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Congressional Securities Trading

Gregory Shill

University of Iowa College of Law, gregory-shill@uiowa.edu

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Congressional Securities Trading

GREGORY H. SHILL*

The trading of stocks and bonds by Members of Congress presents several risks that warrant public concern. One is the potential for policy distortion: lawmakers' personal investments may influence their official acts. Another is a special case of a general problem: that of insiders exploiting access to confidential information for personal gain. In each case, the current framework—which is based on common law fiduciary principles—is a poor fit. Surprisingly, rules from a related context have been overlooked.

Like lawmakers, public company insiders such as CEOs frequently trade securities while in possession of confidential information. Those insiders' trades are governed by federal securities regulations. Borrowing from these regulations, this Essay proposes a taxonomy of congressional securities trading (CST) and develops a comprehensive prescription to manage it. Specifically, Rule 10b5-1 plans (which disclose trades ex ante) and the section 16(b) short-swing profits rule of the Exchange Act (which disgorges illicit profits ex post) should be adapted to the congressional context. To further minimize conflicts of interest, lawmakers should also be restricted from owning any securities other than Treasuries and passive U.S. index funds. The Essay uses recent high-profile trading scandals to illustrate why the new bright-line rules proposed here are better suited to this problem than both the current system of regulating CST, which relies on common law standards, and prominent alternative reform proposals.

This Essay's proposed reforms are purposefully pragmatic. They draw on proven successes and do not require new legislation or regulation; all can be adopted by chamber rule. The changes, which would be very consequential if adopted, are also narrow. A risk they do not address—the enrichment of third parties by lawmakers—is often conflated with policy distortion and lawmaker self-enrichment, but its regulation presents distinct tradeoffs and should be taken up separately. SEC rules provide guideposts here as well.

* Associate Professor of Law, University of Iowa College of Law; J.D., Harvard Law School; B.A., Columbia University. The author thanks Stephen Bainbridge, Patrick Barry, Mihailis Diamantis, Benjamin Edwards, Jared Elias, Arpit Gupta, Andrew Jennings, Ann Lipton, Gillian Moldowan, Anya Prince, Sean Sullivan, Cristina Tilley, J.W. Verret, participants of the UC Hastings Workshop in Law, Business & Economics and the University of Iowa Junior Faculty Workshop for comments, and Samuel Gray and Jordan Romero-Villanueva for invaluable research assistance. Any errors are the author's alone.

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INTRODUCTION

In March 2020, as millions of Americans—a record number of them newly jobless¹—locked themselves indoors to help fight an accelerating pandemic, they learned that two U.S. Senators had received a secret briefing about the coronavirus and had cashed in their investments in the nick of time. After receiving this briefing from high-level public health officials in January 2020, Republican Sens. Kelly Loeffler of Georgia and Richard Burr of North Carolina sold their shares, preserving their fortunes before COVID-19 crashed the market in March.² The first trade of

1. Economists characterized these months as the worst from an employment perspective since the Great Depression. *See, e.g.,* Heather Long, *Over 10 Million Americans Applied for Unemployment Benefits in March as Economy Collapsed*, WASH. POST (Apr. 2, 2020), <https://www.washingtonpost.com/business/2020/04/02/jobless-march-coronavirus/> [https://perma.cc/WG23-K5MQ]. During the months of March and April 2020, 22.2 million Americans lost their jobs. News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, *The Employment Situation—June 2020*, at 3 (July 2, 2020), https://www.bls.gov/news.release/archives/empst_07022020.pdf [https://perma.cc/BK8J-ZTMQ].

2. *See* Eric Lipton & Nicholas Fandos, *Senator Richard Burr Sold a Fortune in Stocks as G.O.P. Played Down Coronavirus Threat*, N.Y. TIMES (Mar. 19, 2020), <https://www.nytimes.com/2020/03/19/us/politics/richard-burr-stocks-sold-coronavirus.html> [https://perma.cc/XA4K-X55F]. Senator Burr has requested an investigation by the Senate Ethics Committee. John Wagner, Michelle Ye Hee Lee, Jon Swaine & Karoun Demirjian, *Sen. Burr Asks Senate Ethics Committee for Review of His Stock Sales Amid Uproar Over Possible Influence of Coronavirus Briefings*, WASH. POST (Mar. 20, 2020), <https://www.washingtonpost.com/politics/sen-richard-burr-r-nc-says-he-has-asked-senate-ethics-committee-for-review-of-his-stock-sales/2020/03/20/43861396-6ab8-11ea-b313->

Senator Loeffler—reportedly the wealthiest Member of Congress, with an estimated net worth of \$800 million³—was executed on January 24, 2020, the very day of the private Senate briefing on the coronavirus.⁴ Senator Burr’s occurred on February 13,⁵ six days after he touted the state of U.S. pandemic preparedness in an op-ed for Fox News.⁶ Stocks collapsed in early March before recovering in the spring and summer.⁷

The stocks the Senators traded included companies, like hotel chains and a telework service, that were especially sensitive to the pandemic.⁸ The public reaction was one of intense disgust. Rather than focus on mobilizing a federal response or warning the public, went the thrust of the criticism, these Senators had chosen to maximize their personal profits. It remains to be determined whether the Senators engaged in insider trading, though at least one of them may have violated other laws.⁹ Calls for resignations issued immediately,¹⁰ and the U.S. Department of Justice

df458622c2cc_story.html [https://perma.cc/BB69-J9R5], and a shareholder has brought suit. Matthew Choi, *Shareholder Suit Accuses Sen. Richard Burr of Securities Fraud*, POLITICO (Mar. 23, 2020), <https://www.politico.com/news/2020/03/23/richard-burr-lawsuit-coronavirus-145564> [https://perma.cc/7VGV-QUYV].

3. Michela Tindera, *The Richest Politician On Capitol Hill Is Likely Georgia’s Recently Appointed, Controversial Sen. Kelly Loeffler*, FORBES (Aug. 3, 2020), <https://www.forbes.com/sites/michelatindera/2020/08/03/the-richest-politician-on-capitol-hill-is-likely-georgias-recently-appointed-controversial-senator-kelly-loeffler/#2fc981b917a3> [https://perma.cc/2ZD3-6JV7].

4. Lachlan Markay, William Bredderman & Sam Brodey, *Sen. Kelly Loeffler Dumped Millions in Stock After Coronavirus Briefing*, DAILY BEAST (Mar. 19, 2020), <https://www.thedailybeast.com/sen-kelly-loeffler-dumped-millions-in-stock-after-coronavirus-briefing> [https://perma.cc/T79D-9VNW].

5. Robert Faturechi & Derek Willis, *Senator Dumped up to \$1.7 Million of Stock After Reassuring Public About Coronavirus Preparedness*, PROPUBLICA (Mar. 19, 2020), <https://www.propublica.org/article/senator-dumped-up-to-1-7-million-of-stock-after-reassuring-public-about-coronavirus-preparedness> [https://perma.cc/97DJ-46H8].

6. See Sen. Lamar Alexander & Sen. Richard Burr, *Opinion, Sen. Alexander & Sen. Burr: Coronavirus Prevention Steps the U.S. Government Is Taking to Protect You*, FOX NEWS (Feb. 7, 2020), <https://www.foxnews.com/opinion/coronavirus-prevention-steps-the-u-s-government-is-taking-to-protect-you-sen-alexander-and-sen-burr> [https://perma.cc/858P-H9D7].

7. See Gunjan Banerji, *Why Did Stock Markets Rebound From Covid in Record Time? Here Are Five Reasons*, WALL ST. J. (Sept. 15, 2020), <https://www.wsj.com/articles/why-did-stock-markets-rebound-from-covid-in-record-time-here-are-five-reasons-11600182704> [https://perma.cc/BQ3U-6JFJ].

8. See James V. Grimaldi & Andrea Fuller, *Burr, Senate Colleagues Sold Stock After Coronavirus Briefings*, WALL ST. J. (Mar. 20, 2020), <https://www.wsj.com/articles/burr-senate-colleagues-sold-stock-after-coronavirus-briefings-11584715866> [https://perma.cc/GTX3-CAA8] (noting sales of stock in hotel chains and purchases of telework firms).

9. See John C. Coffee, Jr., *The Senator Traded While His Constituents Died: A Legal Analysis of Insider Trading by Public Officials*, THE CLS BLUE SKY BLOG (Mar. 31, 2020), <https://clsbluesky.law.columbia.edu/2020/03/31/the-senator-traded-while-his-constituents-died-a-legal-analysis-of-insider-trading-by-public-officials/> [https://perma.cc/GY8Q-T5SX]; *infra* Parts I & II.

10. See, e.g., The Editorial Board, *Opinion, Did Richard Burr and Kelly Loeffler Profit From the Pandemic?*, N.Y. TIMES (Mar. 20, 2020), <https://www.nytimes.com/2020/03/20>

commenced an investigation.¹¹ Regardless of the outcome of the investigation and Senator Loeffler's political fortunes (she faces a runoff election in January 2021), there remain important gaps in the regulation of congressional trades.

