

7-14-2020

Profiteering Off Public Health Crises: The Viable Cure for Congressional Insider Trading

Charles L. Slamowitz

Segal McCambridge Singer & Mahoney, Ltd.

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr-online>



Part of the [American Politics Commons](#), [Health Law and Policy Commons](#), [Legislation Commons](#), and the [Securities Law Commons](#)

Recommended Citation

Charles L. Slamowitz, *Profiteering Off Public Health Crises: The Viable Cure for Congressional Insider Trading*, 77 WASH. & LEE L. REV. ONLINE 31 (2020), <https://scholarlycommons.law.wlu.edu/wlulr-online/vol77/iss1/3>

This Development is brought to you for free and open access by the Law School Journals at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review Online by an authorized editor of Washington & Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Profiteering Off Public Health Crises: The Viable Cure for Congressional Insider Trading

Charles L. Slamowitz*

Abstract

This article takes an approachable, forward-thinking, and academic dive into congressional insider trading in the wake of the coronavirus (COVID-19) pandemic. After a confidential briefing by the Senate Health Committee warned of COVID-19, massive stock sell-offs by members of Congress and their spouses suddenly ensued. Some senators even publicly disparaged COVID-19's viral effects while their own shares were being offloaded. By the time the American people were made aware of its dangers, vast investment holdings by congressional insiders had already been sold. Shockingly, it is unclear if congressional insiders trading on confidential coronavirus information are actually breaking the law. Congress members are also not required to timely disclose trades, even during pandemics, leaving the American people in the dark. This article provides the only viable remedy to congressional insider trading, crucial for governmental transparency and accountability to precipitously curb public health crises moving forward.

* Counsel, Segal McCambridge Singer & Mahoney, Ltd.; J.D., Emory University School of Law, 2016. Thank you to my mentors, Hon. Martin Shulman, Presiding Justice of the New York Supreme Court, Appellate Term, First Judicial District; Hon. Shlomo S. Hagler, Justice of the Supreme Court of New York County; John C. Coffee, Jr., Adolf A. Berle Professor of Law at Columbia University Law School; and Larry Kramer, former Dean of Stanford Law School. Many thanks to the *Washington and Lee Law Review Online* editorial staff for timely publishing this pivotal issue in unprecedented times.

Table of Contents

I. Introduction	32
II. The Faulty Application of Insider Trading Laws to Congress	34
III. The Growing Uncertainty Plaguing Insider Trading Cases..	37
IV. Curing Congressional Insider Trading	45

I. Introduction

In the wake of an impending global pandemic¹ with momentous economic consequences,² a confidential briefing by the Senate Health Committee warned of the novel coronavirus, SARS-CoV-2 (which leads to the disease called COVID-19).³ Within days, massive stock sell-offs by members of Congress and their spouses ensued.⁴ Some senators even publicly downplayed COVID-19's viral effects while their own shares were being offloaded.⁵ By the time the American people were

1. The World Health Organization (WHO) later declared COVID-19 a pandemic. *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19—11 March 2020*, WORLD HEALTH ORG. (Mar. 11, 2020), <https://perma.cc/U22L-B6WB>.

2. See WARWICK MCKIBBIN & ROSHEN FERNANDO, BROOKINGS INST., *THE GLOBAL MACROECONOMIC IMPACTS OF COVID-19: SEVEN SCENARIOS 2* (2020), <https://perma.cc/6269-NWM4> (PDF). The United States entered a recession in February according to National Bureau of Economic Research, as a direct result of COVID-19. See Jeanna Smialek, *The U.S. Entered a Recession in February*, N.Y. TIMES (June 8, 2020), <https://perma.cc/29QE-MTT2>.

3. See Press Release, U.S. Senate Comm. on Health, Edu., Lab. & Pensions, Senate Health Committee Announces Briefing to Update Senators on Coronavirus (Jan. 23, 2020), <https://perma.cc/N2DZ-GB9B>.

4. See Sylvan Lane, *Four Senators Sold Stocks Before Coronavirus Threat Crashed Market*, THE HILL (Mar. 20, 2020, 8:47 AM), <https://perma.cc/NWG6-5JAH> (last updated Mar. 20, 2020, 11:11 AM); Ed Lin, *Nancy Pelosi's Husband Bought Up Slack, Microsoft, and Alphabet Securities*, BARRON'S (Apr. 2, 2020, 12:47 PM), <https://perma.cc/2VSS-RQU7>.

5. See Robert Faturechi & Derek Willis, *Senator Dumped Up to \$1.7 Million of Stock After Reassuring Public About Coronavirus Preparedness*, PROPUBLICA (Mar. 19, 2020, 5:01 PM), <https://perma.cc/ADS5-6X22> (last updated Mar. 25, 2020); Sen. Kelly Loeffler (@KLoeffler), TWITTER (Feb. 28, 2020, 11:20 AM), <https://perma.cc/882D-JDCG>.

made aware of its dangers, vast investment holdings by congressional insiders had already been sold.

