Time for a Broad Prophylactic Against Congressional Insider Trading

JOHN P. ANDERSON*

INTRODUCTION

In 2011, Peter Schweizer published a book, *Throw Them All Out*, in which he exposes some questionable means by which politicians manage to increase their personal wealth fifty percent faster than the average American.[1] Schweizer suggests that trading on material nonpublic information is one method by which congresspersons achieve outsized returns on their investments.[2] He cites one study finding that, while the average American investor underperforms the market when trading in individual stocks, "[t]he average senator beats the market by 12% a year."[3] This statistic is concerning on its own, but it is downright disturbing when considered alongside the same study's finding that corporate insiders and hedge funds (the usual targets of most insider trading complaints) beat the market on average by about only seven percent.[4]

Schweitzer's book was followed by a feature story on the CBS News show, *60 Minutes*, highlighting some dubious stock trades by leaders of both political parties.[5] These stories got the public's attention and spurred Congress to act, adopting the Stop Trading on Congressional Knowledge (STOCK) Act in April of 2012.[6]

The STOCK Act made explicit what many already regarded as implicit—that congressional trading based on material nonpublic information acquired by virtue of their positions as public servants is a breach of their fiduciary duties and therefore constitutes insider trading in violation of the general anti-fraud provisions of Section 10b of the Securities Exchange Act of 1934.[7]

---

* J. Will Young Professor of Law, Mississippi College School of Law; University of Virginia School of Law, J.D.; University of Virginia, Ph.D. (Philosophy).

1 PETER SCHWEIZER, THROW THEM ALL OUT xvii (2011).

2 *See id.* at xvii, xviii.

3 *Id.* at xviii.

4 *Id.*

5 *See, e.g.*, John Bresnahan, *'60 Minutes' on 'Honest Graft'*, POLITICO (Nov. 13, 2011), https://www.politico.com/story/2011/11/60-minutes-on-honest-graft-068271 [https://perma.cc/D6SD-UDE6].

6 15 U.S.C. § 78u-1.

7 *See id.* § 78u-1(g)(1).

Violations of Section 10b can lead to civil enforcement actions brought by the Securities and Exchange Commission (SEC) and criminal enforcement by the Department of Justice (DOJ).[8] The STOCK Act also expanded disclosure requirements for members of Congress, the Executive Branch, and their staff members.[9]

No sooner had the STOCK Act passed, however, than it was quietly overhauled to weaken certain key disclosure provisions,[10] and in any event the Act has not been enforced consistently since its adoption.[11] For example, an investigative counsel in the House of Representatives' independent Office of Congressional Ethics recently admitted "enforcement of the [STOCK Act's] financial-disclosure requirements is virtually nonexistent."[12] As a result, public cynicism concerning congressional insider trading has once again snowballed. A recent poll found that seventy-six percent of American voters think members of Congress have an "unfair advantage" in trading stocks.[13] In fact, many market participants build their trading strategies upon

[8] Section 10b was implemented by the SEC with Exchange Act Rule 10b-5. 17 C.F.R. § 240.10b-5 (2022). Civil penalties for insider trading violation can include, *inter alia*, injunctive relief, disgorgement, and a fine of up to three times the profits gained or losses avoided by the illegal trading. *See* STEPHEN M. BAINBRIDGE, INSIDER TRADING LAW AND POLICY 141–44 (2014). Criminal convictions for insider trading can be punished by a five million dollar fine and up to twenty years imprisonment. 15 U.S.C. § 78ff(a).

[9] *See, e.g.*, Office of White House Press Secretary, *FACT SHEET: The STOCK Act: Bans Members of Congress from Insider Trading*, THE WHITE HOUSE (Apr. 4, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/04/04/fact-sheet-stock-act-bans-members-congress-insider-trading [https://perma.cc/5XMA-E7UT]; *see also infra* Part I for a more detailed discussion of the STOCK Act's disclosure requirements.

[10] *See* Tamara Keith, *How Congress Quietly Overhauled Its Insider-Trading Law*, NPR (Apr. 16, 2013), https://www.npr.org/sections/itsallpolitics/2013/04/16/177496734/how-congress-quietly-overhauled-its-insider-trading-law [https://perma.cc/QNV5-KAY2]; *see also* infra Part I.

[11] *See, e.g.*, Dave Levinthal, *'Conflicted Congress': Key Findings from Insider's Five-Month Investigation into Federal Lawmakers' Personal Finances*, INSIDER (Dec. 17, 2021), https://www.businessinsider.com/conflicted-congress-key-findings-stock-act-finances-investing-2021-12 (noting that "lawmakers and top congressional staffers face minimal and inconsistently applied penalties for violating the STOCK Act").

[12] Camila DeChalus, Kimberly Leonard & Dave Levinthal, *Congress and Top Capitol Hill Staff Have Violated the STOCK Act Hundreds of Times. But the Consequences Are Minimal, Inconsistent, and Not Recorded Publicly.*, INSIDER (Dec. 17, 2021), https://www.businessinsider.com/congress-stock-act-violations-penalties-consequences-2021-12.