While the Senators' trades increased attention on the phenomenon of securities trading by Members of Congress and their staff (congressional securities trading (CST)) and prompted appeals¹² for change, efforts at reform have been percolating for some time. For example, Senator Elizabeth Warren's 2020 presidential campaign platform, which predated the revelation of her Senate colleagues' trades, proposed to ban ownership of individual stocks by Members of Congress.¹³ A bill proposed in previous years by Senators Sherrod Brown and Jeff Merkley would allow ownership of individual stocks but only through a blind trust.¹⁴ It would also bar service on corporate boards.¹⁵

Restrictions like these might reach the precise trades above in the identical circumstances, but they are easily avoided.¹⁶ They would also reach more typical instances of insider trading, like that of former Representative Chris Collins,¹⁷ which are criminal already (and earned him a twenty-six-month prison sentence).¹⁸ Even taken together, conduct like this is the tip of the iceberg when it comes to public concerns around CST. Those concerns extend beyond securities fraud, the historical core of insider trading regulation.

/opinion/coronavirus-burr-loeffler-stocks.html [https://perma.cc/AG2C-U9DR] (noting pressure on both Senators to resign). It was soon divulged that other lawmakers may have traded following the January briefing as well. *See* Lipton & Fandos, *supra* note 2.

11. Aruna Viswanatha & Dave Michaels, *Justice Department Investigating Lawmakers for Possible Insider Trading*, WALL ST. J. (Mar. 31, 2020), <https://www.wsj.com/articles/justice-department-investigating-lawmakers-for-possible-insider-trading-11585586365> [https://perma.cc/REZ9-S2P4]. In addition, Senator Burr asked the Senate ethics panel to investigate. *Id.*

12. For example, a former U.S. Attorney for the Southern District of New York tweeted that "Members of Congress should not own individual stocks, period." Preet Bharara (@PreetBharara), TWITTER (Mar. 19, 2020, 8:22 PM), <https://twitter.com/PreetBharara/status/1240795931676676096?s=20> [https://perma.cc/6KWG-KYU4].

13. *End Washington Corruption*, WARREN FOR PRESIDENT (Sept. 16, 2019), <https://elizabethwarren.com/plans/end-washington-corruption> [https://perma.cc/6AAX-7GT3].

14. *See* Ban Conflicted Trading Act, S. 1393, 116th Congress (2019). This approach was endorsed by The New York Times Editorial Board. The Editorial Board, *Opinion, Make Laws, Not Money*, N.Y. TIMES (Dec. 22, 2019), <https://www.nytimes.com/2019/12/22/opinion/congress-insider-trading.html> [https://perma.cc/4P46-L8C6].

15. S. 1393.

16. *See infra* Part III.

17. Representative Collins was a director and major shareholder of a public company who engaged in insider trading unrelated to his congressional service. Vivian Wang, *Ex-Rep. Chris Collins Pleads Guilty to Insider Trading Charges*, N.Y. TIMES (Oct. 1, 2019), <https://www.nytimes.com/2019/10/01/nyregion/chris-collins-guilty-congress.html> [https://perma.cc/QRM3-TBK4].

18. Benjamin Weiser & Emily Palmer, *Ex-Rep. Chris Collins Gets 26-Month Prison Sentence in Insider Trading Case*, N.Y. TIMES (Jan. 17, 2020), <https://www.nytimes.com/2020/01/17/nyregion/chris-collins-sentencing-prison.html> [https://perma.cc/H334-28F4].

Congressional securities trading is a broad category of conduct ranging from the benign to the imprudent to the criminal. It triggers a special array of concerns that are poorly managed by the current regime. Stock trading by congressional insiders has unusual potential to warp governance and markets: not only do Members of Congress enjoy *access* to material nonpublic information (MNPI) concerning moves in individual stocks and the market as a whole, they *create* it through legislation and other action.

The powers of Congress distinguish CST from trading by corporate insiders. Just as an executive can “create” MNPI for her company through strategic and policy decisions, lawmakers can create MNPI for a particular company—for example, by imposing conditions on federal contracts. But unlike executives, the powers of Members of Congress do not stop at firm-centered influence.¹⁹ They also exercise influence on industries writ large and the economy as a whole through the exercise of their constitutional powers of the purse, regulation, and beyond. But Members of Congress also engage in mundane trades of securities like other insiders.

The basic problem with the current system is that it makes no serious effort to *manage* CST—to bring it into compliance with the law and its underlying goals—and relies instead on an ineffective combination of severe but narrow anti-fraud rules on one hand and a toothless disclosure regime on the other. As Senator Burr’s conduct illustrates, the anti-fraud rules are ill-suited to the breadth of concerns implicated by CST: he claimed his trades were motivated “solely” by public rather than inside information,²⁰ which—unless the contrary proposition is proven beyond a reasonable doubt—would likely place them beyond the reach of the securities laws.²¹ For Senator Loeffler, the same outcome may hold for a different reason: she claimed the trades on her account were made without her knowledge.²² Criminal anti-

19. Scrutiny of pandemic-linked trades by corporate executives underscores the point. Reportedly, leading CEOs sold shares in their firms shortly before the outbreak paralyzed the United States. Susan Pulliam, Coulter Jones & Andrea Fuller, *Amazon’s Bezos, Other Corporate Executives Sold Shares Just in Time*, WALL ST. J. (Mar. 24, 2020), <https://www.wsj.com/articles/bezos-other-corporate-executives-sold-shares-just-in-time-11585042204> [<https://perma.cc/YY9W-ZGKM>]. Even in the worst case, however, this represents unjust self-enrichment, not policy distortion.

20. Richard Burr (@SenatorBurr), TWITTER (Mar. 20, 2020, 9:28 AM), <https://twitter.com/SenatorBurr/status/1241008837479542786> [<https://perma.cc/5P8H-CPW3>]. The day before Senator Burr offered this explanation, his spokesman had explained that the Senator had unwound his positions before the market collapse, apparently not realizing that this statement did not tend to exculpate. See Caitlin Oprysko & Kyle Cheney, *Recording Shows Senate Intel Chair Warned of Coronavirus Disruption in Private Weeks Ahead of Time*, POLITICO (Mar. 19, 2020), <https://www.politico.com/news/2020/03/19/senate-intel-chair-warned-of-coronavirus-disruption-in-private-137407> [<https://perma.cc/N2RU-GV8G>].

21. See *infra* Part II.

22. See Shane Goldmacher, *Kelly Loeffler and Richard Burr Were Briefed on Coronavirus. Then They Sold Stocks. What Now?*, N.Y. TIMES (Mar. 20, 2020), <https://www.nytimes.com/2020/03/20/us/politics/kelly-loeffler-richard-burr-insider-trading.html> [<https://perma.cc/4E5C-7UEW>] (noting Senator Loeffler’s claim that her trades were made “by multiple third-party advisors without” her “knowledge or involvement” or that of her husband, who is the CEO of the parent company of the New York Stock Exchange and

fraud regulation and its civil counterparts are not designed to deal with this behavior.

Pandemic trading by the Senators also exposes yawning temporal gaps in CST regulation. Currently, chamber rules require disclosure forty-five days *after* trades are executed.²³ Corporate insiders operate under a broadly analogous (if more restrictive) obligation; they must disclose trades via a Form 4 filing within two business days.²⁴ But such insiders also commonly specify trades *ex ante*, via Rule 10b5-1 plans (“10b5-1 plans”).²⁵ These plans map insider trades well in advance, alleviating concerns around the inappropriate use of MNPI.

Members of Congress are also permitted to make profits on trades, with no risk of disgorgement after the fact. If corporate insiders enjoyed this luxury, they could likewise evade restrictions on trading on MNPI, but the Securities Exchange Act of 1934 (“Exchange Act”) in essence forecloses that possibility.²⁶ Gains such insiders record on any pair of trades of company stock within a six-month window are categorically barred as short-swing profits and are capable of being disgorged *ex post* under section 16(b) (the “short-swing profits rule”).²⁷

The current “system” of regulating CST, such as it is, isn’t working. Traditional insider trading law—narrow, punitive, and rarely applied—is a clumsy fit for the congressional context because it sets a high, specific bar—it requires a showing of fraud—when public concerns around congressional profiteering on MNPI are far more general. At the same time, the other leg of CST regulation—weak internal disclosure requirements—does not foster accountability. Building on the public company model, efforts at reform should focus on preventing imprudent and malign trades on the front end and providing an easy mechanism for disgorging them on the back end. These changes do not require new legislation and can be accomplished instead by internal rulemaking in each chamber of Congress.²⁸

In brief, each chamber should, with regard to its Members and highly compensated staff:

the Chairman of the NYSE); *infra* Section II.B. (discussing levels of knowledge required for an insider trading charge).

23. See *infra* Section I.C.

24. The insider obligation to file statements of beneficial ownership, which comes from section 16(a) of the Exchange Act, applies to officers, directors, and major shareholders. See Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78qq (2018); *Fast Answers—Forms 3, 4, 5*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/fast-answers/answersform345htm.html> [<https://perma.cc/4MCX-5TBB>] (last modified Jan. 15, 2013). Insiders must also make filings on Forms 3 and 5 at various stages. *Id.* For shareholders, the requirement first becomes operative upon the acquisition of a ten percent stake. *Id.*

25. See 17 C.F.R. § 240.10b5-1(c) (2019). These plans are not generally public, but they serve a disciplining function all the same. See *infra* Part III. For simplicity, this Essay refers only to securities trading, but its analysis and recommendations alike extend to the trading of commodities. Regulation of the two activities shares a common set of principles.

