

1-24-2022

Money, Power, and Radical Honesty: A Look at Members of Congress' Use of Information for Financial Gain

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Recommended Citation

Spencer K. Schneider, *Money, Power, and Radical Honesty: A Look at Members of Congress' Use of Information for Financial Gain*, 14 J. Bus. Entrepreneurship & L. 295 (2022)

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MONEY, POWER, AND RADICAL HONESTY: A LOOK AT MEMBERS OF CONGRESS' USE OF INFORMATION FOR FINANCIAL GAIN

Spencer K. Schneider

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ABSTRACT

Cleared of wrongdoing due to lack of evidence, Senators Kelley Loeffler and David Perdue continued their bids for re-election, and control of the Senate, in the Georgia run-off. Both Senators Loeffler and Perdue traded stocks in the run-up to the COVID-19 crisis after receiving classified briefings. These are just two of many instances of members of Congress profiting after receiving classified information. While the American public remained uninformed as to the true crisis looming as COVID-19 spread, members of Congress received private briefings and quietly sold securities such as travel and hotel related interests, and purchased other securities, such as remote-work software and medical equipment related interests.

Many members of Congress also profit from federal money earmarked to increase the value of their personal land deals, from access to IPOs, and from corporate board seats. While corporate executives, members of the executive branch, and ordinary citizens are subject to strict insider trading laws, members of Congress sail through loopholes and exceptions that are hand-crafted for their benefit. This article reviews

proposals for fixing the problem before proposing a comprehensive solution focused on limiting the financial opportunities for members of Congress and strict reporting requirements.

While many proposals to address this problem exist, none come close to preventing members of Congress from profiting in these often- nefarious ways. To ensure that members of Congress work on behalf of the American Public—and not their own pocketbooks—the comprehensive and drastic reform articulated in this article is required.

INTRODUCTION

From 1993 to 1998, Wall Street financiers beat the market by five percentage points; from 1985 to 2001, members of the United States House of Representatives beat the market by six percentage points; United States Senators outperformed the market by ten percentage points from 1993 to 1998.¹ Most members of Congress are not Wall Street financiers, and few have any professional securities background.² How do these “lay” people consistently outperform the professionals? Besides securities trading, members of Congress and “covered individuals” consistently profit from real estate and other land deals which involve inside information and self-dealing, access to IPOs, and corporate board seats.³

¹ Lynn Stuart Parramore, *Alexandria Ocasio-Cortez is Right About Corruption in Congress*, NBC THINK (March 4, 2019, 9:02 AM), <https://www.nbcnews.com/think/opinion/alexandria-ocasio-cortez-right-about-corruption-congress-ncna975906> [<https://perma.cc/UA4K-HXFN>]; Alan J. Ziobrowski, *Abnormal Returns from the Common Stock Investments of the U.S. Senate*, 39 UNIV. OF WASH. J. OF FIN. & QUANTITATIVE ANALYSIS (December 2004); Alan J. Ziobrowski, *Abnormal Returns from the Common Stock Investments of Members of the U.S. House of Representatives*, 13.1.4 CAMBRIDGE UNIV. J. OF BUSI. & POL. (2011). *But see* Andrew C. Eggers, *Capitol Losses: The Mediocre Performance of Congressional Stock Portfolios*, 75 J. OF POL. (April 2013) 535–551, UNIV. OF CHI. PRESS (finding that members of Congress do not trade with an information advantage).

² Jennifer E. Manning, *Membership of the 115th Congress: A Profile*, CONG. RSCH. SERV. (2018) at 3–4. The previous occupations of 2018 Members of Congress include “[three] members who have worked with stocks or bonds,” “[eighteen] management consultants,” “[six] car dealership owners,” “[three] venture capitalists,” “[eighteen] bankers or bank executives,” and “[thirty-six] veterans of the real estate industry.” *Id.*

³ “Covered individuals” will refer to the immediate family members of Members of Congress, any family members living with a Member of Congress,

In 1909, the Supreme Court held that a corporate director commits fraud when he uses inside information to purchase stock that subsequently increases in value based on that inside information.⁴ Throughout the century that followed, members of Congress regularly and repeatedly used inside information to make their personal financial decisions. The latest examples involve multiple members of Congress who profited from the rise and fall of the stock market during the COVID-19 pandemic, which raised the question as to whether those trades were based on private information that was gained while working on the taxpayers' payroll as elected representatives.⁵

Remarkably, it was not until 2012 that the Stop Trading on Congressional Knowledge Act (STOCK) Act was passed, with the stated purpose of “prohibit[ing] Members of Congress and employees of Congress from using nonpublic information derived from their official positions for personal benefit.”⁶ However, the broad consensus in political and academic spheres has been that the STOCK Act was passed merely to appease the public in the wake of the damning “60 Minutes” report regarding insider information used by members of Congress for personal gain.⁷ In fact, the STOCK Act really did not change much.⁸ Insider trading

and all top-level Congressional staff which this article argues should be subject to restrictions on their financial activities.

⁴ See generally *Strong v. Repide*, 213 U.S. 419 (1909).

⁵ See *infra* section II(a)(1).

