LET'S MAKE A DEAL: HOW CLARIFYING THE FIDUCIARY DUTIES OF CONGRESS CAN HELP SOLVE THE ISSUE OF CONGRESSIONAL INSIDER TRADING

Alex Liubinskas

INTRODUCTION

Anyone tuning into the daily news probably comes away with the perception that Americans are more polarized across the political spectrum than ever. No matter what the issue of the day might be, it seems that Americans disagree sharply on the issues facing our Nation. However, there is one thing that most Americans can agree on: they perceive the government to be corrupt.[1] What is interesting about this perception is that it breaks the common "us versus them" mentality in partisan politics where the opposite party is described as immoral, incompetent, and unintelligent.[2] When it comes to corruption, everyone is implicated.

The perception of public servants being self-interested and corrupt is nothing new. During the Gilded Age, the halls of Congress were described as a "rich man's club" where Senate seats were auctioned off to the highest bidder and where political favors "were traded like horses."[3] More recently, studies conducted in 2011[4] and 2012[5] indicate that Americans perceive their

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[1] A 2022 poll conducted in key battleground states reported that sixty-five percent of voters found corruption in government to be a "very big problem" facing the country—the highest mark reported in poll. Brandon Brockmyer, *Corruption is Public Enemy Number 1*, PROJECT ON GOV'T OVERSIGHT POLL (Oct. 7, 2021), https://www.pogo.org/analysis/corruption-is-public-enemy-number-1; Celinda Lake et al., *Findings Based on Focus Groups and An Online Survey Among Voter in Michigan and Ohio*, PROJECT ON GOV'T OVERSIGHT POLL (Sept. 2021), https://www.pogo.org/document/2021/10/findings-based-on-focus-groups-and-an-online-survey-among-voters-in-michigan-and-ohio. This outranks other prominent political issues such as crime and gun violence (sixty-three percent), COVID-19 (sixty-one percent), and climate change (forty-five percent). *Id.*

[2] *As Partisan Hostility Grows, Signs of Frustration With the Two-Party System*, PEW RSCH. CNTR (Aug. 9, 2022), https://www.pewresearch.org/politics/2022/08/09/as-partisan-hostility-grows-signs-of-frustration-with-the-two-party-system/ (finding that partisans view the opposing party as "closed-minded, dishonest, immoral and unintelligent" than other Americans).

[3] H.J. Sage, *Politics and Corruption in the Gilded Age, 1865–1900*, BREWMINATE BLOG (Oct. 28, 2022), https://brewminate.com/politics-and-corruption-in-the-gilded-age-1865-1900/.

[4] In 2011, sixty-four percent of surveyed Americans gave the honestly and ethical standards of Congress a "very low" or "low" rating. *See* Jeffrey M. Jones, *Record 64% Rate Honesty, Ethics of Members of Congress Low*, GALLUP (Dec. 12, 2011), http://www.gallup.com/poll/151460/Record-Rate-Honesty-Ethics-Members-Congress-Law.aspx.

[5] In a 2012 poll that measured the perceived ethical standards of twenty-two professions, members of Congress ranked the lowest with fifty-four percent of Americans giving Congress a rating of "very

Senators and Representatives to be corrupt and possess ethical standards lower than even other professions generally regarded as untrustworthy.[6] This perception is not unwarranted. American history is filled with accounts of public servants using nonpublic information to manipulate the stock market,[7] and the United States government is considered to be "'the largest producer of information capable of having a substantial effect on stock-market prices.'"[8]

The last fifty years are filled with accusations of congressional members using their positions on Capitol Hill to gain a competitive edge on the stock market. Just days before the 2008 market crash, multiple members of Congress sold large amounts of stocks, making a significant profit.[9] At the beginning of the COVID-19 pandemic and after being privately informed about the seriousness of the ensuing public health crisis, multiple members of Congress sold stocks at enormous profits.[10] In September of 2022, the New York Times published a report analyzing the trading activity of members of Congress and found that ninety-seven lawmakers bought or sold publicly traded assets in industries that could be affected by the lawmaker's legislative work.[11]

In 2012, Congress passed the STOCK Act in response to recent allegations of congressional members engaging in insider trading.[12] The Act was intended to solve the issue of congressional insider trading and provide a basis to which the Securities and Exchange Commission ("SEC") and

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low" or "low" for the honesty and ethical standards categories. *See* Frank Newport, *Congress Retains Low Honesty Rating*, GALLUP (Dec. 3, 2012), http://www.gallup.com/poll/159035/congress-retains-low-honesty-ratings.aspx.

6 *Id.* Member of Congress had lower ratings than car salespeople (forty-nine percent "very low" or "low") and stockbrokers (thirty-nine percent "very low" or "low").

7 For example, in 1778, Samuel Chase was impeached by the House for trying to use inside information to make money on the flour market. *See* Michael A. Perino, *A Scandalous Perversion of Trust: Modern Lessons From the Early History of Congressional Insider Trading*, 67 RUTGERS L. REV. 335, 339 (2015).

8 Paul D. Brachman, *Outlawing Honest Graft*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 261, 263 (2013) (quoting HENRY G. MANNE, INSIDER TRADING AND THE STOCK MKT. 171 (New York: The Free Press 1966)).

9 *See 60 Minutes: Congress: Trading Stock on Inside Information?* CBS NEWS (CBS television broadcast Nov. 13, 2011), http://www.cbsnews.com/8301-18560_162-57323527/congress-trading-stock-on-inside-information; Congress Cashes In On Insider Trading, REPRESENT US, https://represent.us/action/insider-trading/ (last visited Dec. 10, 2022).

10 *See* Dareh Gregorian, *Burr, Other Senators Under Fire for Stock Sell-Offs Amid Coronavirus Outbreak*, NBC NEWS (Mar. 20, 2020, 9:22 AM), https://www.nbcnews.com/politics/congress/aoc-calls-senate-intel-chair-richard-burr-resign-stock-selloff-n1164401.

11 Kate Kelly, et al., *Despite Their Influence and Extensive Access to Information, Members of Congress Can Buy and Sell Stocks With Few Restrictions*, N.Y. TIMES (Sept. 13, 2022), https://www.nytimes.com/interactive/2022/09/13/us/politics/congress-stock-trading-investigation.html.

12 *See* Kristen Kelbon, *Creating an Effective Vaccine to Prevent Congressional Insider Trading: Legislation is Needed to Cure Deficiencies of the STOCK Act*, 55 CREIGHTON L. REV. 145, 147–48.

Department of Justice ("DOJ") could investigate and prosecute members of Congress for insider trading. However, the STOCK Act has fallen short. And the DOJ and the SEC have failed to prosecute any member of Congress for insider trading under the Act.[13]

This Article aims to explain why the STOCK Act has failed to work as intended and offer a solution. The Act is ineffective for two main reasons. Despite the Act purporting to establish that members of Congress owe a fiduciary duty and violate that duty when they engage in insider trading, ambiguity arises when specifying the duty and applying it to an insider trading cause of action. Second, the Speech or Debate Clause of the Constitution and its broad interpretation by courts virtually bars the ability of the SEC or DOJ to collect evidence against members of Congress for alleged instances of insider trading. I argue that the proper framework for understanding the underlying fiduciary duty that members of Congress owe under the STOCK Act is to Congress itself. Further, I use analogical reasoning to argue that the relationship between Congress and its individual members is similar to the fiduciary relationship between partners in a partnership and the partnership itself. This interpretation has two advantages. First, it provides courts and regulators with a clear basis for applying traditional fiduciary principals to members of Congress. Second, this interpretation, and its grounding in partnership law, supports an argument that Congress should waive the evidentiary privileges that they enjoy under the Speech or Debate Clause by instituting internal mechanisms for investigating members of insider trading.

Part I of this Article outlines the required elements of an insider trading cause of action while focusing specifically on the most important element: breach of fiduciary (or fiduciary-like duty). Part II discusses the passage of the STOCK Act, its effectiveness, and the problems associated with it. Here, I argue that the STOCK Act leaves open questions about the fiduciary duty element in the context of congressional insider trading and that courts could have issues applying the STOCK Act's framework without clarification. I also argue that the Speech or Debate Clause prevents federal investigators from collecting evidence on congressional insider trading, making a successful investigation nearly impossible. In Part III I argue that the proper understanding of the fiduciary duty owed by members of Congress under the STOCK Act is to Congress as an institution and how this understanding clarifies the obligations individual members of Congress owe. Part IV explains how this framework supports the ability of Congress to institute internal investigations and waive the evidentiary privileges members of Congress enjoy under the Speech or Debate Clause.