26. Securities Exchange Act of 1934.

27. *Id.* § 78p (defining such insiders as officers, directors, or shareholders owning ten percent of the company’s equity).

28. Similar rules should be adopted for the executive and judicial branches.

1. Supplement its ex post ethics disclosure regime with an ex ante system whereby trading plans are disclosed in advance by adopting, and making public, a plan styled on Rule 10b5-1;
2. Require the disgorgement of short-swing profits, modeled on section 16(b) of the Exchange Act; and
3. Outlaw ownership of all securities, including derivatives, except U.S. Treasuries and passive index funds tracking the U.S. market.²⁹

The first two proposals are entirely novel in the CST context, while the third goes considerably further than other proposed restrictions on ownership to date. The Securities and Exchange Commission (SEC) should also explore ways to adapt its existing rules regarding selective disclosure of MNPI by corporate insiders under Regulation Fair Disclosure³⁰ to address opportunistic selective disclosure by congressional insiders.

This Essay continues in three Parts. Part I explains the regulation of congressional securities trading by law and by chamber rule and applies those sources to prominent recent allegations of congressional insider trading. Part II reviews leading limitations of the current framework. Then, Part III sets forth and develops the Essay's policy prescriptions and explains why they strike a desirable balance of competing interests. It also notes their virtues in administration. The Essay then concludes.

I. THE REGULATION OF CONGRESSIONAL SECURITIES TRADING

In his famous 1966 book on insider trading, Henry Manne identified the federal government as “the largest producer of information capable of having a substantial effect on stock-market prices.”³¹ The creation of new federal agencies and bodies of law in the intervening decades has only fortified this observation. While the use of market-moving information such as MNPI³² for private gain was arguably³³ always

29. This universe includes Treasuries, Treasury bond funds, mutual funds, and exchange-traded funds that passively track the U.S. stock market. The rationale for restricting investments at the geographic and sovereign level is discussed later in this Essay. *See infra* Section III.C.

30. *See* 17 C.F.R. § 243.100 (2019); *infra* Section III.D.

31. HENRY G. MANNE, *INSIDER TRADING AND THE STOCK MARKET* 171 (1966).

32. The prohibition on the misuse of information extends beyond “inside information” (information originating inside a firm or affecting its stock price via business fundamentals, such as sales figures), Stephen M. Bainbridge, *Insider Trading Inside the Beltway*, 36 J. CORP. L. 281, 286 (2011) (citing Victor Brodneyn, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 HARV. L. REV. 322, 329 (1979)), to “market information” (information influencing a firm’s stock price without affecting its business fundamentals, such as the knowledge that a large shareholder is planning to sell many of its shares). *Id.* (quoting *United States v. Chiarella*, 588 F.2d 1358, 1365 n.8 (2d Cir. 1978), *rev’d on other grounds*, 445 U.S. 222 (1980)).

33. *See* Michael A. Perino, *A Scandalous Perversion of Trust: Modern Lessons from the Early History of Congressional Insider Trading*, 67 RUTGERS L. REV. 335, 349 (2015). *But see* Bainbridge, *supra* note 32, at 293 (contending that, pre-STOCK Act, Members of Congress who traded on information they learned in the course of their official duties were not liable under the misappropriation theory because they “clearly” did not owe fiduciary duties to the

subject to the federal laws regulating insider trading, namely section 10(b) of the Exchange Act³⁴ and Rule 10b-5,³⁵ a quirk in the way those provisions were later interpreted created, for a time, some uncertainty around their applicability to public servants. Accordingly, much of securities law caselaw and scholarship has focused on puzzling out the nature of the fiduciary relationship on which insider trading liability is premised. When it comes to congressional insider trading, however, this significant literature has for some years now mostly constituted surplusage due to a change in the law.

In 2012, to eliminate any possibility of a fiduciary-duty gap, Congress enacted the Stop Trading on Congressional Knowledge Act ("STOCK Act"),³⁶ which expressly extended³⁷ federal insider trading prohibitions to trades by lawmakers and their staff³⁸ (as well as the executive branch and judiciary, the regulation of which is beyond this Essay but which should generally be made subject to the same rules). Because the STOCK Act puts lawmakers on the same footing as corporate insiders, lawmakers appear to have the same exposure for tipping or misappropriation of MNPI that had long existed for corporate and other insiders.³⁹ The legislation (which passed the Senate by a vote of 96-3, with Senator Burr, interestingly, as one of the three dissenters)⁴⁰ provides a clear statement of the intent of Congress to empower the SEC to pursue abuses of the "relationship of trust and confidence" that exists between Members of Congress and the American people, Congress, and the U.S. government as a whole via the trading of securities.⁴¹ Each chamber has also adopted

source of the information). Notably, the Bainbridge article was published before the enactment of the STOCK Act in 2012. *See* Stop Trading on Congressional Knowledge Act of 2012, Pub. L. No. 112-105, 126 Stat. 291 (2012).

34. Exchange Act § 10(b), 15 U.S.C. § 78j (2018).

35. 17 C.F.R. § 240.10b-5 (2019).

36. STOCK Act, 126 Stat. at 291. The short title was later changed to the Representative Louise McIntosh Slaughter Stop Trading on Congressional Knowledge Act, Pub. L. No. 115-277, 132 Stat. 4167 (2018) (amending STOCK Act § 1, 126 Stat. 291, 291).

37. STOCK Act § 4(a), 126 Stat. at 292. The STOCK Act also expressly extends prohibitions on insider trading in commodities to various actors, including Members of Congress, under the Commodity Exchange Act. *Id.* § 5. As noted previously, this Essay emphasizes the regulation of securities trading, though commodities trading is governed by similar rules. *See supra* note 25.

38. Specifically, the law states that Members of Congress, their staff, executive branch staff, and the judiciary owe a fiduciary duty 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 . . . or gained from the performance of such person's official responsibilities." STOCK Act §§ 4(b)(2), 9(a), 126 Stat. at 292, 297.

39. *See* United States v. O'Hagan, 521 U.S. 642 (1997) (establishing liability for insider trading under the "misappropriation" theory, whereby the information is misappropriated in breach of a fiduciary duty to the source); *Dirks v. SEC*, 463 U.S. 646 (1983) (establishing insider trading liability for tippees and tippees of information in certain circumstances).

40. *Roll Call Vote 112th Congress-2nd Session*, U.S. SENATE (Mar. 22, 2012, 01:23 PM), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=112&session=2&vote=00056 [<https://perma.cc/A2PL-BHCX>].

41. STOCK Act § 4(b), 126 Stat. at 292.

ethics rules, and a federal code of ethics governs them as well.⁴² Other provisions of law fill in additional gaps.⁴³

Shortly after passage, the STOCK Act was weakened by amendment,⁴⁴ but important STOCK Act prohibitions on trading by Members of Congress (though not their staff) remain in force. The overwhelming support the legislation received from both parties reflects an obvious truth: there is no legitimate argument that lawmakers should be allowed to profit from their public service.⁴⁵ Its winnowing a short time after enactment demonstrates another truism: Congress is not keen to regulate itself. The inadequacy of the current regime reflects these twin constraints and is evident in both the trades executed by Sens. Burr and Loeffler during the pandemic and by Representative Collins in “normal” times.

A. Case Study: Trading on the Pandemic

Lawmakers who trade on MNPI face the possibility of criminal as well as civil sanctions,⁴⁶ but not all congressional trading triggers the prohibition. An examination of the application of the narrow scope of insider trading law to the trades in Sens. Burr and Loeffler’s portfolios during the pandemic, as well as Representative Collins’ conduct in more conventional circumstances, is warranted. Based on currently available information, it is not clear that the pandemic trades constituted legally proscribed CST (i.e., unlawful insider trading) though the non-trading

42. See U.S. SENATE SELECT COMM. ON ETHICS, RESTRICTIONS ON INSIDER TRADING UNDER SECURITIES LAWS AND ETHICS RULES (Dec. 4, 2012), https://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=8C923399-2DC0-4EF6-A0D2-9EF564FC7038 [<https://perma.cc/XFB7-7PES>] [hereinafter SENATE ETHICS MEMO]; U.S. H.R. COMM. ON ETHICS, RULES REGARDING PERSONAL FINANCIAL TRANSACTIONS (Nov. 29, 2011), <https://ethics.house.gov/sites/ethics.house.gov/files/documents/fin%20trans%20pink%20sheet.pdf> [<https://perma.cc/5C7E-PE27>] [hereinafter HOUSE ETHICS MEMO]; Code of Ethics for Government Service, Pub. L. 96-303, 94 Stat. 855 (1980); 34 C.F.R. pt. 73 app. (2019).

43. Coffee, *supra* note 9 (detailing various statutes and rules that might apply to the Senators’ conduct, including the wire fraud statute and a statute barring conversion of government property).