[13] Bryan Metzger, *76% of Voters Disagree with Pelosi, Think Members of Congress Have an 'Unfair Advantage' in Trading Stocks: Poll*, INSIDER (Jan. 7, 2022), https://www.businessinsider.com/76-percent-disagree-with-pelosi-congress-unfair-advantage-stock-trading-2022-1.

the assumption that congresspersons are trading on material nonpublic information. For example, a popular website tracks congressional trading in individual stocks and identifies "buy" and "sell" trends.[14] The website explains that "[t]racking Capitol Hill politicians' trades can provide valuable insights for your investment research — and we offer you a free solution to do just that."[15] Some politicians have achieved almost cult status on social media for their stock trading. For example, Speaker Nancy Pelosi's stock trades have a regular online following on Twitter, TikTok, and Reddit, with popular accounts such as "@NancyTracker."[16] Moreover, the search "Pelosi stock trades" hit a record high on Google in January 2022.[17]

Of course, Speaker Pelosi is not the only congressperson suspected of insider trading.[18] Senators Richard Burr, Diane Feinstein, and Jim Inhofe, as well as then-Senator Kelly Loeffler, have come under scrutiny over suspicious trades as the threat of the COVID-19 pandemic emerged in 2020.[19] Each of these Senators sold off significant stock holdings shortly after participating in a confidential briefing "about the coronavirus and the massive impact it will have upon the economy, jobs and the stock market."[20] Though it is hard to quantify the impact of congressional insider trading on the markets, as the Supreme Court explained in *United States v. O'Hagan*, "investors likely would hesitate to venture their capital in a market where [insider] trading . . . is unchecked by law."[21] So what, if anything, is to be

---

[14] *See What's Trading on Capitol Hill?*, CAPITOL TRADES, https://www.capitoltrades.com/ [https://perma.cc/J35C-J2QS] (last visited June 5, 2022). The website organizes congressional trading data by category. For example, the "Latest" category highlights recently traded stocks, and the "Biggest Players" category highlights the most actively trading politicians. *Id.*

[15] *Id.*

[16] *See, e.g.*, Joshua Bote, *The Financial Gurus on TikTok and Twitter Obsessively Tracking Nancy Pelosi's Stock Trades*, SFGATE (Feb. 3, 2022), https://www.sfgate.com/national-politics/article/Nancy-Pelosi-viral-stock-trades-16826801.php [https://perma.cc/APX8-5T6T]; House Speaker Pelosi's Stock Trades Attract Growing Following Online, Newsmax (Jan. 26 , 2022), https://www.newsmax.com/politics/pelosi-stock-trades-online-attention/2022/01/26/id/1054069/ [https://perma.cc/KW59-UYTP] [hereinafter Pelosi's Stock Trades].

[17] *See Pelosi's Stock Trades*, *supra* note 16.

[18] *See, e.g.*, Kenny Stancil & Common Dreams, *Amid Push for Ban, Lawmakers Traded $355 Million of Stock in 2021*, ALTERNET (Feb. 1, 2022), https://www.alternet.org/2022/02/insider-trading-congress/ [https://perma.cc/4X5RY3HD].

[19] *See* Jack Kelly, *Senators Accused of Insider Trading, Dumping Stocks After Coronavirus Briefing*, FORBES (Mar. 20, 2020), https://www.forbes.com/sites/jackkelly/2020/03/20/senators-accused-of-insider-trading-dumping-stocks-after-coronavirus-briefings/?sh=488905914a45.

[20] *Id.*

[21] 521 U.S. 642, 658 (1997).

done? Just as they did in 2011,[22] members of Congress on both sides of the aisle are rushing to get out in front of the issue. And a number of bills have garnered bipartisan support.[23] Many of these bills propose a broad prophylactic of proscribing members of Congress from trading in individual stocks while in office.[24] Some bills would go so far as proscribing trades by spouses and dependent children as well.[25]

But while momentum is building for broad, new restrictions on congressional stock trading, some representatives continue to express concerns. For example, Speaker Pelosi openly resisted calls for an outright ban on trading in individual stocks by members of Congress, arguing, for example, that "[w]e're a free-market economy" and members of Congress "should be able to participate in that."[26] This Article counters such arguments and defends a broad prophylactic against congressional insider trading in individual stocks as a means of preserving market integrity and restoring the public's trust in the legislative branch. Part I offers a brief summary of the current state of insider trading laws, with a special focus on their application to Congress. Part II surveys some of the proposed insider trading reform bills under consideration by the 117th Congress. Part III argues that, given congresspersons' unique role vis-à-vis securities markets, a broad prophylactic against congressional insider trading is both justified and needed.

I. THE EXISTING REGIME

The parameters of liability for insider trading in the United States have never been explicitly defined by statutes or SEC rulemaking.[27] The principal statutory authority for insider trading liability is Exchange Act Section 10b.[28] Section 10b prohibits the employment of "any manipulative or deceptive device or contrivance" in "connection with the purchase or sale, of any

---

[22] *See* Jeanne L. Schroeder, *Taking Stock: Insider and Outsider Trading by Congress*, 5 WM. & MARY BUS. L. REV. 159, 165 (2014) (noting that the STOCK Act was adopted with overwhelming bipartisan support in 2012 after "*The Wall Street Journal* and the television magazine *60 Minutes* ran exposés of congressional trading" in 2011).
[23] *See infra* Part II; *see also* Stephanie Hughes, *Congress Looks to Ban Lawmakers from Trading Individual Stocks*, MARKETPLACE (Feb. 8, 2022), https://www.marketplace.org/2022/02/08/congress-looks-to-ban-lawmakers-from-trading-individual-stocks/ [https://perma.cc/56A9-X6XB].
[24] *See, e.g.*, Ban Conflicted Trading Act, H.R. 1579, 117th Cong. (2021).
[25] *See* TRUST in Congress Act, H.R. 336, 117th Cong. (2021); Ban Congressional Stock Trading Act, S. 3494, 117th Cong. (2022).
[26] *See* Bote, *supra* note 16 (quoting Speaker Nancy Pelosi).
[27] *See* STEPHEN M. BAINBRIDGE, SECURITIES LAW: INSIDER TRADING 25–28 (2d ed. 2007).
[28] 15 U.S.C. § 78j.