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[13] *See id.* at 164 n.129 ("[N]either the SEC nor the DOJ has prosecuted a member of Congress under the STOCK Act since its passage" even though at least 54 legislators have allegedly violated the STOCK Act by failing to report their securities trades).

I. THE INSIDER TRADING CAUSE OF ACTION

A. *Introduction to Insider Trading*

After the stock market crashed in 1929 triggering the Great Depression, Congress sought to pass legislation that would better regulate securities in the stock market and assure a more open and orderly market.[14] In 1934, Congress passed the Securities and Exchange Act of 1934 ("Exchange Act").[15] Under section 10(b) of the Act, it is illegal for any person selling or buying securities "[t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance."[16] Under the regulatory authority granted to them by the Exchange Act, the SEC promulgated Rule 10b-5, which states that no person may "employ any device, scheme, or artifice to defraud . . . or . . . engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."[17] Although neither section 10(b) nor Rule 10b-5 mention "insider trading" courts and administrative agencies have interpreted these provisions to provide the basis for insider trading liability.[18]

B. *Elements Of Insider Trading*

While section 10(b) and Rule 10b-5 provided the underlying authority to prosecute insider trading, the elements of the claim have been developed by the courts.[19] Generally, there are four elements to an insider trading cause of action: (1) trading on (or tipping); (2) material; (3) nonpublic information; (4) in breach of fiduciary (or fiduciary-like) duty.[20] The following section provides a summary of the elements. The first three elements have little issue being applied to the context of congressional insider trading. However, the

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14 H.R. REP. NO. 94-229, at 91–92 (1975) (Conf. Rep.) (Congress observed in 1975 that the basic goals of the Exchange Act were to assure: fair mechanisms for pricing securities, the dealing of securities is fair without undue special treatment to some investors, that securities can be bought and sold efficiently, and the markets are free and open.).

15 15 U.S.C. § 78a (1934).

16 15 U.S.C. § 78j(b) (1934).

17 17 C.F.R. § 240.10b–5 (2012).

18 *See, e.g.*, United States v. O'Hagan, 521 U.S. 642, 651–56 (1997) (affirming that insider trading liability arises under Section 10(b) and the various theories of liability).

19 *See* Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 CORNELL L. REV. 845, 854–55 (2013) (noting that the elements of insider trading have largely been judicially manufactured).

20 *Id.* at 855 (outlining the elements of an insider trading cause of action).

fourth element requires an understanding of the various theories of insider trading liability and will be analyzed independently.

1. Trading on (or Tipping) Requirement

In order to sustain an insider trading cause of action, the first element that the prosecution must prove is that the defendant traded (or tipped) based on the information in question. This requires proving that the defendant possessed material, nonpublic information at the time they traded the security and had the requisite scienter (state of mind).[21] Once possession is established, courts generally infer that the defendant used the material, nonpublic information to exploit an informational advantage on the marketplace.[22] This inference typically establishes the required scienter to sustain insider trading liability.[23]

If the suit is civil, the scienter required to sustain an action requires evidence that the "defendant knew that the information was material and nonpublic or recklessly disregarded facts that would indicate that the information in his possession was material and nonpublic."[24] If the suit is criminal, the defendant must have "willfully" engaged in impermissible insider trading.[25] Willfully requires a showing of a "realization on the defendant's part that he was doing a wrongful act . . . and that the knowingly wrongful act involved a significant risk of effecting the violation that occurred."[26] There are cases where the defendant has argued that the inside information was not a significant factor in their decision to trade the security, such as where the defendant was compelled by a personal circumstance to trade the security or that they would have traded it regardless of the information.[27] If the defendant can prove that the trade occurred independent of the nonpublic information, courts may not find liability depending on the jurisdiction.[28] Besides evidentiary hurtles that arise from the Speech or Debate Clause, how this element

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21 *Id.* at 856; *see, e.g.*, SEC v. Adler, 137 F.3d 1325, 1340 (11th Cir. 1998) ("Scienter necessarily requires that the insider have possession of material nonpublic information at the time the insider trades.").

22 DONALD C. LANGEVOORT, INSIDER TRADING: REGUL., ENF'T & PREVENTION § 3:13 (2022).

23 *Adler*, 137 F.3d at 1340; Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976).

24 LANGEVOORT, *supra* note 22, at § 5:5.

25 *Id.* at § 8:13 (noting that the Exchange Act as amended in by the Sarbanes Oxley Act of 2022, provides criminal convictions to individuals who "willfully" violate any provision of the Exchange Act).

26 *Id.*

27 *Id.* at § 3:13. The case law on whether the defendant can strike down an insider trading case by arguing that the inside information was not a significant factor in their decision to trade is inconsistent. The Second Circuit has determined that possession alone is sufficient to establish scienter. *See* U.S. v. Teicher, 987 F.2d 112, 120 (2d Cir. 1993). Others, such as the Eleventh Circuit, have determined that possession raises a rebuttable inference that the defendant used the information to trade. *Adler*, 137 F.3d at 1340.

28 Kim, *supra* note 19, at 857.

is analyzed is not significantly altered just because a defendant is a member of Congress.[29]

2. Materiality Requirement

The analysis of the second element—that the information be material—does not substantially change if the defendant happens to be a Representative or Senator. Information is material "if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision."[30] Importantly, certainty of a particular outcome is not necessary for information to be material.[31] Instead, "the information need not be such that a reasonable investor would necessarily change his investment decision on the information, as long as a reasonable investor would have viewed it as significantly altering the total mix of information."[32]

In regards to contingent information, materiality is determined by "a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity."[33] For the purposes of sustaining an action against a member of Congress for trading on the basis of anticipated legislative events, "the factfinder must assess the likelihood (at the time of the trade) that the legislative event would come to pass and the importance of the event to an issuer's business (at the time of the trade)."[34]

Although many legislative developments are difficult to predict due to the uncertainty and volatility of the legislative process, asserting that a legislator traded on material information is not as burdensome as one would think.[35] First, the very fact that the defendant traded on the information can support a finding of materiality.[36] If a judge or jury is persuaded that the information in question factored into the defendant's decision to buy or sell the security, and it believes that the defendant was a "reasonable" investor, then

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29 *Id.*. For a discussion of the evidentiary burdens placed on investigators, see section II(C)(1).

30 TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976).

31 LANGEVOORT, *supra* note 22, at § 5:5.

32 *Id.* at § 5:2 (quoting SEC v. Mayhew, 121 F.3d 44, 52 (2d Cir. 1997)).

33 Basic Inc. v. Levinson, 485 U.S. 224, 238 (1988) (quoting SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968) (en banc)). Information can be considered material even when the trader risked that their trade might not result in a profitable return on their investment. For example, in an administrative proceeding before the SEC, information obtained from a drilling company indicated that there was some oil in a geographical area was material even though there was only a twenty-five percent chance of future profitable operations. *See* LANGEVOORT, *supra* note 22, at § 5:2 (citing In re Wentz, Sec. L. Rep. (CCH) ¶ 83, 629 (Admin. Proc. May 15, 1984)).

34 Kim, *supra* note 19, at 857.

35 *Id.*

36 LANGEVOORT, *supra* note 22, at § 5:2; *see, e.g.*, SEC v. Shared Med. Sys. Corp., No. CIV.A 91-6546, 1994 WL 201858, at *2 ("trading by an insider in suspicious amounts or at suspicious times" raises an inference of materiality).

materiality can be sustained because the information presumably altered the "total mix of information."[37] Second, evidence of a major market movement prompted by the passage of a legislative act could support a finding of materiality.[38] Just like the first element, the analysis of materiality does not alter significantly just because the defendant happens to be a member of Congress. However, investigators and prosecutors will probably have issues collecting the material information in question because the information most likely derived from legislative business and thereby will be privileged under the Speech or Debate Clause.[39]

3. Nonpublic Information Requirement

The third element of an insider trading cause of action requires that the information in question be "nonpublic" meaning it is not generally available to the public and has not been broadly disseminated.[40] In a typical insider trading case, whether information is "nonpublic" is rarely contested.[41] Stock markets are presumed to be efficient, and once information is disseminated to a large number of market participants, the market price of the security quickly resembles the impact of that information to the value of the security.[42] Once the market has internalized the information, the information is said to be public,[43] and the ability for an insider to generate profits from the information is extinguished.[44] However, prior to internalization of the information by the market, the information is likely considered nonpublic for the purposes of sustaining a claim.[45]

Senators and Representatives have ample opportunities to access nonpublic information. For example, legislators through their subpoena power may access a publicly traded company's inside information through the course of a legislative investigation or could easily gain access to how a security may be traded in the future through their knowledge of a proposed legislative action, anticipated criminal investigation, or anticipated agency regulation that may impact an entire industry.[46]

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37 *Id*.