44. 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/X5P5-VYXA>]. Congress repealed sections 8(a) and 11(a) of the STOCK Act except for certain officers and employees such as the President, Vice President, Members of Congress, congressional candidates, and officers listed in section 5312 or 5313 of Title 5, Act of Apr. 15, 2013, Pub. L. No. 113-7, 127 Stat. 438. Congress also amended section 8(b) of the STOCK Act to eliminate the Act’s applicability to congressional staff and the need to maintain databases on the official websites of the House of Representatives and the Senate for the public to view. *Id.*

45. See Bainbridge, *supra* note 32, at 298–99 (observing that even scholars who favor legalizing insider trading by corporate executives disfavor legalizing such activity by lawmakers).

46. The Speech or Debate Clause of the U.S. Constitution is unlikely to act as a bar to civil or criminal enforcement of the federal securities laws. See Bainbridge, *supra* note 32, at 302–03 (2011).

conduct of Senator Burr makes it a closer question for him and he may have violated other laws.⁴⁷

In principle, trades like these may create exposure under the classical theory of insider trading. This theory deems trades executed while in possession of MNPI and in breach of a fiduciary duty to the source of the information—here, the government—to be illegal insider trading.⁴⁸ Any doubt regarding the authentic fiduciary nature of the relationship⁴⁹ between the Senators and the government was eliminated by the STOCK Act.⁵⁰

The classical theory requires a material omission or fraudulent act by the trader with respect to the covered trade.⁵¹ Key facts regarding these Senators' conduct will need to be determined in the investigation, but their acts nevertheless provide a useful vehicle for exploring the application of insider trading law to lawmakers. Assuming

47. See Coffee, *supra* note 9; Sonam Sheth, *The DOJ Is Closing Its Insider Trading Inquiries Into 3 Senators but Is Still Investigating GOP Sen. Richard Burr*, BUSINESS INSIDER, May 26, 2020, <https://www.businessinsider.com/doj-closes-insider-trading-probe-3-senators-continues-burr-investigation-2020-5> [<https://perma.cc/2F8D-LUSA>] (reporting DOJ decision to close insider trading investigations into Sens. Loeffler, Dianne Feinstein, and Jim Inhofe, but not Senator Burr).

48. See *Dirks v. SEC*, 463 U.S. 646 (1983); *Chiarella v. United States*, 445 U.S. 222 (1980). A defendant to such a charge could claim that trading on *generally* market-moving information, such as the revelation that a pandemic was likely going to be worse than was publicly known, cannot establish liability for trades of a *particular stock*. A Member of Congress is poorly positioned to raise this defense, however, because the STOCK Act makes clear that her duty runs not to any particular firm but to the American people. Accordingly, the difficulties that can attach to proving insider trading liability (for example, where no conventional or temporary fiduciary relationship exists and no misappropriation has occurred, see Joel M. Cohen, Mary Kay Dunning & Gregory H. Shill, *Erosion of the Fiduciary-Duty Requirement in Insider-Trading Actions*, 20 SEC. LITIG. J. 12 (2010)), are not relevant here.

49. Bainbridge, *supra* note 32 at 293. *N.B.* This article was published before the enactment of the STOCK Act. The topic of fiduciary duty law as it applies to insider trading of legislators and other officials has attracted considerable scholarly attention. See, e.g., Jeanne L. Schroeder, *Taking Stock: Insider and Outsider Trading by Congress*, 5 WM. & MARY BUS. L. REV. 159 (2014); J.W. Verret, *Applying Insider Trading Law to Congressmen, Government Officials, and the Political Intelligence Industry*, in RESEARCH HANDBOOK ON INSIDER TRADING 153 (Stephen M. Bainbridge ed., 2013); Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 CORNELL L. REV. 845 (2013); Donna M. Nagy, *Owning Stock While Making Law: An Agency Problem and a Fiduciary Solution*, 48 WAKE FOREST L. REV. 567 (2013); Bainbridge, *supra* note 32; Bud W. Jerke, Comment, *Cashing in on Capitol Hill: Insider Trading and the Use of Political Intelligence for Profit*, 158 U. PA. L. REV. 1451 (2010).

50. Apparently under the impression it would help him, Senator Burr's staff put out a statement announcing that the Senator had sold the stock before the market crashed, which is akin to a defendant's counsel noting that the murder victim was alive before the defendant fired the gun. Caitlin Oprysko & Kyle Cheney, *Recording Shows Senate Intel Chair Warned of Coronavirus Disruption in Private Weeks Ahead of Time*, POLITICO (Mar. 19, 2020), <https://www.politico.com/news/2020/03/19/senate-intel-chair-warned-of-coronavirus-disruption-in-private-137407> [<https://perma.cc/FX3D-6GNM>].

51. See *Dirks*, 463 U.S. at 659–60; *Chiarella*, 445 U.S. at 234–35.

that neither Senator Loeffler's trading arrangement⁵² nor other facts preclude liability, a claim against her may lie on grounds of omission. On this theory, she would have had to either abstain from trading on the MNPI or disclose it,⁵³ and she chose instead to trade without disclosing. But, depending on the precise timing of the briefing, the information disclosed there, and the timing of her trades, she may have a good defense of mixed motives.⁵⁴

Both lawmakers' trades occurred against a backdrop of escalating public concern and information around the coronavirus, even if most Americans were not yet fully attuned to it at the time of the Senators' trades. By analogy to more prosaic cases in the corporate context, Senator Loeffler could plausibly claim that her trades were motivated by public information in part⁵⁵ (or even in full, as Senator Burr claimed).⁵⁶ This would make it difficult to pursue an insider trading claim. An action against Senator Burr could rest on the same basis and would likely suffer the same infirmities. But his conduct exposes him to a separate theory: that in his statement touting U.S. pandemic preparedness on February 7, he committed an act of fraud to help prevent a fall in stock prices so he could cash in on February 13 before the market tanked. He could claim, however, that during the intervening period his opinion evolved in reaction to new, publicly available information (indeed, he has already indicated as much).⁵⁷

Under another theory, Senator Burr may have exposure for "tipping" stemming from conduct beyond his trades. In addition to prohibiting covered trades, federal securities laws bar selective disclosure of MNPI to third parties under certain circumstances.⁵⁸ On February 27, 2020, he gave a private briefing to a group of supporters at the Capitol Hill Club during which, a secret recording subsequently

52. As noted previously, Senator Loeffler maintained that the trades were done without her knowledge or direction. Goldmacher, *supra* note 22.

53. She could claim that, in her judgment as a legislator, she determined it was better not to raise the alarm about the pandemic. But this does not imply she is permitted to trade on the information.

54. See Andrew Verstein, *Senator Richard Burr and Mixed Motives for Insider Trading*, CLS BLUE SKY BLOG (Mar. 21, 2020), <https://clsbluesky.law.columbia.edu/2020/03/21/senator-richard-burr-and-mixed-motives-for-insider-trading> [<https://perma.cc/AE9J-943E>] (discussing debates within insider trading scholarship and jurisprudence around the distinction between the use and possession or awareness of MNPI, focusing on the question "whether a trader with both lawful and unlawful reasons for trading violates the law"). This post focuses on the trades of Senator Burr rather than those of Senator Loeffler a few weeks prior, but a similar analysis would apply to this question.

55. See *id.*

56. Richard Burr (@SenatorBurr), TWITTER (Mar. 20, 2020, 9:28 AM), <https://twitter.com/SenatorBurr/status/1241008837479542786> [<https://perma.cc/REK9-BW5U>].

57. See *id.* (claiming his trades were motivated "solely" by public information).

58. See *Dirks v. SEC*, 463 U.S. 646, 659 (1983) ("Not only are insiders forbidden by their fiduciary relationship from personally using undisclosed corporate information to their advantage, but they may not give such information to an outsider for the same improper purpose of exploiting the information for their personal gain."). Exceptions to this rule, such as the sharing of information with professional advisers for the purpose of preparing a tender offer, do not apply here. See 17 C.F.R. § 240.14e-3(d)(1)(i).

revealed,⁵⁹ the Senator warned that the pandemic was “much more aggressive in its transmission than anything that we have seen in recent history” and compared it to the 1918 flu,⁶⁰ which killed an estimated fifty million people globally.⁶¹

It is possible that Senator Burr used the Capitol Hill Club briefing to enrich his supporters by tipping them off about the economic effects of the pandemic, in violation of Rule 10b–5.⁶² It does not help Senator Burr that this briefing is close in time to his other actions: after receiving information from government officials on the gravity of the epidemic on January 24 and reassuring the public on February 7, Senator Burr dumped hundreds of thousands of dollars in his own investments in hotel stocks on February 13—and then revealed the full extent of the expected pandemic to a select group of supporters on February 27, before the stock selloff began in earnest.⁶³ In the three weeks beginning February 28, the S&P 500 lost trillions of dollars—22.7%—in value.⁶⁴ Nevertheless, to prevail under Rule 10b–5 a prosecutor would need to show that Senator Burr intended to tip his audience for trading purposes (though not necessarily for his own pecuniary benefit).⁶⁵ Absent additional facts not currently known, this would be difficult to show. At least one scholar believes Senator Burr likely has exposure under other provisions of law, however.⁶⁶

59. Tim Mak, *Weeks Before Virus Panic, Intelligence Chairman Privately Raised Alarm, Sold Stocks*, NPR (Mar. 19, 2020), <https://www.npr.org/2020/03/19/818192535/burr-recording-sparks-questions-about-private-comments-on-covid-19> [https://perma.cc/Z43V-3HZW].