Public health crises require the government and its agencies to take heightened remedial action⁶ by integrating transparent communication and accountability.⁷ But crises inherently offer opportunities for the government to abuse power or profiteer.⁸ Shockingly, congressional insiders trading on coronavirus information may not actually be breaking the law. Congresspersons are also not required to timely disclose these trades, even during pandemics, leaving the American people in the dark. However, promptly revealing the transactions is crucial for governmental transparency and accountability to effectively curb contagion.⁹ Is there a cure?

6. See generally Michael Olusegun Afolabi, *Pandemic Influenza: A Comparative Ethical Approach*, in 12 *ADVANCING GLOBAL BIOETHICS* 59 (2018) (discussing government obligations to its citizens during public health crises); HOMELAND SEC. COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA: IMPLEMENTATION PLAN (2006), <https://perma.cc/5FFE-XJ98> (PDF) [hereinafter IMPLEMENTATION PLAN]; Pandemic and All-Hazards Preparedness and Advancing Innovation Act of 2019 (PAHPAD), Pub. L. No. 116–22, 113 Stat. 905. (to be codified at 42 U.S.C. § 201).

7. See Bruce Jennings & John D. Arras, *Ethical Aspects of Public Health Emergency Preparedness and Response*, in *EMERGENCY ETHICS: PUBLIC HEALTH PREPAREDNESS AND RESPONSE* 1, 6 (Jennings et al. eds., 2016) (arguing emergency preparedness activities are to incorporate transparent and accountable decision-making processes); Toni G.L.A. van der Meer & Yan Jin, *Seeking Formula for Misinformation Treatment in Public Health Crises: The Effects of Corrective Information Type and Source*, 35 *HEALTH COMM.* 560, 560–75 (2020) (stating governments are responsible for timely transparent information dissemination and in charge against misinformation); WORLD HEALTH ORG., PANDEMIC INFLUENZA PREPAREDNESS AND RESPONSE 41 (2009), <https://perma.cc/J6QJ-NACE> (PDF) (determining it is a necessity to maintain trust to the public through a commitment to transparency and credibility).

8. See Jennings & Arras, *supra* note 7, at 13 (“[E]thics and the law [in the U.S. and many other countries] have always recognized that rights and liberties can be temporarily overridden during an emergency situation when substantial harm to others is impending. Such temporary power has the potential for being extended in unjust ways and abused.”); see also GEORGE J. ANNAS ET AL., ACLU, PANDEMIC PREPAREDNESS: THE NEED FOR A PUBLIC HEALTH—NOT A LAW ENFORCEMENT/NATIONAL SECURITY—APPROACH 23–24 (2008), <https://perma.cc/6QQK-NK6H> (PDF) (stating scientific uncertainty in public health disasters tempt government officials to attempt some form of a cover-up).

9. See IMPLEMENTATION PLAN, *supra* note 6, at 16–17; van der Meer & Jin, *supra* note 7, at 560–61.

II. The Faulty Application of Insider Trading Laws to Congress

While senior government officials were once required to disclose trades in a publicly-accessible electronic manner pursuant to the Stop Trading on Congressional Knowledge Act of 2012 (STOCK Act), this is no longer the case.¹⁰ In 2013, the STOCK Act was abruptly modified, repealing this requirement.¹¹ However, a recent holding in *United States v. Blaszcak*,¹² may conceivably thwart congressional insider trading on confidential government information altogether—like classified COVID-19 information from closed-door committee meetings. The Court of Appeals for the Second Circuit upheld the United States Southern District of New York’s *Blaszcak* decision convicting four defendants for using pre-decisional medical reimbursement rate information from a government agency, Centers for Medicare & Medicaid Services (CMS), to sell stocks for substantial returns.¹³ Remarkably, the Court applied Title 18 securities fraud¹⁴ and wire fraud statutes,¹⁵ holding (A) confidential information held by the government can constitute “property” under these statutes; and (B) the “personal-benefit” test¹⁶ does not apply.¹⁷

In light of *Blaszcak*, confidential COVID-19 information can be considered “property” under certain fraud statutes and

10. See STOCK Act, Pub. L. No. 112–105, 126 Stat. 291 (2012) (repealed 2013).

11. Amendment S.716 to the STOCK Act repealed electronic filing disclosure requirements on April 15, 2013. See STOCK Act, Pub. L. No. 112–105, 126 Stat. 291 (2012) (repealed 2013); see also Dan Auble, *Action Alert: STOCK Act Reversal Signed by President*, CTR. FOR RESPONSIVE POL. (Apr. 15, 2013, 1:27 PM), <https://perma.cc/X9NU-ZKD5> (reporting the STOCK Act’s removal of the requirements for online and electronic accessibility of disclosures).