38 Kim, *supra* note 19, at 858.

39 See section II(C)(1) for a discussion of material information being privileged under the Speech or Debate Clause and therefore unavailable to investigators.

40 LANGEVOORT, *supra* note 22, at § 5:4 (citing SEC v. Matthew, 121 F.3d 44, 50 (2d Cir. 1997)).

41 *Id.*

42 *Id.*

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

44 LANGEVOORT, *supra* note 22, at § 5:4.

45 *Id.*

46 Kim, *supra* note 19, at 859.

C. *Breach of Fiduciary Duty Requirement*

In order to determine whether a fiduciary duty exists, and whether the defendant breached their fiduciary duty when they traded on material, nonpublic information, requires a factfinder to distinguish between four different theories of insider trading lability: (1) the "classical" theory; (2) the "tipper-tippee" theory; (3) the "constructive" theory; and (4) the "misappropriation" theory.[47] Without a requisite fiduciary duty, a defendant cannot be liable for trading on material, nonpublic information. As discussed in the previous section, a defendant will be found liable for insider trading under all four theories if the defendant (1) traded (or tipped) a security on (2) material, (3) nonpublic information (4) in breach of a fiduciary (or fiduciary-like) duty. The tipper-tippee and constructive theories are outgrowths of the classical theory of insider trading and will be discussed first, followed by a summary of the misappropriation theory.

1. The Classical, Tipper-Tippee, and Constructive Theories of Insider Trading

The "classical" theory of insider trading is conceptually the simplest: a corporate insider violates section 10(b) and Rule 10b-5 by using material, nonpublic information as the basis for trading a security in violation of their fiduciary duty owed to a corporation and its shareholders.[48] Under the "classical" theory, trading on this material, nonpublic information qualifies as a "deceptive device" under section 10(b) because "a relationship of trust and confidence [exists] between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation."[49] This relationship of trust and confidence between an corporate insider and the company to which they are an agent of, subjects the trader to a duty to disclose the material, nonpublic information prior to

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47 Kelbon, *supra* note 12, at 151–52. In 2009, the Second Circuit introduced a new theory of insider trading. *See* SEC v. Dorozhko, 574 F.3d 42, (2d Cir. 2009). In SEC v. Dorozhko, the Second Circuit held that for purposes of Section 10(b) and Rule 10(b), liability can be found without a fiduciary duty requirement in certain situations where the alleged fraud is an affirmative misrepresentation rather than a nondisclosure. *Id.* at 49. However, this case presented a unique situation where the defendant hacked into a corporation's computer system and traded on the information he obtained through the hack and has not been extended other situations. *Id.*; *see* Bradley J. Bondi & Steven D. Loftchie, *The Law of Insider Trading: Legal Theories, Common Defenses, and Best Practice for Ensuring Compliance*, 8 N.Y.U. J.L. & BUS. 151, 156–60 (2011).

48 *O'Hagan*, 521 U.S. at 651–52; *see* Aaron Kane, *Congressional Insider Trading Lives On: Not Even a Global Pandemic Could Stop It*, 15 ALBANY GOV. L. REV. 101, 103 (2022).

49 *O'Hagan*, 521 U.S. at 651–52 (quoting Chiarella v. United States, 445 U.S. 222, 228 (1980)).

trading.[50] Therefore, liability can only arise under the classical theory "when one party has information 'that the other [party] is entitled to know because of a fiduciary duty or other similar relation of trust and confidence between them.'"[51]

It is important to note that the term "similar relation of trust and confidence" suggests that relationships that are not strictly fiduciary as a matter of law but share common characteristics of a fiduciary relationship may also satisfy the requirements to sustain an insider trading cause of action.[52] Probably the best articulation of the fiduciary-like duty that arises from a relationship of trust and confidence comes from *United States v. Chestman*, where the Second Circuit stated that a "relationship of trust and confidence" must be one of "functional equivale[nce] of a fiduciary relationship" and "share the essential characteristics of a fiduciary association."[53]

In *Dirks v. SEC*, the Supreme Court expanded the classical theory in two important areas. First, the Court held that insider trading liability applies to the practice of tipping and trading on a tip under the "tipper-tippee theory."[54] The Court reasoned that a tipper, as a corporate insider privy to a company's nonpublic information, breaches their fiduciary duty of loyalty to the company when they disclose the information to a third party.[55] However, the Court noted not all discloses to third parties constitute a breach of the corporate insider's fiduciary duty.[56] Rather, the corporate insider must have received a personal benefit as a result of the disclosure in order for them to have breached their fiduciary duty.[57] Additionally, the Court reasoned that the tippee assumes the tipper's fiduciary duty of loyalty if (1) the tipper breached their duty of loyalty by sharing material nonpublic information with the tippee; (2) the tippee "knows or should have known that there has been a breach;" (3) the tippee uses the information to engage in a securities transaction; and (4) the tipper receives a personal benefit deriving from the tippee's securities transaction.[58] The personal benefit element of tippee/tipper insider trading liability has been interpreted to mean any "pecuniary gain or

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50 *Id.* at 652; Stephen M. Bainbridge, *Incorporating State Law Fiduciary Duties Into the Federal Insider Trading Prohibition*, 52 WASH. & LEE L. REV., 1189, 1194 (1995).

51 *Chiarella*, 445 U.S. at 228 (quoting RESTATEMENT (SECOND) OF TORTS § 551(2)(1) (1976)).

52 Kim, *supra* note 19, at 860–63.

53 United States v. Chestman, 947 F.2d 551, 568 (2d. Cir. 1991); *see* Jeanne L. Schroeder, *Taking Stock: Insider and Outsider Trading By Congress*, 5 WM. & MARY BUS. L. REV. 159, 189 (2014).

54 Dirks v. SEC, 463 U.S. 646, 660–62 (1983).

55 *Id.* at 647.

56 *Id.* at 662.

57 *Id.* (holding that an insider breaches their fiduciary duty when using the inside information to attain a personal benefit or gain).

58 *See generally*, *id.* at 659–61.

reputational benefit that will translate to future earnings,"[59] or when the exchange of information acted as a gift to a relative or close friend.[60] Therefore, if a member of Congress knowingly receives a tip from a corporate insider and the insider receives a personal benefit from the legislator, then the legislator assumes the insider's fiduciary duty and may not trade on the tip or further tip the information to a third party.[61]

Second, the Court in *Dirks* extended insider trading liability to "constructive insiders." Under the "constructive" theory, individuals such as attorneys, accountants, or consultants who temporarily enter into a confidential relationship with the corporation and are granted access to information normally reserved for corporate insiders are deemed insiders and assume a fiduciary duty if: (1) the corporation expects the outsider to keep the nonpublic information confidential; and (2) the constructive insider and the corporation are in a relationship that implies such a duty to keep the information confidential.[62] Therefore, if a congressional member is advising a corporation as a constructive insider (such as an consultant or attorney), then the fiduciary duty to disclose would uncontroversially apply to that member of Congress.[63]

Although the discussion of the requisite fiduciary duty under the classical theory is often thought to only apply to corporate insiders or constructive insiders, the Supreme Court in *Dirks* did not explicitly limit liability to only insiders or constructive insiders.[64] Instead, the Court reaffirmed the language first introduced in the Supreme Court's decision in *Chiarella* by noting that "there can be no duty to disclose where the person who has traded on inside information 'was not [the corporation's] agent, . . . was not a fiduciary, [or] was not a person in whom the sellers [of the securities] had placed their trust and confidence.'"[65] This categorized list suggests that "agents" and "fiduciaries" are not redundant categories under the classical or constructive insider theory and that a fiduciary-like duty may arise outside the confines of a traditional corporate insider relationship (if a relationship of trust and confidence exists that suggests a fiduciary-like duty).[66]

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59 *Id.* at 663; *see* Bondi & Loftchie, *supra* note 47, at 157–58 (finding that courts take a broad view of personal gain and have even found tippers liable for providing the information to the tippee in order to maintain networking contacts and friendships).

60 Salman v. United States, 137 S. Ct. 420, 429 (2016) (citing United States v. Salman, 792 F.3d 1087, 1093–94 (9th Cir. 2015)).