60. *Id.*

61. 1918 Pandemic (H1N1 Virus), CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html> [https://perma.cc/H5A3-QZP7] (last updated Mar. 20, 2019).

62. See *United States v. O'Hagan*, 521 U.S. 642 (1997); *Dirks v. SEC*, 463 U.S. 646 (1983). The STOCK Act leaves little doubt about the *potential* for liability for disclosures of this sort by a Member of Congress; indeed, eliminating any doubt of this obligation was a major purpose of the legislation. See STOCK Act § 4(a) (“AFFIRMATION OF NONEXEMPTION.—Members of Congress and employees of Congress are not exempt from the insider trading prohibitions arising under the securities laws, including section 10(b) of the Securities Exchange Act of 1934 and Rule 10b–5 thereunder.”).

63. In his capacity as chairman of the Senate Intelligence Committee, it is also possible that Senator Burr received additional information about the pandemic during this period. He subsequently agreed to relinquish his chairmanship during an FBI investigation into his trading activity. Devlin Barrett, Seung Min Kim, Spencer S. Hsu & Katie Shepherd, *Sen. Richard Burr Stepping Aside as Intelligence Committee Chair Amid FBI Investigation of Senators' Stock Sales*, WASH. POST (May 14, 2020), <https://www.washingtonpost.com/nation/2020/05/14/fbi-richard-burr-warrant/> [https://perma.cc/B9BF-HSWZ].

64. See Performance of the S&P 500 February 28, 2020 to March 20, 2020, YAHOO! FIN., <https://finance.yahoo.com/quote/%5EGSPC/history?period1=1582848000&period2=1584662400&interval=1d&filter=history&frequency=1d> [https://perma.cc/CP2T-8N9Z].

65. Tips no longer require a pecuniary benefit to the tipper. See *Salman v. United States*, 137 S. Ct. 420, 428 (2016); *United States v. Martoma*, 894 F.3d 64, 75 (2d Cir. 2018). Regulation Fair Disclosure may offer a helpful analogy here, but is only applicable to issuers, not Members of Congress. See 17 C.F.R. § 243.100 *et seq.*; *infra* Section III.D.

66. See Coffee, *supra* note 9 (detailing statutes and rules that may apply to the Senators' conduct, including the wire fraud statute and a statute barring government property conversion).

B. Trading During “Normal” Times

Insider trading by Members of Congress during a pandemic is an acute case of a chronic problem: the special access lawmakers have to MNPI, and their almost unparalleled ability to create material movement in both individual stocks and the market as a whole.⁶⁷

The conduct of former Representative Chris Collins of New York during his tenure in Congress encapsulates these problems in extremis. Simultaneously, he served on the House Committee on Energy and Commerce, which oversees drug companies, and on the board of Innate Immunotherapeutics (“Innate”), a publicly traded drug company.⁶⁸ He also owned nearly seventeen percent of the stock of Innate, making him one of the company’s largest shareholders. After receiving an alert in his director capacity about a major setback for the company, he immediately tipped off his son, allowing the younger Mr. Collins to sell his shares and avoid \$570,000 in losses. His daughter and, by the Congressman’s own admission, “most” members of his staff also owned Innate shares.⁶⁹ Representative Collins’ conduct is well captured by current insider trading law, but more importantly, the conflicts created by his behavior prior to the tip he gave his son are self-evident and suggest straightforward reforms.

L’affaire Collins makes plain many of the negative consequences of allowing individual stock ownership and board service by Members of Congress concurrent with their legislative duties: the potential for actual or apparent distortion of public policy to selectively benefit private firms, which undermines the integrity of the market and regulation; the use of inside information to personally enrich Members of Congress and their families; and the susceptibility of congressional staff (who conduct the day-to-day work of the legislature) to those same incentives.

C. The Current Congressional Securities Trading Disclosure Regime

The trading activity of Members of Congress is not regulated by securities law alone. All federal employees are bound by the Code of Ethics for Government Service never to “use any information gained confidentially in the performance of governmental duties as a means of making private profit.”⁷⁰ Additionally, pursuant to the STOCK Act, the Ethics in Government Act of 1978,⁷¹ and the various internal rules of each chamber, both the House and the Senate have promulgated procedures to regulate securities trading by their members.⁷² Among these is a requirement to disclose ownership and trades. In the House of Representatives, members and

67. For further discussion of these phenomena, see *supra* note 49.

68. See Wang, *supra* note 17.

69. *Id.*

70. Code of Ethics for Government Service, Pub. L. 96-303, 94 Stat. 855, 856 (1980); 34 C.F.R. pt. 73 app. (2019).

71. 5 U.S.C. app. 4 §§ 101–505 (2006).

72. See Stop Trading on Congressional Knowledge Act of 2012 (STOCK Act), Pub. L. No. 112-105, § 3, 126 Stat. 291, 292 (2012) (requiring each chamber’s ethics committee to draft guidance regarding conflicts of interest and gifts).

candidates, highly compensated staffers, and certain others must file (1) Financial Disclosures (FDs) on an annual basis and (2) Periodic Transaction Reports (PTRs) within forty-five days of a securities trade exceeding \$1,000.⁷³ A 123-page manual, with seven appendices, advises on the disclosure process.⁷⁴ The Senate's manual adopts a similar rule for the disclosure of holdings and trades with the same timetable (i.e., PTRs must be filed within forty-five days).⁷⁵

Notably, Congress has adopted disclosure rules for itself that are far more lax than those mandated for corporate insiders under section 16(a) of the Exchange Act.⁷⁶

Several features of the congressional rules stand out. First is their *ex post* character: PTRs need only be filed *after* a trade. (FDs, filed at year-end, are also *ex post* by definition.) In principle, patterns could be identified *ex post* just as they could be identified *ex ante*. However, to borrow a metaphor from Sherlock Holmes, PTRs are reports of the dogs that barked; trades that were planned and then canceled prior to execution are the dogs that do not bark, and current disclosure policy allows lawmakers to keep them a secret. By definition, it is impossible to measure or even estimate the size of this problem. Second, the forty-five-day window is orders of magnitude more generous than the similar disclosure obligations that apply in the public company context.⁷⁷ Third, investments in mutual funds and exchange-traded funds (ETFs) do not trigger an obligation to file a PTR,⁷⁸ which means that a lawmaker who liquidated his S&P 500 ETF after the January 24 briefing (sparing himself an immense destruction of wealth) would not have to report the trade. Further, trades in federal retirement accounts are categorically exempt,⁷⁹ as if to suggest that trades in such accounts—regardless of quantum and even if informed by secret information—are *per se* not a matter of public concern.

II. DESIGN DEFECTS IN THE CURRENT SYSTEM

There are reasons why the system as it exists today doesn't work well to prevent trades like those executed by Senators during the pandemic. Outrage at such trades is well founded, and the legal basis for punishing congressional trades based on

73. H.R. COMM. ON ETHICS, INSTRUCTION GUIDE: FINANCIAL DISCLOSURE STATEMENTS AND PERIODIC TRANSACTION REPORTS 1–7 (2019), <https://ethics.house.gov/sites/ethics.house.gov/files/documents/CY%202019%20Instruction%20Guide%20for%20Financial%20Disclosure%20Statements%20and%20PTRs.pdf> [<https://perma.cc/H5PT-DHK9>] [hereinafter HOUSE ETHICS INSTRUCTION GUIDE FOR FDs AND PTRs]. In 2020, the minimum base salary that triggered these disclosure obligations was \$131,239. *Id.* at 2.

74. *Id.*

75. S. COMM. ON ETHICS, FINANCIAL DISCLOSURE INSTRUCTIONS FOR CALENDAR YEAR 2019 4 (Feb. 2020), https://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=EDADCA8C-D651-4244-BFDE-CC9C69C28687 [<https://perma.cc/LW8S-5QZ3>].

76. *See infra* Part III.

77. *See infra* Part III.

78. HOUSE ETHICS INSTRUCTION GUIDE FOR FDs AND PTRs, *supra* note 73, at 45. Also, investments in the Thrift Savings Plan, the federal government's version of a 401(k), are exempt from both FD and PTR disclosure. *Id.* at 16.

79. *Id.*

MNPI, once contested, is now clearly available. Nevertheless, neither current tools nor leading proposals are calibrated properly to accomplish the needed restoration of public confidence. To be effective, a solution must first identify and account for these shortcomings, which originate in problems in regulatory institutions and securities fraud doctrine. In a nutshell, the institutions involved are not well positioned to police Members of Congress and the doctrine, which relies on common law standards, is even less well suited. The intractability of these shortcomings strengthens the case for a system that treats CST as a trading management problem (while preserving criminal liability for bad acts) rather than a no-man's-land of antiquated fiduciary law.