⁶ Stop Trading on Congressional Knowledge Act of 2012 Act, Pub. L. No. 112–105, 126 Stat. 291 (2012) [hereinafter “STOCK Act”].

⁷ *What is the Stop Trading on Congressional Knowledge (STOCK) Act?*, BRITANNICA PROCON.ORG (Apr. 4, 2012), <https://insidertrading.procon.org/view.resource.php?resourceID=004520> [<https://perma.cc/64EC-NADP>]; Steve Kroft, *Congress: Trading Stock on Inside Information?*, 60 MINUTES (CBS television broadcast Nov. 13, 2011).

⁸ Kimberly Kindy et al., *Lawmakers Reworked Financial Portfolios After Talks with Fed, Treasury Officials*, WASH. POST, (June 24, 2012), https://www.washingtonpost.com/politics/lawmakers-reworked-financial-portfolios-after-talks-with-fed-treasury-officials/2012/06/24/gJQAnQPg0V_story.html [<https://perma.cc/5XKA-ZKK8>] (“Members of Congress are still loosey-goosey about what they require of themselves . . . I think it’s time for Congress to impose the same rules on themselves that they impose on others. The Stock Act doesn’t do that.”); Kevin W. Fritz, *The Stock Act is Inadequate: U.S. Index Funds are the Solution to Political Insider Trading*, 7 LIBERTY UNIV. L. REV. 275, 308 (2013) (“as currently drafted, the [STOCK] Act is anemic. Like many congressional actions, passing the Act is similar to placing a small bandage on a bullet wound. The Act is too

by members of Congress has always been illegal.⁹ The problem is that this prohibition has rarely been enforced, at least partly because of the complexity, ambiguity, and ever-changing benchmark of what actually constitutes insider trading.¹⁰

Part I of this article will provide examples of different forms of insider trading members of Congress participate in, including, securities trading, land deals, and participation in IPOs. Part II will discuss past attempts and failures to remedy this issue and analyze some of the prominent proposals that have been recommended. Lastly, Part III proposes a comprehensive plan for legislative reform to fix the problem.

I. BACKGROUND

The 1934 Securities Exchange Act created the United States Securities and Exchange Commission (SEC) in the wake of the 1929 stock market crash, with Section 10(b) of the act covering securities fraud.¹¹ In 1942, the SEC passed Rule 10(b)-5 to expand securities fraud to cover sales and purchases of securities, and dictated the five elements necessary for prosecution under the Act: (1) fraud or deceit (2) by any person (3) in connection with (4) the purchase or sale (5) of any security.¹² However, the simplicity of these five elements does not sufficiently convey the complexity and ambiguity surrounding insider trading laws and their application to members of Congress and covered individuals.¹³ Insider trading laws have evolved through legislation and common law, which has created a complex body of law rife with competing theories of law, mens rea, jurisdiction, and enforcement.¹⁴

watered down to adequately remedy such a corrupt and widespread practice that has plagued our government for over 200 years.”).

⁹ Jeanne L. Schroeder, *Taking Stock: Insider and Outsider Trading by Congress*, 5 WM. & MARY BUS. L. REV. 159, 159 (2014).

¹⁰ *Id.*

¹¹ *Historical Timeline: History of Insider Trading, 1611–2012, with an Emphasis on Congressional Insider Trading*, BRITANNICA PROCON.ORG, <http://insidertrading.procon.org/view.resource.php?resourceID=002391> [<https://perma.cc/J4YV-77WY>] (last updated June 6, 2013) (hereinafter “*Britannica Insider Trading Timeline*”).

¹² *Britannica Insider Trading Timeline*, *supra* note 11; Fritz, *supra* note 8, at 285.

¹³ See Fritz, *supra* note 8, at 285.

¹⁴ *Id.*

Perhaps a material factor in the lack of enforcement around insider trading by members of Congress is an overall lack of clarity and understanding of securities law. Securities Professor Jeanne L. Schroeder notes: Ignorance about insider-trading law is rife among not only lay people, but also attorneys who do not practice securities law. The lack of any express statutory or regulatory definition for what constitutes insider trading—other than for the limited case of tender offers—makes the law unclear.¹⁵

In fact, a *Politico* article concerning Senator Richard Burr’s stock sales during the early days of the COVID-19 pandemic, authored by former federal prosecutor Renato Mariotti, wrongly reported that insider trading by members of Congress was legal until the 2012 enactment of the STOCK Act.¹⁶

Some definitions of insider trading are quite narrow: “Classic insider trading occurs when a traditional insider of a publicly traded company—such as an officer, director, employee, or controlling shareholder—purchases or sells the equity securities of that company on the basis of material nonpublic, and firm-specific information about that company obtained through her position with the company.”¹⁷ Based on this narrow definition, it is easy to see how the law is rarely applied to members of Congress, even when they act on material information unavailable to the public. Further complicating matters, there are two theories of insider trading: the Classical Theory and the Misappropriation Theory.¹⁸ Under the Classical Theory, certain information belongs to the existing and potential shareholders of publicly traded corporations.¹⁹ Because this information belongs to existing and potential shareholders, a person cannot use this information for personal gain if that information has not been disclosed to the public—since the public is the true owner of this information.²⁰ Under the Misappropriation Theory, information is

¹⁵ Schroeder, *supra* note 9, at 168.