61 Kim, *supra* note 19, at 862.

62 *O'Hagan*, 521 U.S. at 651–52 (1997) (citing *Dirks*, 463 U.S. at 655, n.14).

63 Kim, *supra* note 19, at 862.

64 *Id.* at 863.

65 *Dirks*, 463 U.S. at 654 (alternations in original) (quoting *Chiarella*, 445 U.S. at 232).

66 Kim, *supra* note 19, at 863.

2. The Misappropriation Theory of Insider Trading

The alternative to the "classical" theory – and its expansion to tipper/tippee and constructive insiders in *Dirks* – is the "misappropriation theory." In resolving a circuit split, the Supreme Court first endorsed the misappropriation theory in *United States v. O'Hagan*.[67] This theory applies to situations where an individual, who is not a corporate insider within the meaning of the classical theory or its expansion in Dirk, comes into possession of material nonpublic information.[68] This outsider "commits fraud 'in connection with' a securities transaction . . . when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information."[69] The alleged fraud under the misappropriation theory does not arise from a failure to disclose the inside information to purchasers and sellers of stock, but instead arises from a defendant's failure to disclose to the source of the information the defendant's intention to trade on the information.[70] The distinction between the misappropriation theory and the classical theory is subtle. Under the classical theory, liability for a corporate insider, constructive insider, or tipper/tippee is premised on a fiduciary relationship between the trader of the nonpublic information and a purchaser or seller of company stock.[71] Under the misappropriation theory, liability is premised on a trader's deception of those who entrusted him with access to the confidential information.[72] Because of the nature of the fiduciary relationship, the misappropriation theory is thought to be the primary source of liability for government insiders, although it is possible for government insiders to be liable under the classical theory.[73]

Importantly, the misappropriation theory still requires that there be an underlying fiduciary relationship between the defendant and the source of the information. Without such a relationship, there is no independent duty to observe another person's confidence or not profit off information received.[74] However, because the misappropriation theory allows for a relationship of confidentiality to exists outside the confines of insiders or constructive insiders, this theory implicates a larger number of relationships.[75] In establishing

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67 LANGEVOORT, *supra* note 22, at § 6:3.

68 *O'Hagan*, 521 U.S. at 652–53.

69 *Id*. at 652 (citing 15 U.S.C. § 78j(b) (1934)). The Court in *O'Hagan* pulls from Agency Law to assert that under the "misappropriation theory," a trader's self-serving use of the material nonpublic information belonging to its principal, defrauds the principal in violation of agent's fiduciary duty of loyalty and confidentiality. *See id.*

70 LANGEVOORT, *supra* note 22, at § 6:1; *see, e.g.*, *O'Hagan*, 521 U.S. at 652.

71 *O'Hagan*, 521 U.S. at 652.

72 *Id.*

73 LANGEVOORT, *supra* note 22, at § 6:4.

74 *Id.*

75 *Id.*

this fiduciary duty, the emphasis is usually on a duty of trust and confidence rather than a formal fiduciary status.[76] In an effort to clarify liability under the misappropriation theory, the SEC promulgated Rule 10b5-2.[77] 10b5-2 outlines three situations where a duty of "trust or confidence" arises: (1) whenever a person "agrees to maintain information in confidence;" (2) whenever parties maintain a "history, pattern, or practice of sharing confidences, such that the recipient of the information knows or reasonably should know" that the source expects the recipient to keep the information confidential; or (3) "[w]henever a person receives or obtains material nonpublic information from his or her spouse, parent, child, or sibling."[78] The misappropriation theory and the SEC's promulgation of 10b5-2 has broadened the situations where insider trading liability can be imposed. For example, a trader who has no connection to the financial markets and merely received information from a source who premised the exchange of the information on confidentiality can be liable for insider trading if they trade on such information.

Furthermore, the misappropriation theory provides a more straight-forward application to members of Congress. Unless congressional members have a role outside their positions in Congress, such as being on a board of a company or a consultant, they likely have no direct connection to the company's security they are trading on. Instead, their requisite fiduciary duty would lie with the source of the information, which I will argue later, is to Congress as a whole as well as to other members within Congress.

II. THE STOCK ACT AND ITS SHORTCOMINGS

Now that I have provided a basic outline of the insider trading cause of action under Rule 10b-5, I now turn my focus to the only piece of legislation explicitly aimed at combating legislator insider trading: the Stop Trading on Congressional Knowledge (STOCK) Act.[79] First, I will discuss the passage of the Act and its relevant language. I will then analyze the effectiveness of the Act at preventing congressional insider trading. Then, I will turn to the two main problems with the Act and how they thwart the effectiveness of the STOCK Act.

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76 *Id.*

77 17 C.F.R. § 240.10b5-2 (2020); Thomas M. Madden, *O'Hagan, 10b-5-2, Relationships and Duties*, 4 HASTINGS BUS. L.J. 55, 70–72 (2008) ("The more recent action by the Commission to promulgate new Rules 10b5-1 and 10b5-2 was . . . an attempt to better define the circumstances where the misappropriation theory applies.").

78 17 C.F.R. § 240.10b5-2-2(b) (2011).

79 Stop Trading on Congressional Knowledge Act of 2012, Pub. L. No. 112–105, 126 Stat. 291 [hereinafter STOCK Act].

A. *The Passage of the STOCK Act*

The STOCK Act was originally introduced by Representatives Louise Slaughter and Brian Baird in 2006 as a response to news reports of Representative Tom Delay's former Chief of Staff, Tony Rudy, buying and selling hundreds of stocks from his capitol office computer.[80] However, the STOCK Act remained idle in the House until 2011 when CBS "60 Minutes" ran a story accusing multiple members of Congress of trading on insider information to obtain significant profits.[81] Feeling public backlash from the 60 Minutes report, then President Obama called on Congress to pass the STOCK Act.[82] A few weeks later, the STOCK Act was passed by both Houses and signed into law in 2012.[83] The Act intended to subject members of Congress and their staff to the rules promulgated under SEC Rule 10b-5 and prohibited them from trading securities based on nonpublic knowledge obtained through their congressional capacity.[84] Specifically, the Act clarified that:

> [E]ach 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.[85]

It is important to note that the STOCK Act did not create any new theories of insider trading liability.[86] Rather, it was intended to incorporate the existing framework of insider trading, as understood by the Supreme Court and the SEC, to impose a fiduciary duty on members of Congress and their

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80 H.R. 1148, 112th Cong. (2011); *see* Kelbon, *supra* note 12, at 161 & n.112. (citing Brody Mullins, *Bill Seeks to Ban Insider Trading By Lawmakers and Their Aides*, WALL ST. J. (Mar. 28, 2006), https://www.wsj.com/articles/SB114351554851509761).

81 *See 60 Minutes*, *supra* note 9. The allegations primarily centered around several members of Congress pulling their money from stock market twelve days before the 2008 crash. *Id.* They did so after Congress had been informed by Treasury Department and the Federal Reserve of a looming economic crash. *Id*. The 60 Minutes investigation uncovered market imparity across the political spectrum from Republican Senator Shelley Capito to Democratic Representative Nancy Pelosi. *Id.*

82 Kane, *supra* 48, at 105 (citing John Hudson, *Congress Doesn't Want to Give Up Its Insider Trading Privileges*, THE ATLANTIC (Jan. 25, 2012), https://www.theatlantic.com/politics/archive/2012/01/congress-doesnt-want-give- its-insider-trading-privileges/332676/ (quoting the portion of President Obama's State of the Union Address in which he asked Congress to "[s]end [him] a bill that bans insider trading by Members of Congress, and [he] will sign it tomorrow.")).

83 STOCK ACT, Pub. L. No. 112–105, § 6, 126 Stat. 291, 292 (2012); Stephanie Condon, *Obama Signs STOCK Act to Ban "Congressional Insider Trading,"* CBS NEWS (Apr. 4, 2012, 12:47 PM), https://www.cbsnews.com/news/obama-signs-stock-act-to-ban-congressional-insider-trading/.