security."[29] Though generally recognized as a "catchall" provision, in *Chiarella v. United States*, the Supreme Court clarified that "what [Section 10b] catches must be fraud."[30] A market participant's trading is only fraudulent, however, if it is based on an information advantage that the insider has a duty to disclose. The courts recognize such a duty to disclose under two theories, the "classical theory" and the "misappropriation theory."[31]

Liability arises under the classical theory of insider trading when a firm issuing stock, its employees, or its other agents strive to benefit from trading (or tipping others who then trade) that firm's stock based on material nonpublic information.[32] Here the insider (or constructive insider) violates "a fiduciary or other similar relation of trust and confidence" owed to the counterparty to the transaction (the firm's current or prospective shareholders) by not disclosing the information advantage drawn from the firm's material nonpublic information in advance of the trade.[33] So, for example, the defendant in *Chiarella* learned the identities of takeover targets in advance of the market while working as a "markup man" in the composing room of a financial printer.[34] He then profited by trading in shares of the targeted firms.[35] Because Chiarella's employer was hired by the purchasers, he had no fiduciary or similar relation of trust and confidence to the shareholders of the target firms whose shares he purchased.[36] The Court held he was not, therefore, liable for insider trading under the classical theory.[37]

Under the misappropriation theory, one incurs insider trading liability when one misappropriates material nonpublic information and trades (or tips another who trades) on it without first disclosing the intent to trade to the information's source. The "misappropriation theory premises liability on a fiduciary-turned-trader's deception of those who entrusted him with access to confidential information" by duping them out of "the exclusive use of that information."[38] In *O'Hagan*, the defendant was a partner at a law firm representing the purchaser in a potential tender offer bid.[39] O'Hagan purchased a position in the target of the proposed tender offer based on

---

[29] *Id.*
[30] 445 U.S. 222, 234–35 (1980).
[31] *See* United States v. O'Hagan, 521 U.S. 642, 651–52 (1997).
[32] *See id.*
[33] *Chiarella*, 445 U.S. at 228.
[34] *See id.* at 224.
[35] *See id.*
[36] *See id.* at 232.
[37] *See id.* at 233–35.
[38] United States v. O'Hagan, 521 U.S. 642, 652 (1997).
[39] *See id.* at 647.

knowledge of his client's confidential plans.[40] As in *Chiarella*, O'Hagan had no fiduciary or similar relation of trust and confidence with the shareholders of the target company (the counterparties to his trades), but his trading did breach a fiduciary or similar duty to the *source* of the material nonpublic information upon which he was trading (his firm and its client).[41] So while O'Hagan was not liable for insider trading under the classical theory, he was liable under the misappropriation theory.[42]

Sitting congresspersons can serve on boards.[43] Congresspersons can therefore incur liability under the classical theory if they trade (or tip others) based on material nonpublic information acquired by virtue of their position on the board of a company. In 2019, Representative Chris Collins pled guilty to insider trading charges for tipping material nonpublic information acquired in his role as board member of a publicly traded pharmaceutical company to his son, who then traded on that information.[44] A congressperson could also trade on an illegal tip from an insider at a publicly traded company. In both of these cases, the congressperson can be charged and convicted under a straightforward application of the classical theory of insider trading, but their status as a congressperson is irrelevant to their liability. But what if a congressperson trades on material nonpublic information acquired during a House committee meeting? Assuming this congressperson is not a board member or officer of the company whose shares she traded, she has no fiduciary or similar duty of trust and confidence to the counterparty to the trade, and she is therefore not liable under the classical theory. If she is liable, it must be under the misappropriation theory.[45]

---

[40] *See id.* at 647–48.

[41] *See id.* at 652–53.

[42] *See id.* at 659. Note, the Court would not address the question of whether Chiarella was liable under the misappropriation theory in that case because the prosecutors did not present the theory to the jury. *See Chiarella*, 445 U.S. at 236–37.

[43] The House of Representatives does not preclude board membership, but it does preclude compensation for board membership. *See* RULES OF THE HOUSE OF REPRESENTATIVES, 117TH CONG., XXV 2(d) (2021). U.S. Senate rules prohibit a sitting senator from serving on boards. *See* S. SELECT COMMITTEE ON ETHICS, 117TH CONG., SENATE CODE OF OFFICIAL CONDUCT XXVII 6(a) (2021).

[44] *See* Michael D. Guttentag, *"Huh?" Insider Trading: The Chris Collins Story*, 15 TENN J.L. & POL'Y 95, 97, 99 (2020).