12. 947 F.3d 19, 26 (2d Cir. 2019).

13. *Id.* at 45.

14. See 18 U.S.C. § 1348 (2018) (codifying and detailing securities and commodities fraud).

15. See *id.* § 1343 (providing the elements of fraud by wire, radio, or television).

16. The “personal-benefit” test was established in *Dirks v. SEC*, 463 U.S. 646, 661–64 (1983).

17. *Id.* at 45.

its use can be prosecuted pursuant to misappropriation or embezzlement theories.¹⁸ A comparison between nonpublic COVID-19 government information and the nonpublic CMS government information in *Blaszczak* could undoubtedly be drawn. Further, the “personal-benefit” test, which has been historically difficult to demonstrate, is no longer required under certain fraud statutes.¹⁹ Under the “personal-benefit” test established in *Dirks v. SEC*,²⁰ insiders are only convicted of securities fraud when proven they breached a duty of trust and confidence by disclosing material, nonpublic information for a “personal benefit.”²¹ Similarly, the one who traded on the information (the “Tipee”) can only be convicted of fraud when it is shown they utilized the inside information with knowledge that the tip had been obtained in breach of the insider’s duty.²² The “personal-benefit” test has been altered drastically since *Dirks* by subsequent legal decisions, including *Newman*,²³

18. The *Blaszczak* majority reasoned that its decision here aligns with the Supreme Court in *Carpenter v. United States*, 484 U.S. 19, 26 (1987), which held that confidential pre-published *Wall Street Journal* information constitutes “property.” See *Blaszczak*, 947 F.3d at 33 (“Here, we find it most significant that CMS possesses a ‘right to exclude’ that is comparable to the proprietary right recognized in *Carpenter*. Like the private news company in *Carpenter*, CMS has a ‘property right in keeping confidential and making exclusive use’ of its nonpublic predecisional information.”).

19. *Blaszczak* differentiated the Title 18 and wire fraud statutes from the Title 15 fraud and 10-b5 statutes, with the former not applying to the “personal-benefit” test. *Id.* The Court in *Carpenter* found Title 18 was intended to provide broader enforcement mechanism to address securities fraud, and that wire fraud “includes the act of embezzlement, which is . . . the fraudulent appropriation to one’s own use of the money or property entrusted to one’s care by someone else.” See *Carpenter*, 484 U.S. at 27.

20. 463 U.S. 646 (1983).

21. See *id.* at 663–667.

22. *Id.*

23. See *United States v. Newman*, 773 F.3d 438, 447–49 (2d Cir. 2014) (reanalyzing the *Dirks* “personal-benefit” test and ruling that a tip and trade resembles a gift, but only with “proof of a meaningfully close personal relationship that generates an exchange that . . . represents at least a potential gain of a pecuniary or similarly valuable nature” to the tipper).

Salman,²⁴ and, more recently, *Martoma II*.²⁵ Nevertheless, because *Blaszczak* effectively removed the onerous “personal-benefit” requirement for the Title 18 and wire fraud statutes altogether, insider trading cases could conceivably be brought with more regularity—including against Congress members trading on confidential COVID-19 information.²⁶

Still, the topical application of *Blaszczak* invites convincing counter-arguments by lawmakers. Significantly, the District Court in *Blaszczak* required the jury to find the material information at issue be knowingly and willfully “misappropriated” or “embezzled” by the defendants.²⁷ Since one cannot misappropriate from oneself, this protects those who develop material information on their own.²⁸ Thus, lawmakers involved in constructing the COVID-19 material could be exempt from the theory of misappropriation, which generates broad ramifications. Moreover, while the theory of embezzlement or conversion may be available, fraud cases that specifically concern government information are often difficult to demonstrate, as evidenced by conflicting circuit court opinions and the lack of legislative guidance.²⁹ Lastly, *Blaszczak*

24. *Salman v. United States*, 137 S. Ct. 420, 428 (2016) (overruling *Newman*’s potential pecuniary-gain requirement of the personal-benefit test, holding it “inconsistent with *Dirks*,” while not expressly overruling *Newman*’s meaningfully close personal relationship aspect).

25. *United States v. Martoma (Martoma II)*, 894 F.3d 64, 79 (2d Cir. 2018) (holding the “personal-benefit” test may be proven through a gift, a relationship that suggests a quid pro quo, or an intention to benefit). The Court further held a “meaningfully close relationship” is not required when proving a quid pro quo or an intention to benefit. *Id.*

26. See John C. Coffee, *A Short Primer on the New Law of Insider Trading*, N.Y. L.J. (Mar. 18, 2020, 12:30 PM), <https://perma.cc/N7H8-FGWM>; Mark D. Cahn et al., *Better the Devil You Know? Tipping Liability, Martoma and the Rise of 18 U.S.C. § 1348*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 2, 2019), <https://perma.cc/QXC8-L4CU> (“In light of . . . the lower bar presented by the elements of [Title 18], tipping charges under [Title 18] may become increasingly more common.”).