84 Condon, *supra* note 83.

85 STOCK ACT, Pub. L. No. 112–105 § 4(b)(2)(g)(1), 126 Stat. 291, 292 (2012).

86 *See* Anna Fodor, *Congressional Arbitrage at the Executive's Expense: The Speech or Debate Clause and the Unenforceable Stock Act*, 108 NW. U. L. REV. 607, 627–28 (2014).

employees and reaffirmed that Congress and its staff are subject to the same civil and criminal insider trading laws that broadly apply to the public.[87] In a catchall sentence, the STOCK Act purports to affirm that members of Congress owe a fiduciary-like relationship of trust and confidence to Congress, the citizens of the United States, and the United States Government.[88] In doing so, the Act mimics the case law and Rule 10b-5 by asserting that legislators violate this duty when they trade on material, nonpublic information or when they act as a tippee.[89]

Importantly, despite significant public outcry against the perceived corruption of members of Congress during the passage of the Act, the final version of the bill was not as powerful as it could have been.[90] During floor deliberation, Senators Sherrod Brown and Jeff Merkley argued that an amendment should be added to the Act that would require members to sell securities that created conflicts of interest or place them in a blind trust.[91] Senator Brown argued that the perceived corruption implicated with owning interested securities reflected poorly on Congress and that more stringent action was necessary.[92] However, the amendment was struck down by seventy-three Senate members.[93]

Along with stating that members of Congress are subject to traditional insider trading laws, the STOCK Act increased the disclosure requirements for its members by requiring that members of Congress report their financial transactions within thirty days.[94] However, many members fail to meet this requirement, citing ignorance of law or clerical errors.[95]

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87 *See* Kelbon, *supra* note 12, at 162; *see also* Peter Rasmussen, *ANALYSIS: The Stock Act Still Works, but it Could Work Better*, BLOOMBERG L. (Aug. 4, 2020, 9:50 AM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-the-stock-act-still-works-but-it-could-work-better-6 (finding that the STOCK Act affirmed that Congress was not exempt from insider trading liability).

88 STOCK ACT, Pub. L. No. 112–105, § 4(b)(2)(g)(1), 126 Stat. 291, 292 (2012).

89 *See* STEPHEN M. BAINBRIDGE, INSIDER TRADING LAW AND POLICY 112 (2014).

90 Kane, *supra* note 48, at 108.

91 *Merkley, Brown Outline Amendment That Would Strengthen Insider Trading Bill*, JEFF MERKLEY: PRESS RELEASE (Feb. 1, 2012), https://www.merkley.senate.gov/news/press-releases/merkley-brown-outline-amendment-that-would-strengthen-insider-trading-bill.

92 *See id.*

93 *See* Donna M. Nagy, *Owning Stock While Making Law: An Agency Problem and a Fiduciary Solution*, 48 WAKE FOREST L. REV. 567, 622 (2013).

94 STOCK ACT, Pub. L. No. 112–105, § 6(a), 126 Stat. 291, 293 (2012).

95 Dave Levinthal, *78 Members of Congress Have Violated a Law Designed to Stop Insider Trading and Prevent Conflicts-of-Interest*, BUSINESS INSIDER (Jan. 3, 2023), https://www.businessinsider.com/congress-stock-act-violations-senate-house-trading-2021-9#rep-peter-welch-a-democrat-from-vermont-5.

B. *Ineffectiveness of the STOCK Act at Combating Congressional Insider Trading*

Despite numerous accusations and investigations, neither the DOJ nor the SEC have prosecuted any members of Congress for insider trading since the passage of the STOCK Act.[96] In January of 2020, Representative Chris Collin was found guilty of tipping his son inside information and sentenced to twenty-six months in prison.[97] Although the STOCK Act might have helped draw awareness to Collin's trading activities, the information he tipped to his son was acquired by Collins through his position on a company's board, not from his role as a Representative.[98]

The issue of congressional insider trading came to the forefront of public discourse during the COVID-19 pandemic.[99] During the early stages of the pandemic, when the federal government was largely downplaying the threat of the virus to the public,[100] multiple Senators, their families, and aids sold a considerable number of stock.[101] The Senators included members of both parties such as Richard Burr, Dianne Feinstein, Kelly Loeffler, and James Inhofe.[102] They sold these stocks before the public and more importantly, the market, had any inclination of the seriousness of the ensuing pandemic.[103]After these stocks were sold and it became clear that COVID-19 was going to have a serious effect on the economy, the New York Stock Exchange experienced volatility.[104] The lucky Senators and aids who sold their stocks prior to the volatility experienced profits in the millions of dollars.[105]

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96 *See* Kelbon, *supra* note 12, at 164 n.129 (federal law enforcement agencies have rarely used the STOCK Act and that at least 54 legislators have allegedly violated the STOCK Act by failing to report their securities trades); *see also* Levinthal, *supra* note 95.

97 *See* Caroline Kelly & Sheena Jones, *Former Rep. Chris Collins, the First Member of Congress to Endorse Trump, Sentenced to 26 Months in Prison in Insider Trading Case*, CNN (Jan. 18, 2020, 1:16 PM), https://www.cnn.com/2020/01/17/politics/collins-sentencing/index.html.

98 *See* Erica Orden, *Former Rep. Chris Collins Pleads Guilty to Federal Crimes*, CNN POL. (Oct. 1, 2019), https://www.cnn.com/2019/10/01/politics/chris-collins-guilty-plea/index.html (finding Representative Collins gave his son nonpublic information regarding the results of a drug trial conducted by a company who Collins was a board member of).

99 *See* Gregorian, *supra* note 10.

100 *See, e.g.*, Kathryn Watson, *A Timeline of What Trump Has Said on Coronavirus*, CBS NEWS (Apr. 3, 2020, 6:35 PM), https://www.cbsnews.com/news/timeline-president-donald-trump-changing-statements-on-coronavirus/.

101 *See* Gregorian, *supra* note 10.

102 *Id.*

103 *Id.*

104 *See* Taylor Telford & Thomas Heath, *U.S. Stocks Nosedive, Trading Paused as Emergency Fed Action Fails to Mollify Investors*, THE WASH. POST (Mar. 16, 2020, 3:19 PM), https://www.washingtonpost.com/business/2020/03/16/stocks-markets-live-updates-coronavirus/.

105 *See* David Shortell, et al., *Exclusive: Justice Department Reviews Stock Trades by Lawmakers After Coronavirus Briefings*, CNN POL. (Mar. 30, 2020, 10:22 AM), https://www.cnn.com/2020/03/29/politics/justice-stock-trades-lawmakers-coronavirus/index.html

When news of these trades by the Senators and their aids came to light, there was considerable bipartisan outrage.[106] The FBI opened an investigation into all four Senators.[107] However, Senators Feinstein, Loeffler, and Inhofe were all quickly cleared.[108] Under intense media pressure, Senator Burr resigned from his Chair position on the Senate Intelligence Committee,[109] but the investigation into his actions was eventually dropped as well.[110]

Congressional insider trading continues to be in the news. In September of 2022, the New York Times published a report that analyzed the trading activity of Senators and Representatives and found that 97 lawmakers (or their family members) bought or sold publicly traded assets in industries that could be affected by the lawmaker's legislative committee work.[111] For example, the report found that the wife of Representative Alan Lowenthal sold a large number of Boeing shares on March 5, 2020, which was just one day before a House committee on which Representative Lowenthal sits, released their preliminary finding into Boeing's mishandling of its production of their 737 Max jet.[112]

C. *Problems With the STOCK Act*

Why has not a single member of Congress been charged, nevertheless convicted, of insider trading under the STOCK Act despite numerous reliable accusations and multiple investigations? The answer lies with the two major hurtles that prosecutors must overcome to successfully assert an insider trading cause of action under the STOCK Act. First, although the STOCK Act

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(discussing a few examples, including one Senator making between $628,000 and $1.7 million from selling their stocks and another making between $1.275 million and $3.1 million on stock deals).

106 *See* Katie Shepherd, *'There is No Greater Moral Crime': Tucker Carlson Calls for Sen. Richard Burr's Resignation Over Stock Sell-Off*, WASH. POST (Mar. 20, 2020, 9:40 AM), https://www.washingtonpost.com/nation/2020/03/20/coronavirus-tucker-carlson-burr/.

107 Dan Mangan, *DOJ Still Investigating Coronavirus Stock Sales by Sen. Burr, but Drops Probes of Loeffler, Inhofe, Feinstein*, CNBC (May 27, 2020, 8:17 AM), https://www.cnbc.com/2020/05/26/coronavirus-doj-investigates-burr-stock-sales-drops-loeffler-feinstein-probes.html.

108 *Id.*

109 Jeremy Herb et al., *Richard Burr to Step Down as Intelligence Committee Chairman*, CNN POL. (May 14, 2020, 3:09 PM), https://www.cnn.com/2020/05/14/politics/richard-burr-steps-down-intel-chairman/index.html.