[45] Some scholars have argued that congresspersons do owe a fiduciary-like duty to all citizen-investors and can, therefore, incur insider trading liability for trading on government information in breach of the classical theory. *See, e.g.*, Donna M. Nagy, *Insider Trading, Congressional Officials, and Duties of Entrustment*, 91 B.U. L. REV. 1105, 1111, 1139 (2011). While this is not the standard view, *see, e.g.*, Schroeder, *supra* note 22, at 162 (explaining that congressional trading on confidential government information "would not constitute *classic* insider trading," but it was unclear prior to the STOCK Act whether it violated the misappropriation theory), the debate is outside the

But, for some time, there was legal ambiguity about the misappropriation theory's application to congresspersons. As explained above, liability pursuant to the misappropriation theory turns on some breach of a fiduciary or similar duty of trust and confidence to the *source* of the material nonpublic information upon which a person trades. Who is the source (or beneficial owner) of government information? And whoever the source is, do congresspersons owe them a fiduciary or similar duty of trust and confidence?

As noted above, in response to public accusations of congressional insider trading, and mounting political pressure, Congress passed the STOCK Act in 2012. The Act explicitly provides that

> 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.[46]

The Act also includes a prompt reporting requirement, whereby members of Congress, congressional staff, and other identified government employees must report their stock transactions within forty-five days of execution.[47] The original version of the Act also requires that such reports of congressional trading be made available to the public on the "official websites of the Senate and the House of Representatives not later than 30 days after such forms are filed."[48] Within a year, however, Congress quietly passed an amendment that exempted congressional staff (though not congresspersons themselves) from this online posting requirement,[49] and reports suggest that many

---

scope of this Article. Ultimately, this Article argues a broad prophylactic approach is necessary to combat congressional insider trading because Section 10b's fiduciary-fraud model is inadequate for reasons addressed *infra* Part III—and expanding the model to apply the classical theory of liability on congresspersons would not alter this analysis.

[46] 15 U.S.C. § 78u-1(g)(1).

[47] *See* 5 U.S.C. app. § 103(l).

[48] STOCK Act, S. 2038, 112th Cong. § 8(a) (2012).

[49] *See* S. 716, 113th Cong. § 1(b) (2013) ("modify[ing] the requirements under the STOCK Act regarding online access to certain financial disclosure statements and related forms"); *see also*, Keith, *supra* note 10.

congresspersons are simply ignoring the disclosure requirement altogether.[50] For example, one study found that that fifty-seven members of Congress failed to disclose their stock trades in compliance with the requirements of the STOCK Act in 2020 and 2021.[51] Such noncompliance is supposed to result in penalties, but "[n]o public records exist indicating whether these officials ever paid the fines."[52] The congressional ethics staff would not confirm whether a record of noncompliance is kept, and nineteen congresspersons whom the study identified as out of compliance refused to answer questions about whether they had paid a penalty.[53]

Commentators have criticized the STOCK Act as "toothless."[54] As Professor Jeanne L. Schroeder explains, the STOCK Act did not change the law at all: "At most it casts a dim light on congressional duties, but leaves the other elements of this notoriously fuzzy cause of action in the dark."[55] Schroeder adds, "if the SEC and the DOJ felt uncertain in their ability to bring actions against members of Congress and their staffers in the past, they will probably continue to feel this way."[56] This concern has been reinforced in the decade since the Act's passage. For example, shortly after the Act was enacted, the SEC opened an investigation of a congressional staffer on the House Ways and Means Committee for tipping a lobbyist about an upcoming Medicare decision.[57] Lawyers for the House, however, moved to block the investigation, arguing that it violated the separation of powers.[58] The SEC's investigation of this staffer was ultimately dropped without charges.[59] In addition to separation of powers concerns, there is also the problem that the Constitution's Speech or Debate Clause[60] may be interpreted to "make

---

[50] *See* Michelle Cottle, *Congress Can Trade Stocks or Keep the Public Trust. Not Both.*, N.Y. TIMES (Jan. 18, 2022), https://www.nytimes.com/2022/01/18/opinion/congress-trade-stocks.html; *see also* Levinthal, *supra* note 11.

[51] *See* DeChalus, Leonard & Levinthal, *supra* note 12.

[52] *Id.*

[53] *Id.*

[54] Schroeder, *supra* note 22, at 223.

[55] *Id.* at 224.

[56] *Id.*

[57] *See* Lee Fang, *Congress Tells Court that Congress Can't Be Investigated for Insider Trading*, INTERCEPT (May 7, 2015), https://theintercept.com/2015/05/07/congress-argues-cant-investigated-insider-trading/ [https://perma.cc/5D9E-BCH6].

[58] *See id.*

[59] *See, e.g.*, Marisa Taylor & Christina Jewett, *HHS Pick Price Made 'Brazen' Stock Trades While His Committee Was Under Scrutiny*, KAISER HEALTH NEWS (Feb. 7, 2017), https://khn.org/news/hhs-pick-price-made-brazen-stock-trades-while-his-committee-under-scrutiny/ [https://perma.cc/3BE2-AH8S] (noting that the SEC "quietly dropped" its investigation of the staffer, Brian Sutter, without any charges being brought).

[60] U.S. CONST. art. I, § 6, cl. 1. This clause provides that senators and representatives "shall not be questioned in any other Place" for "any Speech or Debate in either House."