27. See Appendix at 1044–45, *United States v. Blaszczak*, 947 F.3d 19 (2d Cir. 2019) (Nos. 18-2811, 18-2825, 18-2867, 18-2878); see also Coffee, *supra* note 26 (determining District Judge Lewis Kaplan heroically placed significant limitations on the scope of § 1348).

28. See Coffee, *supra* note 26.

29. See *United States v. Girard*, 601 F.2d 69, 70–72 (2d Cir. 1979) (concluding 18 U.S.C. § 641 is proven through “knowingly converting” a “thing

contains a noteworthy dissent that considers information used by the government for regulatory purposes to not constitute “property” at all.³⁰ Arguing that government COVID-19 information is considered “regulatory” and not “property” could be judiciously contemplated.

III. The Growing Uncertainty Plaguing Insider Trading Cases

It is also important to note that insider trading cases have been plagued with uncertainty in recent years, casting doubt if *Blaszczak* will survive as controlling precedent.³¹ Indeed, “stealth overrulings” in insider trading cases now dominate these principally judicial constructs.³² The legal notion that cases subscribe to the doctrine of *in pari materia*, construction with reference all other applicable statutes, has been recurrently depreciated in insider trading cases, including *Blaszczak*.³³

of value”); Jessica Lutkenhaus, *Prosecuting Leakers the Easy Way*: 18 U.S.C. § 64, 114 COLUM. L. REV. 1167, 1169–79 (2014) (highlighting the ambiguity over whether Congress intended to prohibit theft and misuse of government information as a “thing of value” under 18 U.S.C. § 641).

30. Hon. Amalya L. Kearsse dissented in *Blaszczak*, stating the CMS government information did not actually constitute “property,” see *Cleveland v. United States*, 531 U.S. 12, 27 (2000) (holding Louisiana state video poker licenses were considered to be merely “regulatory” and not constitute “property”). *Blaszczak*, 947 F.3d at 45–49 (Kearsse, J., dissenting).

31. While it also remains to be seen if the Second Circuit *Blaszczak* decision will be adopted by other circuit courts, the Southern and Eastern Districts of New York are where most insider trading cases take place. See generally, e.g., *Blaszczak*, 947 F.3d at 19; *Martoma II*, 894 F.3d at 64; *Newman*, 773 F.3d 438; *Girard*, 601 F.2d at 69.

32. See Recent Case, *United States v. Martoma: Second Circuit Redefines Personal Benefit Requirement for Insider Trading*, 132 HARV. L. REV. 1730, 1730–37 (2019) (reasoning *Martoma I and II* were stealth reversals of *Salman v. United States*, which overruled *Newman*, that misstated *Jiau*, and reversed *SEC v. Obus*, which stealthily overruled *Dirks*).

33. See, e.g., *Blaszczak*, 947 F.3d at 36 (determining that Congress indicated a contrary intent, so *in pari materia* does not apply: “Section 1348 was added to the criminal code by the Sarbanes-Oxley Act of 2002 in large part to overcome the ‘technical legal requirements’ of the Title 15 fraud provisions.”).

An insider trading bill currently before the Senate, the Insider Trading Prohibition Act (H.R. 2534) (the “Act”)³⁴—which already passed the House of Representatives by a significant margin—could inject more chronic uncertainty into the already complex insider trading laws. The Act proposes to reinstate the “personal-benefit” test in one subsection,³⁵ which may preempt *Blaszczak*, while another subsection undermines the “personal-benefit” entirely by eliminating the requirement to prove a fiduciary breach for “misappropriation, or other unauthorized and deceptive taking of such information,”³⁶ akin to *Blaszczak*. In light of recent rulings, certain subsections are at odds. In its current form, the Act’s drafting leaves much to be desired. Even the most connected insider would forgo betting on its practical consequences.

Interestingly, however, the Act proposes to amend the Exchange Act of 1934,³⁷ enforced by the Securities and Exchange Commission (SEC).³⁸ Amending the 1934 Act’s subsections to more clearly conform to the *Blaszczak* decision would further expand the SEC’s governance to have well-defined standing under Title 18 securities and other fraud statutes,³⁹ to enact pandemic-specific congressional disclosure forms. Right now, the SEC’s standing is more clearly defined under the STOCK Act to show a violation of Rule 10b-5.⁴⁰ But charges under the STOCK Act to members of Congress face a

34. This bill passed the House of Representatives on December 5, 2019, by a vote of 410 to 13. See Insider Trading Prohibition Act, H.R. 2534, 116th Cong. § 16A (2019).