110 Evan Perez & Paul LeBlanc, *DOJ Closes Insider Trading Investigation Into Sen. Richard Burr*, CNN POL. (Jan. 19, 2021, 9:28 PM), https://www.cnn.com/2021/01/19/politics/doj-insider-training-investigations-closed/index.html.

111 Kelly, et al., *supra* note 11.

112 *Id.*; House Committee on Transportation & Infrastructure, *The Boeing 737 MAX Aircraft: Preliminary Investigative Findings* (March 2020), https://transportation.house.gov/imo/media/doc/TI%20Preliminary%20Investigative%20Findings%20Boeing%20737%20MAX%20March%202020.pdf.

clearly indicates that members of Congress are not immune from insider trading laws and owe a fiduciary duty of trust and confidence, it is difficult to determine what this duty specifically is and how it is defined. Second, the Speech or Debate Clause of the Constitution provides significant evidentiary hurtles investigators must overcome to successfully investigate and prosecute members of Congress for insider trading.

1. Ambiguity of the Fiduciary Duty Asserted in The STOCK Act

In the typical insider trading case, whether a defendant owes a fiduciary duty is easily identified. Individuals such as officers, directors, controlling shareholders, employees, and the corporation itself are fiduciaries as a matter of law and their obligations are clearly defined through well-established precedent making it easy for the court to apply the classical theory.[113] Under the misappropriation theory, defendants can be assumed to engage in a fiduciary-like relationship that requires them to keep confidence such as employer-employee, principal-agent, or client-attorney relationships.[114] Recall that the Supreme Court in *Chiarella* and *Dirks* indicated their intention to expand the category of relationships where a fiduciary-like duty arises when they used the phrase "fiduciary or other similar relation of trust and confidence."[115] However, Supreme Court has said little on how to identify which types of relationships fit this expanded category.[116]

Although the STOCK Act clearly indicates that members of Congress are not immune from insider trading laws and owe a duty of "trust and confidence," it is difficult to determine what this duty specifically is and how it is defined. Prior to the STOCK Act's passage, many commentors believed that members of Congress were immune from congressional insider trading.[117] A majority of commentors believed that this stemmed from the difficulty of establishing a breach of a fiduciary duty for members of Congress.[118] This majority view asserts that unlike employees of the other three branches of government who are agents and therefore subject to insider trading laws

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113 *See, e.g.*, *Chiarella*, 445 U.S. at 227–30 (summarizing established precedents of fiduciary relationships).

114 *Chestman*, 947 F.2d at 568.

115 *Chiarella*, 445 U.S. at 228; *Dirks*, 463 U.S. at 654.

116 Schroeder, *supra* note 53, at 187–88.

117 *See* Kim, *supra* note 19, at 847– 48 (stating that the majority view of commentators on Congressional insider trading assert that insider trading laws did not reach members of Congress); *see also* Stephen M. Bainbridge, *Insider Trading Inside the Beltway*, 36 J. CORP. L. 281, 295–96 (2011) (describing Congressional immunity to insider trading law as the "predominant view").

118 *See* Kim, *supra* note 19, at 848.

through their employer/employee relationships,[119] members of Congress are independent and are not employees of anyone.[120]

Recall that the language of the STOCK Act states that members of Congress owe a duty of trust or confidence to Congress, the United States Government, and the citizens of the United States.[121] Despite this language, it is difficult to see how a member of Congress violates this duty in a typical insider trading fact pattern. For example, say a member of Congress acquires inside information regarding an upcoming regulation that will greatly impact the profits of a particular company. The Congress member sells a significant amount of the company's stock, resulting in massive profits. They are certainly trading on nonpublic, material information in order to receive a competitive edge in the market. This satisfies the first three elements of an insider trading cause of action. But what fiduciary or fiduciary-like duty exists and how did they breach that duty? They did not breach a fiduciary duty under the classical theory because they are neither insiders nor constructive insiders within the meaning of the term. Under the misappropriation theory, it might be easier to argue that the congressional member broke their promise to keep nonpublic information confidential.[122] But what promise did the member of Congress break? Did they break their promise to the United States Government or to the citizens of the United States or to Congress itself?

Without a clearer picture of the duty owed by members of Congress when they acquire inside information, it might be difficult for prosecutors to bring an insider trading case.[123] The problem is coupled by the fact that ambiguity surrounds the phrase "trust and confidence" and the fact that many scholars prior to the STOCK Act believed that members of Congress were not fiduciaries to anyone.

2. The Speech or Debate Clause as the Major Evidentiary Hurdle

The second reason that the STOCK Act has been ineffective is due to the evidentiary hurtles associated with its implementation. These hurdles stem from the current interpretation of the Speech or Debate Clause of the

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119 *See* Bainbridge, *supra* note 117, at 297 (asserting that "no serious doctrinal obstacle precludes applying misappropriation theory [of insider trading] to *employees* of Congress, the Executive Branch, and other governmental agencies.") (emphasis added).

120 *See* Kim, *supra* note 19, at 849 (asserting that under this majority view, member of Congress are fiduciaries to no one because they are "neither employees nor agents of any larger entity.") (quoting *Insider Trading and Congressional Accountability: Hearing Before the S. Comm. on Homeland Sec. & Gov't Affairs*, 112th Cong. 4 (2011) (statement of John C. Coffee, Jr., Professor of Law, Columbia Univ.)).

121 STOCK ACT, Pub. L. No. 112–105 § 4(b)(2), 126 Stat. 291, 292 (2012).

122 LANGEVOORT, *supra* note 22, at § 6:1 (arguing that the misappropriation theory allows for government insiders to be prosecuted for insider trading).

123 Matthew Barbabella et. al., *Insider Trading in Congress: The Need for Regulation*, 9 J. BUS. & SEC. L. 199, 215 (2009).

Constitution.[124] The Speech or Debate Clause provides that: "Senators and Representatives shall . . . be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; for any Speech or Debate in either House, they shall not be questioned in any other Place."[125] Generally, this Clause protects the right of members of Congress to conduct legislative activity without the threat of prosecution or interference by the Executive, but will not protect activity that does not have a legislative purpose.[126] The Supreme Court has applied this clause more broadly than merely protecting speeches and debates and has applied it to anything done in the legislative process, such as committee activity[127] and voting.[128] However, the Supreme Court has limited the immunity derived from the Clause by asserting that it does not protect against any conduct possibly related to legislation because this would lead members of Congress to assume that they are "above the law."[129]

Some scholars believe that the Speech or Debate Clause does not pose a significant hurtle to prosecution and investigation under the STOCK Act.[130] They argue that given the Supreme Court's treatment of other information-sharing acts as non-legislative acts, such as those that regulate press releases, the information implicated in insider trading should also not be privileged.[131] They argue that the conveyance of nonpublic information in the context of insider trading is not central to the legislative process and the actual trading of the information is even more removed from the legislative process, therefore making it available to investigators and prosecutors when looking into members of Congress for insider trading.[132]

This argument follows the reasoning put forth in *United States v. Brewster*, where the Supreme Court distinguished between taking a bribe which is a criminal, non-legislative act and the performance of the promise that the bribe required (in this case was to vote for a piece of legislation, an legislative act).[133] Using *Brewster*, one scholar argues that "[just as the Speech [or] Debate Clause does not prohibit members of Congress from being prosecuted

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124 Kane, *supra* note 48, at 111; Kim, *supra* note 19, at 915–19; Barbabella et. al., *supra* note 123, at 217–19.

125 U.S. CONST. art. I § 6, cl. 1.

126 Gravel v. United States, 408 U.S. 606, 616 (1972); *see* Barbabella et. al., *supra* note 123, at 218.

127 *See* Tenney v. Brandhove, 341 U.S. 367, 377–78 (1951).

128 *See* Kilbourn v. Thompson, 103 U.S. 168, 204 (1880).

129 *See* United States v. Brewster, 408 U.S. 501, 516 (1972) (preforming a legislative act as consideration for a bribe was not protected by the Speech and Debate Clause).

130 Fodor, *supra* note 86, at 632–33.

131 *See, e.g.,* Barbabella et. al., *supra* note 123, at 218–19 (citing cases where the Supreme Court has refused to grant immunity for information published by legislators in press releases).