A. Institutional Shortcomings

The SEC and congressional ethics committees alike have strong incentives not to police insider trading restrictions aggressively. The SEC, which depends on Congress for its funding and statutory authority, has historically been “unwilling to take any sort of initiative against insider trading by senators and other congressional officers.”⁸⁰ The roots of the problem are mostly structural, though doctrinal in part.⁸¹ In 2011, one scholar observed that a clear statement of the SEC’s authority to regulate congressional insider trading might reorder this dynamic.⁸² The following year, Congress provided such a statement in the STOCK Act, which may yet catalyze a change in SEC practice. Such a change hasn’t yet manifested, however, including in the successful prosecution of Representative Collins. The trading activity at issue occurred following the Congressman’s unlawful tip of MNPI to his son, to which the former was privy not because of his public office but because he was also a corporate director.

A prosecutor’s office or agency that takes action against trading lawmakers also risks inserting itself into the political process. “Will prosecutors dare to indict a senator, particularly when political control of the Senate might be affected?” asks one scholar of Senator Burr’s case.⁸³ On one hand, such a case could be a career maker for a U.S. Attorney or other prosecutor. On the other, partisan or other political considerations—for example, the fact that the President and the lawmaker are of the same political party, as was the case with both Sens. Burr and Loeffler—may outweigh even the combination of prosecutorial ambition and public interest. Whatever the outcome in a particular case, the political constraint is inherent and the risk of underenforcement correspondingly high, resulting in suboptimal protection of public as well as investor interests.

80. Jonathan R. Macey & Maureen O’Hara, *Regulation and Scholarship: Constant Companions or Occasional Bedfellows?*, 26 YALE J. ON REGUL. 89, 108 (2009); see also Bainbridge, *supra* note 32, at 304 (“Any government agency is likely to be reluctant to bite the budgetary hand that feeds it.”).

81. See *infra* Section II.B.

82. Bainbridge, *supra* note 32, at 304.

83. Coffee, *supra* note 9. As discussed later, a prematurely departing Senator Burr would be replaced with another Republican, but the electoral risk remains. See *infra* text accompanying notes 91, 93.

B. Doctrinal Shortcomings

Insider trading law is rife with confusion over how to manage trades executed upon mixed motives.⁸⁴ Where a fiduciary duty to the source of MNPI exists, the basic question is whether trades are barred at any time when the trader is *in possession* of MNPI or only when the trade is *based on* MNPI. Trade-offs between these two approaches are unavoidable and have created a multicircuit split.

In some jurisdictions, the law treats possession of MNPI as sufficient to trigger an obligation to abstain or disclose, while in others, it requires an analysis of whether such information actually motivated a decision to trade.⁸⁵ In the CST context, the former risks stripping lawmakers of the right to trade even when they would have traded absent MNPI, while the latter makes violations nearly impossible to show.⁸⁶

On its face, Rule 10b5-1 appears to resolve this conundrum. It sidesteps the question of causation, requiring “only that the defendant be ‘aware’ of the material, nonpublic information” when he trades.⁸⁷ However, there is some doubt whether the lesser mental state required by this regulation could create criminal liability under the statute.⁸⁸ Further, section 32(a) of the Exchange Act makes clear that a showing of willfulness is required for criminal sanction.⁸⁹ The factual circumstances of the trades executed on behalf of Sens. Burr and Loeffler, and the explanations offered, illustrate the difficulty prosecutors face in meeting that requirement. Securities fraud regulation suffers from design problems in general but is poorly adapted to the concerns generated by CST in particular.

These doctrinal gaps compound institutional shortcomings. For example, the SEC lacks jurisdiction to bring cases under certain provisions of federal law, leaving them enforceable only by U.S. Attorneys’ offices.⁹⁰ Such offices are generally headed by appointees of the President’s political party, making prosecution of same-party holders of high office less likely. The case of Senator Burr provides an illustration of these constraints. Like President Trump, he is a Republican. If he were to leave office early, state law would require the Governor (a Democrat) to fill the vacancy from a list generated by the departing Senator’s political party (i.e., a Republican).⁹¹ Thus,

84. See Andrew Verstein, *Mixed Motives Insider Trading*, 106 IOWA L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3558540 [<https://perma.cc/VC6J-PFBH>].

85. *Id.* (manuscript at 5).

86. See *id.* (manuscript at 27) (proposing a middle-ground rule where a trade is unlawful if “two traders alike in all respects except for their knowledge of proscribed information [do not] enjoy the same expected profits from trading”) (emphasis omitted). Reform proposals concentrated on this gap in conventional insider trading are not a natural fit for the special context of congressional trading where lawmakers are perpetually in possession of MNPI about the entire market. *Id.*

87. Coffee, *supra* note 9.

88. See *id.*

89. Exchange Act § 32(a), 15 U.S.C. § 78ff(a).

90. Coffee, *supra* note 9 (noting that the SEC’s jurisdiction extends only to Title 15 of the United States Code, not Title 18, where relevant prohibitions are located).

91. N.C. GEN. STAT. § 163-12 (2018) (setting forth procedures for filling vacancies in the U.S. Senate “caused by death, resignation, or otherwise than by expiration of term”).

his prosecution or resignation would not result in any change in the balance of power in the Senate. However, a prosecution or resignation—if perceived as an admission of responsibility—might have complicated the President’s battle for reelection in general and for the electoral college votes of North Carolina, a swing state, in particular. A prosecution in the months leading up to the election could also have imperiled campaigns by other members of their party. Under alternative permutations and combinations, some of these dynamics might flip, but the problem would not go away. And in one of the forty-five states that, unlike North Carolina, do not require that the appointee to a vacant Senate seat be made from a member of the departing Senator’s political party, the situation might be different altogether.⁹²

III. A BELT-AND-SUSPENDERS MANAGEMENT SYSTEM FOR CONGRESSIONAL SECURITIES TRADING

Congressional securities trading presents three distinct risks of public concern: the potential for policy distortion, unjust self-enrichment of lawmakers, and unjust enrichment of third parties by lawmakers. The Senators’ pandemic trades underscore the limitations not only of the status quo but also of leading reform proposals in managing this risk trinity. Banning ownership of individual stocks, for example, wouldn’t have stopped lawmakers from using MNPI to enrich themselves. COVID-19 caused a selloff of the stock market as a whole, so lawmakers learning MNPI in an advance briefing⁹³ would not have needed to trade specifically on stocks that were especially exposed to the pandemic to profit from their office. Because the collapse was near-universal, they could have saved a bundle if they had sold their shares in virtually any stocks they owned. They even could have cashed in by selling shares in index funds—yet a requirement of investing only in index funds dominates leading reform proposals.⁹⁴ Such a requirement is only one step, and a partial one at that. Similarly, the blind trust option in the Ban Conflicted Trading Act proposed by Sens. Brown and Merkley,⁹⁵ while an improvement over current rules, affords little in the way of transparency or accountability in a situation that calls for a maximum quantum of both. A new paradigm is needed—or rather, a paradigm borrowed from the analogous system that regulates securities trading by corporate insiders.

Three reforms should be adopted by each house of Congress. While ambitious in scope, none require new legislation or regulation; they can each be accomplished as

92. See NATIONAL CONFERENCE OF STATE LEGISLATURES, VACANCIES IN THE UNITED STATES SENATE (July 13, 2020), <https://www.ncsl.org/research/elections-and-campaigns/vacancies-in-the-united-states-senate637302453.aspx> [<https://perma.cc/7PYT-37M7>].

93. Markay et al., *supra* note 4. It might be contended that by January 24, 2020, publicly available information already suggested that the pandemic was going to have grave consequences for the stock market, but the special briefing of Senators seems nevertheless likely to constitute MNPI given the intensity of the warning provided through official channels and the private setting.

94. See WARREN FOR PRESIDENT, *supra* note 13 (proposal of Senator Elizabeth Warren); Ban Conflicted Trading Act, S. 1393, 116th Congress (2019) (proposal of Senators Sherrod Brown and Jeff Merkley).

95. *Id.*

a matter of internal rulemaking.

First, each chamber should create an *ex ante* disclosure system whereby lawmakers and highly compensated staff (“staff”) announce their trading plans in advance by adopting a 10b5–1-style plan. In the corporate context, such plans are confidential;⁹⁶ given the comparatively higher value of transparency and lower interest in privacy when it comes to CST, these plans should be made publicly accessible online. Second, on the *ex post* side, each house should require the disgorgement of short-swing profits earned by Members and staff, similar to the requirement under section 16(b) of the Exchange Act. In addition to their intrinsic benefits, each of these requirements would create a record of disclosures that could inform action by the SEC or other regulators, whether against the covered trader or others acting on the same information.⁹⁷ And third, ownership of securities by Members of Congress and their staff should be limited to U.S. Treasuries and passive index funds tracking the U.S. market. The belt-and-suspenders approach embodied in these three reforms and detailed in this Part would go a long way to addressing the risks of policy distortion and unjust self-enrichment. The risk of unjust enrichment of third parties presents distinct challenges. A fourth reform, sketched here, models an extension of the SEC’s Regulation Fair Disclosure requirement via regulation to address those challenges.

