://www.vox.com/policy-and-politics/2018/10/24/18009856/working-class-income-inequality-randy-bryce-alexandria-ocasio-cortez> (discussing how members of Congress have spent only 2% of their pre-congressional careers engaging in working-class jobs).

327. *Id.*

328. *Id.*

329. Nick Carnes, *The Class War in American Politics is Over. The Rich Won*, VOX (Sept. 3, 2014, 8:00 AM), <https://www.vox.com/2014/9/3/6098677/the-class-war-in-american-politics-is-over-the-rich-won>.

330. Abraham Lincoln, U.S. President, Gettysburg Address at Gettysburg Pa. (Nov. 19, 1863).

331. Carnes, *supra* note 326 (“Government by the rich is government for the rich. This ongoing exclusion of working-class Americans from our political institutions has enormous consequences for public policy. Just as ordinary citizens from different classes tend to have different views about the major economic issues of the day (with workers understandably being more pro-worker and professionals being less so), politicians from different social classes tend to have different views too.”).

332. *See id.*

333. *See id.*

334. See Jamie Bittner, “Diversity is Necessary at the Table”: Nancy Pelosi’s Last Official Acts, GRAY (Dec. 22, 2022, 5:39 PM), <https://www.graydc.com/2022/12/22/diversity-is->

This proposal is cheap, easy, pragmatic, has little apparent downside, and is sure to be effective—yet our government will undoubtedly resist this just solution. Why will the government refuse to put this modest proposal into motion? This Article asks the reader to grapple with that question and the disheartening answers it invokes.

CONCLUSION

In resisting regulations on congressional trading, Nancy Pelosi succinctly observed, “We are a free-market economy. [Members of Congress] should be able to participate in that.”³³⁵ We agree; however, members of Congress should also participate in the criminal justice system—and they do not currently do so with regard to congressional insider trading. While helping to establish the U.S. government, James Madison observed that “[i]f this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate [anything] but liberty.”³³⁶ With regard to insider trading, America has reached Madison’s inflection point.

Insider trading law is not complex; in its current form, the law applies to members of Congress. The anecdotal and empirical evidence strongly indicate that members of Congress are trading on material nonpublic information gleaned from their government service. Past and present scholarly and legislative proposals are, if anything, counterproductive. This modest proposal is simple, efficient, pragmatic, and will quickly solve the problem of congressional insider trading in a way that should appeal to almost all Americans. Yet, this modest proposal asking for a simple executive commitment confirming that government officials must simply comply with the current law arises almost to the level of satire. In confronting this bleak conclusion, perhaps readers will push past the manufactured “complexity” of insider trading law in order to end the nationwide complacency that routinely enables congressional securities fraud.

necessary-table-nancy-pelosis-last-official-acts/ (detailing Nancy Pelosi’s commitment to congressional diversity).

335. Hall, *supra* note 7.

336. THE FEDERALIST NO. 57 (James Madison or Alexander Hamilton).