35. See *id.* § 16A(c)(1)(D). Patrick McHenry (R-NC), Ranking Member of the House Financial Services Committee, reinstated this “personal-benefit” test back into the Act on the evening of the vote. *Id.*

36. See *id.* § 16AI(1)(C)

37. 15 U.S.C. § 78a–78qq (2018).

38. The SEC, which was created by Section 78d of the Exchange Act of 1934, enforces other legislation, including the Sarbanes-Oxley Act of 2002. See *The Laws that Govern the Securities Industry*, U.S. SEC. AND EXCHANGE COMM’N (Oct. 1, 2013), <https://perma.cc/87RU-E5UX>.

39. See 18 U.S.C. § 641 (2018); John C. Coffee, *The Senator Traded While His Constituents Died: A Legal Analysis of Insider Trading by Public Officials*, COLUM. L. SCH. BLUE SKY BLOG: CLS BLOG ON CORPS. AND THE CAP. MKTS. (Mar. 31, 2020), <https://perma.cc/T2RH-P394>.

40. See Coffee, *supra* note 39.

myriad of legal and constitutional issues, including the Speech or Debate Clause in Article I of the U.S. Constitution,⁴¹ interpreted by the Supreme Court as “anything generally done in a session of [Congress] by one of its members in relation to the business before it.”⁴² This prevents the obtainment of any documents or testimony reflecting those acts, which has previously encumbered the SEC.⁴³ The modified STOCK Act also lacks the means to compel more immediate and publicly-accessible disclosures.⁴⁴

The STOCK Act has been recently asserted in a lawsuit against Senator Richard Burr (R-NC), the Chairman of the Senate Intelligence Committee, by a shareholder of Wyndham Resorts, one of the several companies where Burr offloaded shares.⁴⁵ But until this lawsuit plays out, it remains to be seen if Senator Burr actually broke insider trading laws.⁴⁶ The traditional route for prosecuting insider trading cases for

41. U.S. CONST. art. 1, § 6, cl. 1.

42. *Doe v. McMillan*, 412 U.S. 306, 311 (1973).

43. See Christian Garcia & John W.R. Murray, *Insider Trading, Congress and COVID-19: A Renewed Focus on the STOCK Act*, JDSUPRA (Apr. 16, 2020), <https://perma.cc/LUM3-HHEA> (“Courts have held that the [Speech or Debate] Clause also prevents the government from obtaining documents or testimony reflecting those acts.” (citing *SEC v. Comm. on Ways & Means of the U.S. House of Representatives*, 161 F. Supp. 3d 199, 242–43 (S.D.N.Y. 2015))).

44. See STOCK Act, Pub. L. No. 112–105, 126 Stat. 291 (2012) (repealed 2013).

45. Jacqueline Thomsen, *Browne George Ross Attorneys File First Lawsuit Over Sen. Richard Burr’s Coronavirus-Tied Stock Dumps*, NAT’L L.J. (Mar. 24, 2020, 11:49 AM), <https://perma.cc/4VRR-PXMT> (stating the lawsuit was initiated by Alan Jacobson, a shareholder of Wyndham Hotels & Resorts).

46. Senator Burr is currently under investigation by the Department of Justice for potential criminal violations of these laws, while similar investigations into Senators Kelly Loeffler (R-GA), James Inhofe (R-OK), and Dianne Feinstein (D-CA) concluded in May with no charges being filed. Katie Benner & Nicholas Fando, *Justice Dept. Ends Inquiries Into 3 Senators’ Stock Trades*, N.Y. TIMES (May 26, 2020), <https://perma.cc/NJ39-SXUR>. After the FBI raided Senator Burr’s home on May 13, 2020, to seize his cellphone as part of the insider trading investigation, the senator “stepped aside” from his post as chairman of the Senate Intelligence Committee. Robert Faturechi & Derek Willis, *Richard Burr Steps Down from Chairmanship of Senate Intelligence Committee*, PROPUBLICA (May 14, 2020, 12:45 PM), <https://perma.cc/B3GG-H89Q>.

members of Congress has been through classic insider trading laws, including by the Department of Justice (DOJ).⁴⁷ Notably, the DOJ has opened and swiftly dropped investigations into Senators Kelly Loeffler (R-GA), James M. Inhofe (R-OK) and Dianne Feinstein (D-CA). Moreover, other members of Congress heavily involved in trading around COVID-19 were not investigated or named in lawsuits, such as Senator David Perdue (R-GA), who reportedly made a series of 112 stock transactions sold for around \$825,000 and buying stocks worth \$1.8 million, including a company directly involved in the provision of personal medical equipment, on the same day as the Senate briefing on March 2, 2020.⁴⁸ Interestingly, Senator Perdue was also named to the President's coronavirus task force.⁴⁹