[insider trading] prosecution impossible for [trading on] certain types of information received officially in committee or other legislative settings."[61] This is because the Supreme Court has interpreted the Speech or Debate Clause broadly to protect not just speech and debate, but anything "generally done in a session of the House by one of its members in relation to the business before it."[62] Beyond these constitutional problems, the notoriously vague elements of materiality[63] and publicity[64] for insider trading liability are

---

[61] Stanley M. Brand, *DOJ Drops Investigation into Three Senators for Insider Trading; Burr Probe Continues*, CONVERSATION (Apr. 2, 2020), https://theconversation.com/doj-drops-investigation-into-three-senators-for-insider-trading-burr-probe-continues-134875 [https://perma.cc/YB2V-67C4].

[62] Kilbourn v. Thompson, 103 U.S. 168, 204 (1881). It should be noted that it is by no means certain that the Speech or Debate Clause would be interpreted by the courts to offer congresspersons protections from fraudulent conduct that would form the basis of an insider trading charge. *See, e.g.*, United States v. Rostenkowski, 59 F.3d 1291, 1294 (D.C. Cir. 1995) (rejecting the claim that the Speech or Debate Clause could bar an indictment "alleging generally that Rostenkowski and others had 'devised . . . a scheme' to defraud the United States"); *see also* Nagy, *supra* note 45, at 1136 (noting Speech or Debate Clause should not insulate congresspersons from prosecution of illegal insider trading). Professor Nagy does, however, recognize that the Speech or Debate Clause can complicate civil and criminal investigations into such illegal trading. *See id.* at 1135–36.

[63] In *Basic Inc. v. Levinson*, the Supreme Court held that information is material for purposes of Exchange Act Section 10b if "there is a substantial likelihood that a reasonable shareholder would consider it important" in making a trading decision. 485 U.S. 224, 231–32 (1988). In addition, the Court held "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Id.* But, as Professor Joan MacLeod Heminway notes, "[t]he facial simplicity" of this test "masks the complexities encountered by transaction planners" ex ante. Joan MacLeod Heminway, *Materiality Guidance in the Context of Insider Trading: A Call for Action*, 52 AM. U.L. REV. 1131, 1138–39 (2003). For example, who is the "reasonable investor"? Is she a retail or institutional trader? Is she a long-term investor, or a speculator who trades based on price? What constitutes the "total mix" of information? Courts have struggled to answer these questions consistently. *See id.* at 1152–53; *see also* Donald C. Langevoort, *Commentary: Stakeholder Values, Disclosure, and Materiality*, 48 CATH. U.L. REV 93, 98 (1998) (noting that "investors are not homogeneous"); BAINBRIDGE, supra note 8, at 66-68 (noting additional challenges faced by courts in applying the materiality test to insider trading cases).

[64] In a dissenting opinion in *Dirks v. SEC*, Justice Blackmun expressed frustration that "the SEC seemingly has been less than helpful in its view of the nature of disclosure necessary to satisfy the disclose-or-refrain duty. The [SEC] tells persons with inside information that they cannot trade on that information unless they disclose; it refuses, however, to tell them how to disclose." 463 U.S. 646, 678 (1983). Justice Blackman then added that "[t]his seems to be a less than sensible policy, which it is incumbent on the [SEC] to correct." *Id.* To date, however, the SEC has failed to offer clear guidance on when information is public. As a result, courts continue to struggle to identify a consistent test. *See* JOHN P. ANDERSON, INSIDER TRADING: LAW, ETHICS, AND REFORM 62–66 (2018).

complicated further in the context of congressional trading.[65] For example, is an intelligence briefing that collects and digests information from public sources around the world nonpublic information? Is it material? With these problems for enforcement in mind, it is unsurprising that, despite much hoopla over insider trading investigations into Senators Burr, Loeffler, Feinstein, and Inhofe, who sold off millions of dollars in shares soon after receiving COVID-19 intelligence briefings in the spring of 2020 (just before the market collapsed due to pandemic-related worries),[66] not a single senator was charged.[67] To date, no congressperson has been convicted of insider trading pursuant to the STOCK Act.[68]

II. REFORM BILLS CURRENTLY BEFORE CONGRESS

In response to renewed calls for reform, members of Congress, on both sides of the aisle, have rushed to get out in front of the issue. A number of bills have been introduced (and others will no doubt percolate in the coming months), but, to date, none have made it to a vote. The bills vary in scope, but are uniform in proposing a broad proscription against certain categories of congressional stock trading as a preventive against insider trading.

In the House, the Ban Conflicted Trading Act (BCTA),[69] sponsored by Representative Raja Krishnamoorthi, would prohibit members of Congress and their senior staff (though not spouses or dependents) from trading in individual stocks while in office, or at least require that such trading take place via a blind trust.[70] The BCTA would permit congresspersons to continue to hold individual stocks purchased prior to taking office.[71] The bill

---

[65] *See, e.g.*, John P. Anderson, *Solving the Paradox of Insider Trading Compliance*, 88 TEMP. L. REV. 273, 279–85 (2016) (identifying problems of vagueness in the elements of materiality and publicity in insider trading law).

[66] *See supra* Introduction.

[67] *Feds Won't Charge Sen. Richard Burr with Insider Trading*, MARKETWATCH (Jan. 19, 2021), https://www.marketwatch.com/story/feds-wont-charge-sen-richard-burr-with-insider-trading-01611104898# [https://perma.cc/U3SG-XM88]. There are, however, reports that the SEC has continued to investigate Senator Burr. *See, e.g.*, Dan Mangan, *Sen. Richard Burr, Brother-in-Law Spoke on Phone Just Before Stock Sales that Are Under Investigation, SEC Says*, CNBC (Oct. 28, 2021), https://www.cnbc.com/2021/10/28/sec-probes-possible-insider-stock-trades-by-sen-richard-burr-relative.html [https://perma.cc/Z73U-4FKM].