132 *Id.*

133 *See Brewster*, 408 U.S. at 526; Fodor, *supra* note 86, at 632–33 (citing Bainbridge, *supra* note 117, at 303 (asserting that the Speech or Debate Clause does not present a significant hurtle by relying on the Supreme Court's holding in *Brewster*)).

for accepting bribes, it should not bar regulation of congressional insider trading."[134]

However, scholars who believe that the Speech or Debate Clause does not present a hurtle to combating insider trading under the STOCK Act fail to consider the D.C. Circuit's decision in *United States v. Rayburn House Office Building*.[135] In *Rayburn*, FBI agents, under a valid search warrant, entered the Rayburn Office Building and searched Representative William Jefferson's office in search of documents connected to an alleged fraud and bribery scheme.[136] The circuit court broadly interpreted the Speech or Debate Clause to hold that the search warrant was unconstitutional and that compelling disclosure of documents related to legislative acts violated the Clause.[137] Before the D.C. Circuit's decision in *Rayburn*, the Speech or Debate Clause was largely understood to allow members of Congress to refuse to testify about their involvement in legislative acts and did not include the privilege for an individual member of Congress to withhold documents that were sought under a valid warrant.[138] The Supreme Court denied to hear *Rayburn*,[139] and the individual guarantee that members of Congress are immune from disclosing any documents connected to legislative acts remains good law in the nation's capital.[140]

On the other hand, the Ninth Circuit in *United States v. Renzi* rejected former Representative Richard Renzi's argument that the Speech or Debate Clause included the privilege of nondisclosure for reports related to legislative actions.[141] However, the Supreme Court did not grant certiorari and the decision in *Rayburn* continues to be good law, while also creating a circuit split.[142]

As a result, the Speech or Debate Clause frustrates and might even bar a successful insider trading suit under the STOCK Act. Unlike in *United States v. Brewster*, where both the main evidentiary component and the underlying crime was the bribe, and the legislative act (voting on a piece of legislation) was merely ancillary to the bribe; in an insider trading case the evidentiary component is the conveyance of material, nonpublic information

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134 Bainbridge, *supra* note 117, at 303.

135 United States v. Rayburn House Office Bldg., 497 F.3d 654 (D.C. Cir. 2007), cert. denied, 552 U.S. 1295 (2008).

136 *Id.* at 656.

137 *Id.*; *see* Fodor, *supra* note 86, at 624 (the [D.C. Circuit] interpreted legislative privilege broadly to permit nondisclosure of covered materials to the Executive Branch or any of its agents, even in a criminal investigation) (citing *Rayburn*, 497 F.3d at 662–63).

138 *See* Fodor, *supra* note 86, at 610–11.

139 *Rayburn*, 552 U.S. at 1295.

140 *See* Brachman, *supra* note 8, at 292 (noting that the Rayburn decision is still good law in D.C. where most of the litigation of the Speech or Debate Clause takes place).

141 *See* United States v. Renzi, 651 F.3d 1012, 1037–39 (9th Cir. 2011), *cert. denied,* 565 U.S. 1157 (2012).

142 *See id.* at 1157; *see also* Klebon, *supra* note 12, at 174.

and the underlying crime is the trading and breach of fiduciary duty.[143] While the act of trading on insider information is not privileged; the material, nonpublic information – which is central to bringing a cause of action – will likely be perceived as legislative because it was likely acquired through the legislative process of Congress.[144] For example, during the DOJ's investigation into Senator Burr's trading activities, if federal authorities were to subpoena Senator Burr to answer questions regarding the material, nonpublic information he allegedly traded upon, the information would likely be privileged because it was acquired through senatorial briefings.[145] Similarly, if investigators were to issue a warrant for Senator Burr's cell phone the decision in *Rayburn* would be implicated because the Senator most likely used his cell phone to conduct congressional business.[146]

Insider trading is already extremely difficult to prove, and prosecutors require specific information surrounding the transfer of insider information to bring a case. If members of Congress are able to invoke the nondisclosure privilege endorsed in *Rayburn*, then the STOCK Act looks more like a political stunt rather than a real deterrent to congressional insider trading. As one scholar puts it: "[t]he post-*Rayburn* environment created an arbitrage opportunity" where "the Act's passage without [a] wavier [of legislative privilege] will game the system."[147]

III. CONGRESS OWES A FIDUCIARY DUTY TO CONGRESS AS AN INSTITUTION

As previously discussed, the uncertainty surrounding the duty that a member of Congress owes (and breaches) when they engage in insider trading frustrates the ability of the STOCK Act to be enforced. One possible solution to the problem is to rely on analogical reasoning to assert that members of Congress are fiduciaries to Congress by virtue of how they receive nonpublic information. In the next section I will discuss how this understanding of the fiduciary relationship could potentially alleviate the evidentiary burdens associated with the Speech or Debate Clause by providing evidence that a waiver of the protection should be granted for the purposes of investigating insider trading allegations.

Recall that the SEC promulgated Rule 10b5-2, intended to clarify when a relationship of "trust and confidence" arises under the misappropriation

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143 Fodor, *supra* note 86, at 633 (citing *Brewster*, 408 U.S. at 526).

144 *See* Brachman, *supra* note 8, at 294–95.

145 Robert Anello, *How Senators May Have Avoided Insider Trading Charges*, FORBES (May 26, 2020, 9:28 PM), https://www.forbes.com/sites/insider/2020/05/26/how-senators-may-have-avoided-insider-trading-charges/?sh=247afc5b27ba.

146 *Id.*

147 Fodor, *supra* note 86, at 634.

theory.[148] Specifically, the rule states that a duty of trust or confidence exists when parties sharing material nonpublic information have a "history, pattern, or practice of sharing confidences" such that the person receiving the information knows that they are expected to keep the information confidential.[149] In the context of congressional insider trading, the question becomes whether a relationship between Congress as a whole and its individual members have a "history, pattern, or practice of sharing confidences" suggesting that Congress expects its members to keep certain information confidential.

Evidence of a relationship where members are expected to keep information derived from their positions in Congress confidential can be found in the Code of Ethics for Government Services.[150] The Code of Ethics states that any person engaged in government service should "[n]ever use any information coming to him confidentially in the performance of governmental duties as a means for making private profit." This regulation mimics the well-established common law ban on fiduciaries using information derived from their position to pursue secret private profits.[151] What is unique about this regulation is that it pulls from common law fiduciary law and applies it equally (to all members of the United States government) including members of Congress who are not de-facto fiduciaries by virtue of their employer/employee relationship.[152] If presented to a court, this regulation could provide the necessary evidence to assume that members of Congress have assumed a fiduciary-like duty of trust and confidence to Congress by virtue of adhering to this regulation.

Furthermore, as a practical matter, it makes sense that members of Congress are in a fiduciary-like duty of trust and confidence with Congress as a whole. As Professor Sung Hui Kim points out, the relationship between a member of Congress and its individual members can be analogized to the relationship between individual partners and the partnership itself.[153] Under the Revised Uniformed Partnership Act ("RUPA"), the "fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care."[154] Under partnership law, each member of a partnership is both an agent and principle and owes a fiduciary duty of loyalty to every

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148 *See* Section I(C)(1) for a complete overview of Rule 10b5-2(b)(2).

149 17 C.F.R. § 240.10b5-2(b)(2) (2020). Note that SEC v. Cuban called into question the validity of Rule 10b5-2, 634 F. Supp. 2d 713, 714 (N.D. Tex. 2009) but the case was vacated and remanded by the Fifth Circuit who did not reach a decision on the validity of 10b5-2. *See* SEC v. Cuban, 620 F.3d 551 (5th Cir. 2009).

150 Code of Ethics for Government Service, 21 C.F.R. § 19.6 (1958).

151 It is well-established law that a fiduciary has a duty of loyalty to their principle that forbids them from using their position to profit individually. *See* AM. JUR. 2D CORPORATIONS § 1467 (2022).

152 Recall that unlike other positions in government, legislators are not in an employee/employer relationship. *See* section II(C)(1).

153 *See* Kim, *supra* note 19, at 885–87.

154 Revised Uniform Partnership Act § 404(a) (2006)) [hereinafter RUPA]; *see also* § 12:15, Partnership fiduciary duties under RUPA: In general, Partnership Law & Practice § 12:15 (2022–2023).

other partner in the partnership and the partnership as a whole.[155] Furthermore, RUPA defines a partnership as a "association of two or more person to carry on as co-owners of a business for profit . . . whether or not the persons intend to form a partnership."[156]

In using this analogy, Sung Hui Kim notes that members of Congress do not join together to carry on a business for profits, but they do come together to carry on a singular enterprise: the business of Congress.[157] Members of Congress forsake other possible business ventures and come together to pass legislation and the success of their venture depends on working together with fellow lawmakers.[158] Similar to how partners share in the control of a partnership equally, individual members of Congress have equal standing in Congress and their ability to enact change is dependent on the whole of Congress.[159]

Furthermore, when a member of Congress acquires inside information, they do so through their participation in Congress. Through hearings, committee reports, and floor deliberation, members of Congress acquire confidential information that is intended to be used to draft effective legislation in Congress. Under the misappropriation theory, a partner in a partnership violates their fiduciary duty of loyalty when they use information acquired through the partnership to trade.[160] Similarly, members of Congress violate their duty of trust and confidence to Congress when they trade on information acquired through Congress.