A. Ex Ante: Disclosure Via a Congressional 10b5–1 Plan

The system for regulating congressional securities trading compares unfavorably with the one for corporate insiders. Public companies manage how their executives and directors trade securities through 10b5–1 plans. A defense created by Rule 10b5–1(c), these plans allow officers and directors of public companies to precommit to trades of company stock in specific or ranges of quantities on prespecified dates. The 10b5–1 plan is an accommodation to executive and director compensation structures that are increasingly illiquid because they are now composed mostly of equity, some share of which is subject to sale restrictions. As used in the public company context, the 10b5–1 plan is neither a requirement nor a true safe harbor but instead an affirmative defense to an allegation of insider trading.⁹⁸ Yet it reflects a broader purpose and has broader potential for CST.

96. See Stuart Gelfond & Arielle L. Katzman, *A Guide to Rule 10b5–1 Plans*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 24, 2016), <https://corpgov.law.harvard.edu/2016/03/24/a-guide-to-rule-10b5-1-plans/> [<https://perma.cc/2NKN-UZ9U>].

97. As financial journalist Matt Levine has observed, this principle extends beyond the covered traders themselves. For example, during the Equifax hack, the filing of mandatory Form 4 reports triggered a broader investigation that “unearthed subtler insider trading” by an executive who was senior but not required to file a Form 4—conduct which the SEC and the Department of Justice then charged. Matt Levine, Opinion, *Senators Picked a Good Time to Sell Stocks*, BLOOMBERG OPINION (Mar. 20, 2020), <https://www.bloomberg.com/opinion/articles/2020-03-20/senators-picked-a-good-time-to-sell-stocks> [<https://perma.cc/7NRM-R3TB>]. As Levine put it: “The SEC was not just going to ignore those Form 4s!” *Id.*

98. Rule 10b5–1 plans do this by providing an affirmative defense, not absolute immunity. See Gelfond & Katzman, *supra* note 96.

The key advantage of 10b5–1 plans is not merely transparency but ex ante transparency. Insider trading law is inadequate to the task of preventing unjust self-enrichment by lawmakers, and neither designed for nor capable of preventing policy distortion. The public deserves to hear its representatives call the pocket before hitting the cue ball—not to ensure that the eight ball rolls into the right pocket but to ensure the table is not tilted to get it there. Ex ante disclosure is needed to accomplish this goal.

The legal problem 10b5–1 plans addresses is that insiders are perpetually in possession of MNPI but have economic reasons from time to time to acquire or dispose of company stock. Such plans represent an effort at striking a trade-off between extremes of barring all trading in the issuer’s securities on one hand and exposing its leadership to significant liability on the other. Rule 10b5–1 plans provide a useful model for congressional disclosure because they negotiate public and private concerns through notice, predictability, and transparency.

The 10b5–1 model also addresses some key proof problems that are inherent in securities laws designed to target intentional fraud, a narrow class of conduct. The topics on which legislators have *superior* information to that which is available to the investing public are often those on which the public already has *some* information. Thus, it is trivially easy for trading lawmakers who receive MNPI in an environment that is also flush with public information, such as a pandemic, climate change event, war, or recession, to claim a mixed motive for their trade that would significantly complicate efforts to establish liability.⁹⁹ Currently, transaction disclosures filed by lawmakers (FDs and PTRs) do not provide much (if any) evidence of motive, and the delays permitted give them time to manufacture alternative explanations.

In addition, not only are the disclosures ex post but the grace period allowed in the CST context—forty-five days—is unusually generous. By comparison, corporate insiders must report trades within two business days¹⁰⁰ and large shareholders within ten days.¹⁰¹ Merely shortening the ex post disclosure window does not go far enough. An ex ante system would require public disclosure of lawmaker trades ahead of time, permitting scrutiny even before they happened and even if they were canceled.

An ex ante framework modeled on the 10b5–1 plan can help prevent recurrences of both pandemic trading and more conventional insider trading, such as that engaged in by Representative Collins. But even more importantly, it would prevent future abuses that are currently shielded from public view under chamber rules and difficult to prosecute under the securities laws. It would need to be adapted to CST, however, rather than simply imported from the corporate context.

In adapting public company 10b5–1 plans to the CST context, thoughtfulness and attention to detail will be critical to minimize unintended consequences. For example, a public company insider’s 10b5–1 plan must be put in place during a

99. See Verstein, *supra* note 84 (manuscript at 17–18).

100. U.S. SEC. & EXCH. COMM’N, *supra* note 24.

101. See 17 C.F.R. § 240.13d-101 (2019) (Schedule 13D); 17 C.F.R. § 240.13d-102 (2019) (Schedule 13G) (stating the rule for shareholders who own five percent or more of a corporation’s securities).

trading window when the insider possesses no MNPI, e.g., immediately following an earnings release.¹⁰² Once a lawmaker takes office, however, it is difficult to posit a direct analogy to such a window, as she will receive (and create) MNPI on a continuous basis. Accordingly, lawmakers should be able to update their plans on some regular interval, perhaps annually. In addition, following a change in a plan, a delay should apply before the changes take effect. While not required by 10b5–1, this is common practice in public companies to enhance the appearance of propriety. It is also possible that lawmakers could take advantage of the safe-harbor-like quality of Rule 10b5–1 under existing law,¹⁰³ but not only is it not mandatory, but no guidance exists regarding these important details.

*B. Ex Post: Disgorgement Via a Congressional § 16(b)
Short-Swing Profits Rule*

A chamber adaptation of the section 16(b) short-swing profits rule would provide a clean and efficient enforcement mechanism for correcting improper congressional securities trading. In the corporate context, the rule prohibits insiders from earning profits on trades of company stock within a six-month window. It uses strict liability: if a pair of transactions (purchase and sale) generates a profit within the window, it violates the rule. Regardless of scienter, the insider is deemed to have executed the trades with MNPI and must disgorge the profits to the company. Even inadvertent trades can trigger the disgorgement, but without more, no criminal liability attaches.

Similar to Rule 10b5–1, the intuition behind this rule is that insiders always have inside information, and so rather than prohibit them from trading outright the law should regulate such trades by minimizing the unjustified use of that information. An analogous set of concerns attaches to Members of Congress and could be used to manage their trades. Each chamber should adopt a version of the short-swing profits rule for its own members with review and enforcement by the ethics committee or its designee within each body.

This rule, too, will need to be adapted rather than copied wholesale. For example, the section 16(b) version is enforceable by a private right of action, which neither house likely wants to authorize given the potential for harassment by political opponents. Disgorgement should be effectuated in such a way as to substitute for private enforcement. This is simple enough.

To ease the administration of a congressional short-swing profits rule, the window for filing a disclosure of trades should be shortened radically. Currently, Members of Congress have forty-five days to file a PTR. Corporate insiders, by contrast, must disclose within two business days following a transaction. There is no sound basis to allow lawmakers to keep their trades in the dark for more than twenty times longer

102. Gelfond & Katzman, *supra* note 96.

103. See Donna M. Nagy, *Five Myths About Insider Trading*, WASH. POST, Apr. 3, 2020, https://www.washingtonpost.com/outlook/five-myths/five-myths-about-insider-trading/2020/04/03/80ba8be8-752b-11ea-85cb-8670579b863d_story.html [<https://perma.cc/GA5N-8KPY>] (“To be sure, lawmakers can avoid allegations of unlawful insider trading . . . by trading only through a written plan, which gives a broker complete trading authority, as described by an SEC rule.”).

than corporate insiders. To harmonize the CST regime with its section 16(b) counterpart under Form 4, the congressional PTR window should be set to two business days. In the absence of a private right of action, Congress need not set up a mini-securities agency to manage CST; instead, disgorgement should be automated. The strict liability nature of the rule will ease and expedite enforcement, with defenses available on grounds of software, clerical, or similar errors only. Profits that accrue through any other means—whether intentional or inadvertent—should be mechanically disgorged. Analogous trades result in disgorgement under section 16(b) when triggered by corporate insiders, and no sound reason exists to allow the short-swing profits of Members of Congress to escape. The enhancement of ex post disclosures would work hand-in-hand with this rule to make the disgorgement process easier and to provide public accountability.

*C. Continuous Management: Ongoing Restrictions on
Congressional Securities Investments*

While ex ante disclosure and ex post disgorgement reforms would substantially ameliorate the risks to the public generated by CST, to make the rules more effective they should be paired with a bright-line rule severely restricting the range of investments lawmakers are permitted to own or trade.

Members of Congress should be prohibited from owning or trading securities other than U.S. government bonds and passive U.S. index funds. This restriction builds upon those already proposed by some reformist lawmakers but goes significantly beyond them in terms of its own scope. But more important is the fact that it works in tandem with the first and second proposals above, borrowed from Rule 10b5-1 and section 16(b).

The pandemic trades and the Representative Collins case illustrate the potential of both policy distortion and unjust self-enrichment presented by individual stock ownership. Index funds that seek to replicate the performance of the total U.S. stock market or the S&P 500 (i.e., passive funds) are the only equity products that should be permitted. They could be held either as mutual funds or exchange-traded funds. As for bonds, lawmakers should be restricted to those issued by the United States Government—namely U.S. Treasuries, including those held in Treasury funds, of any tenure.¹⁰⁴ Since Congress is regularly called upon to appropriate funds that flow to states, cities, and various state entities, it is inappropriate for Members to own their debt. The balance of risks weighs against permitting elected representatives and their staff to invest in foreign sovereigns and markets.