[68] The Chris Collins case was a straightforward classical insider trading action, which did not implicate the misappropriation theory under the STOCK Act. *See* Guttentag, *supra* note 44, at 97.

[69] H.R. 1579, 117th Cong. (2021).

[70] *See id.* §§ 2–4.

[71] *See id.* § 4.

would also prohibit congresspersons from sitting on the board of a corporation.[72] Violations of the BCTA would be punishable by a "civil penalty of not less than 10 percent of the value of the covered investment."[73] Similarly, the TRUST in Congress Act (TCA),[74] sponsored by Representative Abigail Spanberger, would require that members of Congress place their individual stocks in a blind trust, but it would extend that requirement to even those stocks purchased prior to taking office.[75] And while the TCA would extend the restriction to congresspersons' spouses and dependent children, it would not restrict trading by congressional staff members.[76] The current version of the TCA does not include a civil or criminal enforcement provision.

In the Senate, Senator Jon Ossoff introduced the Ban Congressional Stock Trading Act (BCSTA),[77] which would require congresspersons to either divest individual stocks within thirty days of taking office, or place those investments in a blind trust.[78] Like the TCA, this bill would also apply to congresspersons' spouses and dependent children (but not to congressional staff).[79] But unlike the TCA, the BCSTA would impose a civil penalty equal to the congressperson's full annual salary.[80] The Banning Insider Trading in Congress Act (BITCA),[81] introduced by Senator Josh Hawley, would also require that members of Congress and their spouses place individual stocks in a blind trust, but it would not extend the restriction to their dependents.[82] The BITCA would also impose penalties of disgorgement and civil fines, to be assessed by the supervising ethics committee.[83] None of the bills would impose criminal penalties for violations.

Each of the above bills would proscribe even innocent individual stock trades made in good faith, so long as such trades are executed by covered persons. There is precedent for such broad prophylactics against insider trading. For example, Congress imposed a broad proscription against short-swing trading by "directors," "officers," and "principal stockholders" of

---

[72] *See id.* § 3(b).
[73] *See id.* § 6(b).
[74] H.R. 336, 117th Cong. (2021).
[75] *See id.* § 2.
[76] *See id.*
[77] S. 3494, 117th Cong. (2022).
[78] *See id.* § 202.
[79] *See id.*
[80] *See id.* § 202(g)(2).
[81] S. 3504, 117th Cong. (2022).
[82] *See id.* § 202.
[83] *See id.* § 202(c).

publicly held corporations in 1934 with the enactment of Section 16(b) of the Securities Exchange Act.[84] Under this provision, any profits a covered insider earns from a purchase and sale (or sale and purchase) of their company's shares that takes place within a six-month span "shall inure to and be recoverable by the issuer," regardless of whether the covered person traded on material nonpublic information.[85] Congress determined this broad prophylactic was necessary to "curb the evils of insider trading [by] . . . taking the profits out of a class of transactions in which the possibility of abuse was believed to be intolerably great."[86] Moreover, Exchange Act Rule 14e-3 permits civil and criminal liability for any trading based on material nonpublic information concerning tender offers, even if there is no accompanying proof of breach of a fiduciary or similar duty of trust and confidence.[87]

So, to take stock: the public is calling for a broad prohibition against congressional trading in individual stocks, a number of bills have been proposed, and there is precedent for such broad prophylactics against insider trading elsewhere in the law. So, what is the holdup? For the reasons offered below, it is time for Congress to act.

III. WHY A BROAD PROPHYLACTIC MAKES SENSE

Though this author has argued for reducing the scope of insider trading liability in some contexts (for example, under certain conditions where such trading is licensed by the issuer of the stock being traded),[88] the author has consistently recognized trading on misappropriated information (such as when a congressperson misappropriates material nonpublic government information for personal gain) as morally wrong, and as warranting civil and criminal sanctions.[89] For reasons outlined in Part I, however, the existing regime has proved an inadequate deterrent against congressional insider trading—or at least it has failed to assuage the public's concerns. Some reform is needed to assuage the public's concerns, and to restore confidence in our securities markets and government. The legislative process is in its

---

[84] 15 U.S.C. § 78p(a)-(b).
[85] *Id.* § 78p(b).
[86] Foremost-McKesson, Inc. v. Provident Sec. Co., 423 U.S. 232, 243 (1976).
[87] *See* 17 C.F.R. § 240.14e-3 (2022). This rule was adopted pursuant to §§ 14(e) and 23(a) of the Exchange Act. 15 U.S.C. §§ 78n(e), w(a).
[88] *See, e.g.*, ANDERSON, supra note 64, at 243–46; John P. Anderson, *Anticipating a Sea Change for Insider Trading Law: From Trading Plan Crisis to Rational Reform*, 2015 UTAH L. REV. 339, 339 (2015).
[89] *See* ANDERSON, *supra* note 64, at 201–21; *see also* John P. Anderson, *Greed, Envy, and the Criminalization of Insider Trading*, 2014 UTAH L. REV. 1, 27–43 (2014).