While an investigation against Senator Burr did not entirely cease as of yet, many surmise this investigation is politically motivated and not necessarily grounded in the basis of insider trading laws for congressional members and for good reason. Indeed, there is reason to believe that the sole congressional insider trading investigation remaining against Senator Burr is political and not grounded in any established legal framework. The investigation of Burr's trading is reportedly being handled by the Justice Department's Public Integrity Section, along with the U.S. Attorney's Office in the District of Columbia, instead of the U.S. Attorney for the Southern District of New York's office, which customarily works on high-profile insider trading cases, raising concerns that the investigation might not be handled competently or

47. See MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., RS21127, FEDERAL SECURITIES LAW: INSIDER TRADING 1-13 (2016) (providing a detailed overview of the federal statutes related to insider trading, such as the Securities Exchange Act of 1934, the STOCK Act, etc., along with seminal insider trading decisions).

48. Sheth Sonam, *Sen. David Perdue Bought Stock in a Company that Produces Protective Medical Equipment the Same Day Senators Received a Classified Briefing on the Coronavirus*, BUS. INSIDER (Apr. 6, 2020, 6:25 PM), <https://perma.cc/H9G6-5CUQ>.

49. Tia Mitchell, *Perdue, Loeffler to Advise Trump on Post-Pandemic Economy*, ATLANTA J.-CONST. (Apr. 16, 2020), <https://perma.cc/2VJV-3QHD>.

independently.⁵⁰ Senator Burr has fallen out of favor with Present Trump and his constituents for investigating Russia's interference in the 2016 presidential election, including issuing a subpoena to the president's oldest son, Donald Trump, Jr., and the releasing of the investigation report in his position as Chairman of the Senate Intelligence Committee.⁵¹ Notably, in a rare occurrence, more than one-thousand former DOJ employees accused Attorney General William Barr of political interference and demanded his resignation, along with testimony from a still-employed DOJ lawyer accusing the Attorney General of political interference and other allegations of political motivation.⁵²

Although former Representative Chris Collins of New York (R-NY) pled guilty in 2019 and was sentenced to twenty-six months in jail for violating insider trading charges under Rule 10(b)(5) for telling relatives to sell biopharmaceutical shares, he obtained the nonpublic information by sitting on the company's board, not through his governmental role.⁵³ While stronger stances on insider trading on COVID-19 information have

50. Ankush Khardori, *The Insider Trading Investigation of Richard Burr is in Terrible Hands*, SLATE (May 20, 2020), <https://perma.cc/2MEA-RLX2>. See Sarah N. Lynch & Karen Freifeld, *Manhattan Prosecutor Steps Down, Ending Stand-Off with Attorney General Barr*, REUTERS (Jun. 20, 2020, 2:46 PM), <https://perma.cc/Z9K5-9UW2> (reporting, interestingly, that the DOJ had Geoffrey Berman step down as U.S. Attorney for the Southern District of New York after stand-off presumed related to investigating President Donald Trump's personal lawyer, Rudolph "Rudy" Giuliani).

51. Anita Kumar, *Don't Expect Trumpworld to Rescue Richard Burr*, POLITICO (May 14, 2020, 7:20 PM), <https://perma.cc/SN7J-V772>. Senator Marco Rubio (R-FL) has since been placed at the helm of the Committee as the acting chairman. Patricia Zengerle, *Senator Rubio Chosen as Acting Intelligence Committee Chairman*, REUTERS (May 18, 2020, 3:37 PM), <https://perma.cc/4LZY-NP68>.

52. Jerry Lambe, *1,250-Plus Former DOJ Employees Call for Investigation of Bill Barr's 'Role in Ordering' Use of Force Against Protestors*, LAW & CRIME (Jun. 10, 2020, 3:47 PM), <https://perma.cc/77AL-WMNV>.

53. See Jonathan Allen, *Former U.S. Congressman Collins Sentenced to 26 Months for Insider Trading*, REUTERS (Jan. 17, 2020, 6:07 AM), <https://perma.cc/33M6-6ECG>.

recently been taken by the DOJ⁵⁴ and SEC,⁵⁵ these stances do not explicitly pertain to members of Congress. Nor does this retroactively remedy the bereft American people who were unaware of the drastic economic impact while Congress members' shares were sold. Stronger stances alone are simply not enough here. But, it is a start.