Denying Members of Congress the ability to diversify internationally, subnationally, and by industry (and to hedge via derivatives) asks only a trivial sacrifice in exchange for helping to restore the public trust. It is also the kind of restriction that many in the securities industry already observe. Not only corporate executives, large shareholders, and other statutory insiders but junior bankers,

104. Permitting ownership of corporate equity funds while barring ownership of corporate bond funds creates an asymmetry, but only a minor one. These options allow lawmaker-investors to achieve a wide range of risk-reward ratios.

lawyers, and accountants are often de facto barred by their employers or professional conduct rules from active trading or even ownership of individual securities.

One alternative, perhaps appealing in populist quarters, would be simply to deny lawmakers access to the stock market altogether. This would have undesirable consequences for the representativeness of Congress, however. In such a regime, the composition of power holders could be expected to tilt further to figures who enjoyed extraordinary wealth before entering public service.¹⁰⁵ Unlike some peer nations, the United States lacks a robust pension system, and instead those citizens who are fortunate to have the ability to save for retirement have for decades relied on private investments to augment Social Security. Members of Congress and their staff are no different: they do not receive pensions but invest for retirement via the federal workforce's counterpart to the 401(k).¹⁰⁶ Top salaries for even highly compensated staffers and for Members of Congress themselves are modest by elite private sector standards and have declined in real terms over time.¹⁰⁷

105. Senator Mitt Romney, former New York City Mayor Michael Bloomberg, and Senator Kelly Loeffler provide some examples. See Grace Wyler, *This is How Mitt Romney Actually Made All His Money*, BUS. INSIDER (Dec. 14, 2011), <https://www.businessinsider.com/how-mitt-romney-made-his-money-2011-12> [<https://perma.cc/763Q-QQ9J>]; Edwin Durgy, *What Mitt Romney is Really Worth: An Exclusive Analysis of His Latest Finances*, FORBES (May 16, 2012), <https://www.forbes.com/sites/edwindurgy/2012/05/16/what-mitt-romney-is-really-worth> [<https://perma.cc/5PJR-TY6B>]; Chloe Foussianes, *Michael Bloomberg's Net Worth Ranks Him Among the World's Top Billionaires*, TOWN & COUNTRY (Mar. 4, 2020), <https://www.townandcountrymag.com/society/money-and-power/a25781489/michael-bloomberg-net-worth/> [<https://perma.cc/EAX5-2QZN>]; #14 Michael Bloomberg, FORBES, <https://www.forbes.com/profile/michael-bloomberg/> [<https://perma.cc/RZD3-HFA6>]; Josh Barro, *Here's Why Mike Bloomberg Is So Rich*, N.Y. MAG. (Nov. 20, 2019), <https://nymag.com/intelligencer/2019/11/heres-why-mike-bloomberg-is-so-rich.html> [<https://perma.cc/3DDN-TLCE>]; Tia Mitchell, *Kelly Loeffler Outlines Millions in Assets in Financial Disclosures*, ATLANTA JOURNAL-CONSTITUTION (May 6, 2020), <https://www.ajc.com/news/state--regional-govt--politics/kelly-loeffler-outlines-millions-assets-financial-disclosures/bU0AYQgXQXD1y7E8VtECXI/> [<https://perma.cc/S5J6-UP8E>]; Ed Kilgore, *Kelly Loeffler's Money is Her Biggest Problem and Her Only Hope*, N.Y. MAG. (Apr. 16, 2020), <https://nymag.com/intelligencer/2020/04/kelly-loefflers-money-is-her-problem-and-her-only-hope.html> [<https://perma.cc/UPX8-YN5E>] (discussing Senator Loeffler's appointment to the Senate and describing her as having "more money than God").

106. KATELIN P. ISAACS, CONG. RSCH. SERV., RL30631, RETIREMENT BENEFITS FOR MEMBERS OF CONGRESS 6, 13–14 (2019), <https://www.senate.gov/CRSpubs/ac0d1dd5-7316-4390-87e6-353589586a89.pdf> [<https://perma.cc/4BDY-VYWD>].

107. See Timothy B. Lee, *This Chart Shows Why Members of Congress Really Should Earn More Than \$172,000*, WASH. POST (Sept. 19, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/09/19/this-chart-shows-why-members-of-congress-really-should-earn-more-than-172000/> [<https://perma.cc/JV75-YSVK>] (noting that Members of Congress made nearly fifty percent more in 1970 than in 2013 in real terms (\$250,000 vs. \$172,000, in 2013 dollars). That salary is still much higher than that of the average American, *id.*, but must support two households—one in the home district and another in Washington.

D. One Model for Regulating Congressional “Tipping”: Regulation Fair Disclosure

The proposals detailed at Sections III.A–C above address only securities trading by Members of Congress and their staff. Tips of MNPI by such individuals to third parties are frequently outlawed by Rule 10b–5 and the STOCK Act. However, just as those provisions are not good at managing CST, they are not well positioned to manage selective disclosures of MNPI and in particular cannot distinguish between legitimate and illegitimate cases of disclosure. Selective disclosure touches on a wider array of public policy concerns than other aspects of CST and regulation and should be explored on a parallel track. For this reason, its relevance is only sketched here rather than fully developed.¹⁰⁸

Regulation Fair Disclosure (“Reg FD”) provides a good, if not fully analogous, model for managing such disclosures. Currently, it only applies to certain insiders of securities issuers (for example, managers and directors) and thus would need to be expanded by the SEC in order to embrace Congress. Having already been amended by the STOCK Act to expressly include employees of Congress, the authorizing legislation (the Exchange Act) probably would not need to be amended further.

When it comes to the challenges of CST, Reg FD has the potential to shine just where Rule 10b–5 goes dark: while Rule 10b–5 only captures *intentional* frauds and material omissions in disclosures of MNPI, Reg FD is designed to regulate *selective* disclosures, irrespective of intent. This is a particularly useful distinction for CST—but it would need to be adapted. A few examples illustrate both these points.

Suppose a Member of Congress asks Greenpeace to mobilize activist support for her proposed environmental bill. Has she provided MNPI concerning the prospect of government action that could reduce the value of oil company stock? Theoretically yes, though this was clearly not her objective—and to punish her for it would chill the democratic process. Suppose instead that a Senator who was present at the same briefing as Sens. Burr and Loeffler were to call a hospital administrator in his district to urge stockpiling protective supplies for medical workers. Say the administrator does so, and then buys stock in 3M, a major manufacturer of such products. This is a more difficult question, and Reg FD provides two vehicles for approaching it. One, making a simultaneous public disclosure, would defeat the purpose of making a private disclosure to the hospital. But the other—an agreement by the recipient (here, the hospital administrator) both to keep the information confidential and not to trade on it—could be instructive. For example, one could envision selective disclosures of MNPI by Members of Congress creating, by contract or by implication, an obligation in the recipient not to trade on the information. Such an obligation would help shore up the principle of legality and the appearance of propriety in this fraught area.

Drafting a Reg FD for CST would take careful planning. The SEC has taken up similar questions in rulemaking as well as telephone interpretations by the Division of Corporation Finance and should consider similar processes for CST rulemaking

108. Regulation of the so-called political intelligence industry implicates concerns that are even more remote from core CST and thus are not developed in this Essay. For discussion, see *supra* note 49.

and interpretation. However, the Commission should tread especially carefully here, as some of the considerations implicated go to the heart of democracy, freedom of speech and assembly, and other matters of general public (not just investor) concern. Since the SEC is accountable to Congress, the risk of overreach in this regard seems slight and, in any event, could be addressed legislatively as well as by the courts.

CONCLUSION

Congressional securities trading generates broader issues than the insider trading regime, which is based on a fiduciary model, is able to address. These include the potential for policy distortion and other abuses of public trust. To respond to these more complex risks, reform efforts should go beyond the existing common law model and embrace the certainty of bright-line rules. The system for regulating trading in an analogous context—public company insiders—is sophisticated and well established and provides several models for managing both the special risks of CST and the prosaic ones.

The three most helpful interventions are straightforward. First, each house of Congress should mandate that Members and highly compensated staff file a Rule 10b5-1 plan *ex ante*, before their trades are executed. Next, each chamber should apply the short-swing profits rule contained in section 16(b) of the Exchange Act to its Members and highly compensated staff. This would disgorge any short-term profits generated by trades, whether intentional or inadvertent. Liability should be strict and disgorgement automatic. As part of this *ex post* rule, the window to file a mandatory disclosure should also be radically shortened so that it is the same as the equivalent for public company insiders. Finally, the universe of securities ownable by lawmakers and highly compensated staff should be sharply restricted. They should only be permitted to own U.S. Treasuries and passive index funds tracking the U.S. market.

The belt-and-suspenders approach embodied in these proposals would help mitigate the risks of policy distortion and congressional self-enrichment. Each chamber of Congress can adopt them as a matter of internal rulemaking, without a need for legislation or regulation.

Finally, the SEC should begin the process of adapting Regulation Fair Disclosure to the congressional context. This rule regulates selective disclosures of material nonpublic information. Applying it to Congress will help guard against the use of inside information by Members of Congress to unjustly enrich powerful donors, interest groups, and other third parties.