initial phases, and, even if a bill is ultimately enacted, it will likely incorporate a combination of the existing proposals. To be most effective, Congress should enact reform that includes BCSTA's and TCA's divestiture-or-blind-trust requirement for individual stock ownership by congresspersons, their spouses, and their dependents, but extend it to senior staffers as well.[90] In addition, any reform must be enforced by an independent office with authority to impose meaningful civil penalties. The BITCA's proposed penalty of disgorgement of any profits combined with the BCSTA's civil fine based on annual salary would be sensible.[91] Though these measures would certainly restrict the investment options of congresspersons, their senior staffers, and those close to them, such a broad prophylactic is warranted as a supplement to the existing civil and criminal prohibitions for insider trading under Exchange Act Section 10b for the following reasons:

First, congresspersons (and staffers through their influence of congresspersons) are in a unique position to affect individual stock prices by (a) introducing bills directly affecting those issuers, (b) calling on the SEC to investigate issuers,[92] or (c) otherwise exerting their extensive political influence. As one congressperson notes, "one line in a bill in Congress can be worth millions and millions of dollars."[93] Moreover, congresspersons do not just enjoy positions of influence, but of access. They are party to continuous confidential briefings concerning matters of great domestic and foreign importance. Such nonpublic information is often market-moving upon release. Consequently, just as the unique position of influence and access held by corporate directors, officers, and principal shareholders warrants a special proscription on their trading under Exchange Act Section 16(b)[94] as a prophylactic against insider trading, a congressperson's unique position justifies a broad proscription on certain types of trading for the same reasons.

Second, given the preceding concerns arising from the special influence and access shared by congresspersons and their senior staffers, even

---

[90] *See supra* Part II. The current draft of the BCTA would extend the divestiture-or-blind-trust rule to staffers, but not to spouses and dependents.
[91] *See supra* Part II.
[92] *See, e.g.*, Dan Mangan, *Sen. Elizabeth Warren Calls on SEC to Investigate Trump SPAC Deal with DWAC for Possible Securities Violations*, CNBC (Nov. 18, 2021), https://www.cnbc.com/2021/11/18/sen-elizabeth-warren-calls-on-sec-to-investigate-trump-spac-deal.html [https://perma.cc/PLP5-WPNB].
[93] Dan Primack & Sophia Cai, *Momentum Builds to Ban Lawmakers from Trading Stocks*, AXIOS (Jan. 17, 2022), https://www.axios.com/congress-stock-trading-ban-ossoff-d49f9d30-743d-4247-a3c7-acc1875ec055.html [https://perma.cc/ZKU3-C7BR].
[94] *See supra* Part II.

legitimate stock trades by members of Congress and their staff will be the subject of continued public suspicion and cynicism. In an article titled, "Congress Can Trade Stocks or Keep the Public Trust. Not Both[,]" one commentator explains, "[e]ven lawmakers who hew to the straight and narrow [should] understand that America is facing a crisis of faith in its political system and elected leaders."[95] If, as noted above, seventy-six percent of Americans are convinced their representatives are trading on material nonpublic information,[96] then this perception alone (justified or not) undermines public confidence in the integrity of the legislative branch, and in trading markets. Prohibiting all individual stock trades by members of Congress, senior staff, their spouses, and dependents would help to restore some of this lost confidence.

Third, Congress's influence over the SEC and DOJ can make aggressive enforcement pursuant to the existing civil and criminal enforcement mechanisms more challenging. For example, Congress controls the budgets of these agencies, and is responsible for confirming SEC commissioners and Attorneys General.[97] A broad prophylactic against individual stock trading by congresspersons would mitigate this concern. Violations will be obvious, liability would be strict, online reporting would render the trading subject to immediate public scrutiny, and the current bills do not rely on the SEC or DOJ for enforcement. Any real (or imagined) congressional influence over the SEC and DOJ would not therefore impact an investigation into violations of any of the proposed prophylactic rules.

Fourth, Speaker Nancy Pelosi's protest that a broad proscription against individual stock trading would be un-American because "[w]e are a free-market economy" and "[members of Congress] should be able to participate in that" is totally unavailing.[98] People voluntarily assume roles that deprive them of rights they otherwise enjoy all the time (for example, members of the military or corporate board members), and public service, with its associated increased ethical responsibilities and fiduciary duties, has always been understood as just such a role.[99] In any event, members of Congress should

---

[95] Cottle, *supra* note 50.
[96] *See* Metzger, *supra* note 13.
[97] *See, e.g.*, ANDERSON, *supra* note 64, at 57.
[98] Cottle, *supra* note 50.
[99] *See, e.g.*, U.S. CONST. art. I, §6, cl. 2 (including the Ineligibility Clause, sometimes referred to as the Incompatibility or Emoluments Clause, which makes members of Congress ineligible to hold an office established by the federal government during their time in Congress); *see also* STAFF OF H. COMM. ON STANDARDS OF OFF. CONDUCT, 110TH CONG., HOUSE ETHICS MANUAL (2008); STAFF OF SELECT S. COMM. ON ETHICS, 108TH CONG., SENATE ETHICS MANUAL (2003). Each of these manuals includes ethics codes for

not be financially disadvantaged by a rule precluding trades in individual stocks. Given the efficient market hypothesis (roughly, that an individual stock's price always reflects all currently available public information about that stock),[100] members of Congress should not expect their individual stock purchases to outperform a similar investment in, say, mutual funds—unless, that is, their individual stock purchases would be based on information that is *not* publicly available. Diversification is always the best long-term investment strategy.[101]