Overall, this analogy provides further evidence that under Rule 10b5-2 a "history, pattern, or practice of sharing confidences" exists for members of Congress. Combining this with the fact that the Code of Ethics for Government services forbids government actors from using confidential information for profit, a court should have little trouble applying the misappropriation theory to a member of Congress for insider trading under the STOCK Act. This framework clarifies the duties under the STOCK Act by providing a straightforward framework for federal investigators and courts to use the STOCK Act as an effective enforcement mechanism.

IV. HOW THIS DEFINITION STRENGTHENS THE STOCK ACT

Using the framework above gives clarity to the STOCK Act by providing a clear path for asserting an insider trading claim against a member of Congress. However, it does not (yet) directly solve the evidentiary issues

155 *See* Kim, *supra* note 19, at 885 (citing RUPA § 404(a) (2006)).

156 RUPA § 202(a).

157 *See* Kim, *supra* note 19, at 886.

158 *Id.*

159 *Id.*

160 SEC v. Peters, 735 F. Supp. 1505, 1521 (D. Kan. 1990) (finding that a partner potentially violated his fiduciary duty to his partner under the misappropriation theory when he traded on confidential information).

implicated by the Speech or Debate Clause. As previously discussed, without the ability for investigators to issue subpoenas and search warrants to demonstrate that a member of Congress used material, nonpublic information to trade, an indictment under the STOCK Act is unlikely. The purpose of this section is to provide an argument that classifying the relationship between Congress as a whole and its members as a fiduciary-like relationship of trust and confidence advances an argument for a waiver of the protections under the Speech or Debate Clause for the purposes of investigating insider trading.

In *United States v. Helstoski*, the Supreme Court held that a federal statute that outlawed bribery did not create a waiver of legislative privilege under the Speech or Debate Clause.[161] However, the Court left open the possibility of Congress instituting a waiver if certain conditions are met. The Court concluded that a waiver would be constitutional only if "an explicit and unequivocal expression" was expressed by Congress.[162] In *Helstoski*, this burden was not met in the case of the bribery statute.[163] In *United States v. Brewster*, Justice White dissented from the majority opinion insisting that the Speech or Debate Clause did not foreclose the ability of Congress to regulate its own members: "[t]he Speech or Debate Clause does not immunize corrupt Congressman. It reserves the power to discipline in the Houses of Congress."[164] As Justice White notes, Congress can and should police its own members for actions that violate their ethics as well as the laws of the United States.

The STOCK Act indicates that members of Congress are not immune from insider trading laws. As I argued above, each member of Congress owes a fiduciary duty of trust and confidence to their fellow Congressmen and Congress as a whole, similar to how a partner owes a fiduciary duty to their fellow partners and the partnership as a whole. Under partnership law, partners may govern their internal affairs through the agreement of a majority of partners.[165] Any action taken to regulate the internal affairs of the partnership is binding if taken in good faith and within the scope of the partnership's business.[166]

Similarly, Congress has the power to self-regulate and police its members in a way they see fit. An internal mechanism that keeps Congress out of the press and prevents allegations that undermine the confidence of Congress can be said to be part of Congress's "internal affairs." Furthermore, Congress already has statutes and regulations in place that do regulate its internal affairs. For example, Congress has already enacted specific statutes aimed at combating bribes and eliminating conflicts of interests for all government

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161 Fodor, *supra* note 86, at 635 (citing United States v. Helstoski, 442 U.S. 477, 493 (1979)).

162 *Helstoski*, 442 U.S. at 493.

163 *Id.*

164 Brewster, 408 U.S. at 563 (White, J., dissenting).

165 AM. JUR. 2D PARTNERSHIP § 273 (2022).

166 *Id.*

officials, including members of Congress.[167] Moreover, Congress has already instituted some internal mechanisms to oversee and investigate the conduct of congressional members. A good example of these internal mechanisms is the Office of Congressional Ethics ("OCE").[168] First authorized by the House of Representatives in 2008, the OCE is an independent investigatory panel whose powers include the ability to investigate and punish members of both parties in the House of Representatives.[169] The panel is composed of six members, three being nominated from each political party, and is answerable to the whole of the House by a majority vote.[170] The powers of the panel extends to investigating any member of the House of Representatives or employee of a member for "any law, rule, regulation, or other standard of conduct."[171] Additionally, the panel has the power to hold hearings, solicit testimony, and attain relevant evidence.[172] Upon completing their investigation, the OCE drafts a written report where they lay out all material facts and evidence produced during an investigation and recommends whether any subpoenas should be issue to further investigate the matter.[173] Although the Senate does not have a similar panel, they could easily authorize one to investigate broadly, like the OCE, or to limit its scope to allegations of insider trading.

Additionally, because the investigations under the STOCK Act would be internal, considerations surrounding Executive encroachment would not be implicated. This means that the evidentiary hurtles implicated in the Speech or Debate Clause would likely not pose a problem for these panels. In turn, these panels could vet viable claims of insider trading and then refer the manner to federal investigators from the DOJ and SEC. Of course, federal investigators might still run up against the legislative privilege problems associated with the Speech or Debate Clause. But, this filtering function, where allegations of insider trading are first investigated internally and then passed to the Executive upon the recommendation of the internal panel for further investigation, supports an argument that Congress should create a waiver of the protections under the Speech or Debate Clause for the STOCK Act. Once an internal panel finds creditable evidence that a member of Congress improperly used material, nonpublic information to trade on the stock market, then it makes sense that federal investigators should be able to proceed freely to create a case against that member of Congress. Additionally, if Congress

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167 *See, e.g.*, 18 U.S.C. § 201(b)(1)(a) (1994) (stating that it is a crime for a public official to engage in conveyance of anything of value with the intent to influence any government activity); 18 U.S.C. § 201(c) (1994) (it is a crime for a government official to accept any gratuity for their performance of an official act). Note that members of Congress are included in the covered positions under this act. 18 U.S.C. § 201(a)(1); *see, e.g.*, Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as an amendment in scattered sections of 2, 5, 18 and 28 U.S.).

168 H.R. Res. 895, 110th Cong. (2008).

169 *See* H.R. Res. 895, § (I).

170 *Id.* at § (I)(b).

171 *Id.* at § (I)(c).

172 *Id.* at § (I)(c)(ii)(2)(D).

173 *Id.* at § I(c)(ii)(2)(C)(i–ii).

would institute an explicit and specific waiver of the protections under the Speech or Debate Clause using this framework, it would probably receive Supreme Court endorsement. Especially if the waiver is conditioned upon a recommendation from an internal panel.

CONCLUSION

The story of a legislator using their lofty position on Capitol Hill to trade on insider information for their own financial benefit creates strong sentiments of injustice. It reeks of unfairness and pulls on the heartstrings of all Americans regardless of their political predisposition. We were told that the STOCK Act was passed to put an end to congressional insider trading. However, the ambiguity surrounding the fiduciary duty owed by members of Congress was not solved by the STOCK Act, and the evidentiary hurtles posed by the Speech or Debate Clause were not eliminated by the Act's passage. Instead, Congress continues with business as usual, acquiring inside information and profiting on the market.

As discussed above, the fiduciary relationship between partners in a partnership mimics the relationship that legislators have with their fellow members of Congress and Congress as a whole. Federal prosecutors and courts should use this framework to assert that members of Congress breach their fiduciary duty to Congress when they engage in insider trading. Furthermore, Congress is compelled to internally investigate its own members for violations of its ethics and the laws of the United States. Doing so, however, requires Congress to forsake some of the privileges they enjoy under the Speech or Debate Clause through a waiver. The best way to do this is to compromise and create an internal vetting protection before members of Congress are open to investigation by federal authorities. This framework provides a compromise between the necessary protections against Executive encroachment within the Speech or Debate Clause and the necessity for federal authorities to be able to prosecute the criminal activities of Congress. Given the warranted public perception that members of Congress are in fact above the law when it comes to insider trading, and the lack of progress Congress has made in combating this perception, it makes sense that this compromise is warranted for the STOCK Act.