The United States Senate Select Committee on Ethics, which is vested with the power to oversee government insider trading, has been called to investigate including none other than Senator Burr.⁵⁶ Remarkably, Senator Burr, already discovered withholding information from the public,⁵⁷ asked the Ethics Committee to investigate, claiming he "relied solely on public reporting to guide [his] decision to sell the stock."⁵⁸ Burr co-sponsored the Pandemic and All-Hazards Preparedness and Advancing Innovation Act (PAHPAI),⁵⁹ 2019 legislation aimed to improve the nation's preparation and response to natural and man-made public health threats.⁶⁰ As a pandemic expert of the

54. See Memorandum from William Barr, Attorney General, for All United States Attorneys 2 (Mar. 16, 2020) ("Every U.S. Attorney's Office is thus hereby directed to prioritize the detection, investigation, and prosecution of all criminal conduct related to the current pandemic.") (on file with the Washington and Lee law Review).

55. Stephanie Avakian & Steven Peikin, *Statement from Stephanie Avakian and Steven Peikin, Co-Directors of the SEC's Division of Enforcement, Regarding Market Integrity U.S. Securities and Exchange Commission*, U.S. SEC. AND EXCHANGE COMM'N (Mar. 23, 2020), <https://perma.cc/YVC6-CDMD>.

56. Eric Lipton et al., *Stock Sales by Senator Richard Burr Ignite Political Uproar*, N.Y. TIMES (Mar. 20, 2020), <https://perma.cc/Z3ZX-8T6F> (last updated Mar. 21, 2020); Letter from Daniel Schuman, Pol'y Dir., Demand Progress, to Honorable James Lankford & Honorable Christopher Coons, U.S. Senate Select Committee on Ethics (Mar. 20, 2020) (requesting an investigation into Senator Richard Burr) (on file with the Washington and Lee Law Review).

57. See Tim Mak, *Weeks Before Virus Panic, Intelligence Chairman Privately Raised Alarm, Sold Stocks*, NAT'L PUB. RADIO (Mar. 19, 2020, 5:08 AM), <https://perma.cc/2HFA-XDGE> (publishing a recording of Senator Burr warning a group of constituents of the pandemic: "Luckily, we have a framework in place that has put us in a better position than any other country to respond to a public health threat, like the coronavirus.").

58. Letter from Richard Burr, U.S. Senator, North Carolina, to Honorable James Lankford & Honorable Christopher Coons, U.S. Senate Select Committee on Ethics (Mar. 20, 2020).

59. Pub. L. No. 116-22, 113 Stat. 905 (2019).

60. *Id.*

Senate, Burr certainly appreciated that the confidential COVID-19 information he obtained was material. The fact that Burr is requesting an Ethics Committee investigation elucidates the significantly muddled distinction between public and nonpublic information for the purposes of congressional insider trading.

Indeed, guidance from the Senate Ethics Committee on the STOCK Act's insider trading prohibition acknowledges how common detecting nonpublic information in the Senate can be: “[W]hile Senators and staff are prohibited from using *nonpublic* information for making a trade, a great deal of Congressional work is conducted on the *public* record or in the public realm during committee hearings and markups, floor activity, and speeches.”⁶¹

The Committee on Ethics disclosed an important issue here—it is hard to determine if lawmakers get their information in a nonpublic briefing or in public proceedings. In Senator Burr's case, he claimed that the public market guided his decisions.⁶² Further, closed-door meetings may use information obtained from publicly-disclosed global sources, making actual violations difficult to verify. The Ethics Committee also does not have a broad-based predictable framework or enforcement mechanism, nor does it facilitate immediate and easily-accessible trading disclosures to the public. Thus, expecting wide-spread, demarcated, and pandemic-specific congressional oversight by the Ethics Committee as a practical solution is implausible.

A more drastic position—that members of Congress be prohibited from trading altogether—is becoming more widely held, a view shared by some members of Congress and a former drafter of the STOCK Act.⁶³ Congress members Raja Krishnamoorthi (D-IL), Alexandria Ocasio-Cortez (D-NY), and Joe Neguse (D-CO) have proposed reintroducing the Ban

61. See Memorandum from the U.S. Senate Select Committee on Ethics to All U.S. Senators (Dec. 4, 2012) (providing guidance on restrictions on insider trading under securities laws and ethics rules) (on file with the Washington and Lee Law Review).

62. Letter from Richard Burr, *supra* note 58.

63. See Tyler Gellasch, *I Helped Write the STOCK Act. It Didn't Go Far Enough*, POLITICO (Mar. 25, 2020, 3:50 PM), <https://perma.cc/TAN3-CFYQ>.

Conflicted Trading Act (S. 1393)⁶⁴ (the “Bill”), initially introduced by Senator Jeff Merkley (D-OR) in May 2019. The Bill proposes barring members of Congress, along with their senior staff, from buying or selling individual stocks or other investments while in office, among other requirements and prohibitions.⁶⁵ The individual holdings would need to be liquidated within six months of the Bill’s enactment, and new members of Congress would have six months to sell from when they join, or else, the investments must be transferred to a blind trust or held throughout their entire tenure in office.⁶⁶ The ambitious legislation overseeing Congress members and their senior staff may be regarded as overbearing, extreme, or political Democratic partisanship without additional support, rendering it unpassable. Compromise and political conciliation would undoubtedly need to be attained.