Finally, those congresspersons who have been investigated for insider trading often protest that the scrutiny is politically motivated. For example, former Senator Kelly Loeffler claimed that an FBI investigation of her trading in advance of the pandemic-related market collapse was nothing more than "a politically-motivated attack shamelessly promoted by the fake news media and her political opponents."[102] Indeed, scholars have noted that vagueness in the current insider trading laws[103] can invite abuse of prosecutorial discretion.[104] This suggests a self-interested reason why congresspersons should favor the broad prophylactic rule against individual stock trades. If vagueness in the law can make any trade in individual stocks by a congressperson the potential subject of a politically motivated

---

government service; *see* Nagy, *supra* note 45, at 1142 (noting that members of both houses of Congress can be disciplined for "breaches of the public's trust"). In addition, The Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824-1867 (codified at various §§ of Title 2, 5, 18, and 28 of the U.S.C.), which provides a statutory basis for increased disclosure responsibilities for members of Congress, was designed to reveal potential conflicts of interest (that may result in breaches of their duties of loyalty as public servants) among federal officials. *See* Donna M. Nagy, *Owning Stock While Making Law: An Agency Problem and a Fiduciary Solution*, 48 WAKE FOREST L. REV. 567, 577–78 (2013) (explaining how the Ethics in Government Act responds to a recognition that members of Congress owe a special duty of "public trust").

[100] *See* Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 554–65 (offering an excellent summary of the efficient market hypothesis).

[101] *See, e.g.*, RICHARD A. BREALEY & STEWART C. MYERS, PRINCIPLES OF CORPORATE FINANCE 165–79 (7th ed. 2003) (explaining the importance of portfolio diversification for reducing risk); *see also* CHRISTIAN SZYLAR, HANDBOOK OF MARKET RISK 59–100 (2013) (explaining that diversification is a "widely embraced investment strategy" for reducing portfolio risk).

[102] Rachel Sandler, *DOJ Drops Coronavirus Insider Trading Probe Into 3 Senators, But Will Keep Investigating Burr*, FORBES (May 26, 2020), https://www.forbes.com/sites/rachelsandler/2020/05/26/doj-drops-coronavirus-insider-trading-probe-into-3-senators-but-will-keep-investigating-burr/?sh=685e44b35314.

[103] *See, e.g.*, ANDERSON, *supra* note 64, at 59–87.

[104] *See id.* at 91–93.

investigation,[105] then it is perhaps in the best interest of members of Congress to avoid such trades altogether. Moreover, and more importantly, the mere accusation of politically motivated prosecutions of congresspersons for insider trading tends to undermine the legitimacy and authority of the SEC and DOJ as nonpolitical, neutral enforcers of the law. This erosion of trust can have broader consequences for investors' confidence in the markets, as well as for citizens' confidence in the rule of law more broadly.

CONCLUSION

The political climate in the United States has become increasingly partisan and volatile,[106] and the public's trust in government continues to hover near all-time lows.[107] Recent polls suggest that Congress enjoys the approval of only about twenty percent of Americans.[108] If Congress would like to begin improving those numbers, and to rebuild the public trust, this Article has suggested that it adopt some combination of the proposed insider trading bills currently before the House and Senate that would proscribe individual stock trading by its members, senior staffers, their spouses, and dependents. Such a move would go a long way toward restoring the perception that members of Congress are public servants, as opposed to the current perception shared by many Americans (justified or not) that they are public parasites.[109] In addition to restoring public confidence in the legislative branch, adopting such a prophylactic against insider trading as a supplement to existing enforcement mechanisms pursuant to Exchange Act Section 10b and the STOCK Act would also help improve public confidence in the

---

[105] *See id.* at 92.

[106] *See, e.g.*, Paul Bedard, *America Never More Politically Divided Than Under Biden*, WASH. EXAMINER (Apr. 15, 2021), https://www.washingtonexaminer.com/washington-secrets/america-never-more-politically-divided-than-under-biden (citing Gallup survey suggesting that "the partisan gap" in U.S. politics recently reached "its widest point" on record).

[107] *See, e.g.*, *Public Trust in Government: 1958–2021*, PEW RSCH. CTR., (May 17, 2021), https://www.pewresearch.org/politics/2021/05/17/public-trust-in-government-1958-2021/ [https://perma.cc/6G8X-MYK3] (showing that the trust in government "remains low," with less than one quarter of Americans saying "they trust the government in Washington to do what is right").

[108] *See Congressional Job Approval*, REAL CLEAR POLITICS, https://www.realclearpolitics.com/epolls/other/congressional_job_approval-903.html [https://perma.cc/Y6K4-3T3G] (last visited Feb. 11, 2022).

[109] *See, e.g.*, Kimberly Leonard & Dave Levinthal, *Here Are 6 Things to Watch as Congress Considers Banning Lawmakers from Trading Stocks*, INSIDER (Apr. 6, 2022), https://www.businessinsider.com/congress-trading-stocks-nancy-pelosi-kevin-mccarthy-zoe-lofgren-2022-4 (noting that "voters are agitated by the idea that lawmakers are in Washington to benefit and enrich themselves rather than the people they were sent there to represent").

integrity of our securities markets—a goal Congress has touted repeatedly for almost a century.