Shockingly, Senator Kelly Loeffler (R-GA), who has been accused of insider trading on COVID-19 information,⁶⁷ recently pledged to liquidate all of her stock options due to public backlash, while contending that she did nothing wrong.⁶⁸ But Loeffler may be an outlier since she was appointed to President Trump’s coronavirus task force on reopening America and is running for special election in a hotly contested Senate race.⁶⁹ On the other hand, several other members of Congress accused of insider trading have not conceded to selling their shares,

64. Ban Conflicted Trading Act, S. 1393, 116th Cong. (2019).

65. See Press Release, U.S. Congressman Raja Krishnamoorthi, Representatives Krishnamoorthi, Ocasio-Cortez, and Neguse to Introduce Legislation to Prohibit Government Officials from Profiting Off Their Positions by Trading Stocks (Mar. 23, 2020) (summarizing how the Act would also prevent House members from serving on corporate boards, like the Senate) (on file with the Washington and Lee Law Review). The Bill was originally introduced as the Ban Conflicted Trading Act, S. 1393, 116th Cong. (2019).

66. Ban Conflicted Trading Act, §§ 2–6.

67. See *supra* note 46 and accompanying text.

68. See Kelly Loeffler, *I Never Traded on Confidential Coronavirus Information*, WALL ST. J. (Apr. 8, 2020, 12:57 PM), <https://perma.cc/L77Q-555W>.

69. See Dave Goldiner, *‘Insider Trading’ Senator Named to Trump’s ‘Reopen America’ Coronavirus Task Force*, N.Y. DAILY NEWS (Apr. 16, 2020), <https://perma.cc/9TPN-TEEX>.

including Senator Burr, despite many calling for his resignation (pursuant to recent developments, he would now be succeeded only by someone from his own party if leaving office before his term expires).⁷⁰

IV. Curing Congressional Insider Trading

In its current state, the legitimacy of whether members of Congress trading on nonpublic COVID-19 information will be successfully prosecuted for insider trading remains unknown. More significantly, the present measures available fall short of enforcing essential government transparency and accountability by government during pandemics. But there is a cure: enact timely heightened pandemic-specific securities disclosure requirements for members of Congress in an easily publicly-accessible manner.

Since public health crises inherently offer opportunities for governments to abuse power or profiteer,⁷¹ codifying pandemic-specific requirements is that much more significant. Indeed, curtailing congressional insider trading during public health crises is already ensconced in our ethical and constitutional frameworks.⁷² Importantly, enacting heightened disclosure requirements that are limited to public health crises also outweighs countervailing national security concerns. It is, indeed, a more sensible solution than prosecuting all congresspersons alleged of insider trading, barring them from owning any securities, or doing nothing. By enacting pandemic-specific congressional disclosure requirements, a more transparent and accountable government narrative emerges. Its implementation is the next step.

Enacting timely heightened congressional disclosure requirements can be accomplished through amending the Insider Trading Prohibition Act, legislation already pending

70. See Emily Singer, *GOP Rigged Rules to Ensure Only a Republican Can Replace Burr*, THE NAT'L MEMO (Mar. 21, 2020), <https://perma.cc/5JK5-4CD5>.

71. See *supra* notes 4–5 and accompanying text.

72. The U.S. Government is allotted a large latitude of powers and responsibility for pandemics. See *supra* notes 6–8 and accompanying text; see, e.g., *Pandemic Flu—Public Health Research Guide*, GEO. L. LIBR., <https://perma.cc/GG4Y-2TQ7> (last updated Apr. 2, 2020, 12:22 PM).

before the Senate. Clarifying that “property” includes government information, and that the “personal-benefit” test is not required for certain fraud statutes like misappropriation, embezzlement, or conversion, modeling *Błaszczak*, would deliver the requisite modifications. Adjusting the reintroduced Ban Conflicted Trading Act to include these provisions could also work. Or, a new bill can be introduced entirely. Alternatively, members of Congress could do the unthinkable: timely and publicly disclose the information themselves. But all jokes aside, by incorporating veritable legislation of pandemic-specific congressional securities disclosures, our agencies will make the enactment a reality. This way, the American people—through the economy and media—have the opportunity to recognize the true impact that the next pandemic might have. Before it is too late.

The profound impact of COVID-19 is irrefutably changing our country and our world. A more transparent and accountable government to counteract public health crises has never been more essential. Enacting pandemic-specific congressional disclosure requirements is the cure.