¹⁶ Tamara Keith, *Rep. Bachus Investigated For Insider Trading*, ALL THINGS CONSIDERED (National Public Radio broadcast Feb. 10, 2012), available at <https://www.npr.org/2012/02/10/146709359/rep-bachus-investigated-for-insider-trading> [<https://perma.cc/S6XD-EKPT>].

¹⁷ Schroeder, *supra* note 9, at 181.

¹⁸ *Id.* at 177–78.

¹⁹ *Id.* at 181.

²⁰ *Id.* at 177; Donna M. Nagy, *Insider Trading and the Gradual Demise of Fiduciary Principles*, 94 IOWA L. REV. 1315, 1326 (2009).

deemed to belong to the source of that information.²¹ Therefore, a person who uses this information for personal gain is misappropriating the use of this information, but only if that person owes a fiduciary duty to the source.²² What remains undecided under the Misappropriation Theory is whether members of Congress are considered fiduciaries to the sources of the information they may trade on. In *United States v. O'Hagan*, the Supreme Court explained “a fiduciary’s undisclosed, self-serving use of a principal’s information to purchase or sell securities, in breach of a duty of loyalty and confidentiality, defrauds the principal of the exclusive use of that information.”²³

This fiduciary duty element, paired with the showing that a securities transaction was based on material, nonpublic information, arose from *Dirks v. SEC*.²⁴ The fiduciary duty element requires that a personal benefit was received by the tippee from the tipper, and what qualifies as a personal benefit was “overbroadly extended” in *United States v. Newman*.²⁵ Summarizing the discord decisions on insider trading have created, Columbia Law Professor, John C. Coffee explains that *Salman v. United States*, a 2016 Supreme Court case, reversed much, but not all, of *Newman*.²⁶ Then, just two years later in *United States v. Martoma*, the Second Circuit held that “Rule 10b-5 is violated whenever a ‘corporate insider receives a personal benefit . . . from deliberately disclosing valuable confidential information without a corporate purpose and with the expectation that the tippee will trade on it.’”²⁷ This holding upended *Newman*. The court noted that it made an:

[E]nd run around Newman by seizing on language in *Dirks* that had said gifts of information by insiders to friends or relatives could also violate Rule 10b-5 on the theory that such gifts resembled trading by the insider and

²¹ Schroeder, *supra* note 9, at 178; Nagy, *supra* note 20, at 1319.

²² Schroeder, *supra* note 9, at 178; Nagy, *supra* note 20, at 1318.

²³ *United States v. O'Hagan*, 521 U.S. 642, 652 (1997).

²⁴ John C. Coffee Jr., *A Short Primer on the New Law of Insider Trading*, 263 N.Y. L. J. 5, 5 (2020); *Dirks v. SEC*, 463 U.S. 646 (1983).

²⁵ Coffee, *supra* note 24; *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014).

²⁶ Coffee, *supra* note 24; *Salman v. United States*, 137 S. Ct. 420 (2016); *Newman*, 773 U.S. at 646.

²⁷ Coffee, *supra* note 24, at 5–6 (quoting *United States v. Martoma (Martoma II)*, 894 F.3d 64, 79 (2d Cir. 2018)).

a follow-up gift of the proceeds by the insider to a friend or relative.²⁸

Finally, most recently, in *United States v. Blaszcak*, the Second Circuit upheld an insider trading conviction under 18 U.S.C. § 1348 and the wire fraud statute holding that the elements in *Dirks* were unnecessary in a prosecution outside of § 10(b) of the Securities Exchange Act.²⁹

Beyond statutory regulation, Congressional committees, Codes of Official Conduct and Ethics Manuals also dictate acceptable behavior by Members of Congress. Ultimately, the Standards Committee has the power to enforce standards of conduct, investigate alleged violations and make recommendations to the House for further action.³⁰ Relevant to the issue of insider trading, the House Ethics Manual states that “Members, officers, and employees of the House should: . . . not in any way use their office for private gain. Nor should they attempt to circumvent any House rule or standard of conduct.”³¹ Further, the Manual dictates that “Members and employees should never use any information received confidentially in the performance of governmental duties as a means for making private profit[.]” and “Members and employees of the House may not accept benefits under circumstances that might be construed by reasonable persons as influencing the performance of their governmental duties.”³² However, the Manual also inadvertently exposes the root of the problem, leading off the section of Statutes and Rules Governing Disclosure of Financial Interests by stating: “No federal statute, regulation, or rule of the House absolutely prohibits a Member of House employee from holding assets that might conflict with or influence the performance of official duties.”³³

²⁸ Coffee, *supra* note 24, at 5–6.

²⁹ *Id.* at 6; *United States v. Blaszcak*, 947 F.3d 19 (2d Cir. 2019).

³⁰ COMM. ON STANDARDS OF OFFICIAL CONDUCT, 110TH CONG., 2D SESSION, HOUSE ETHICS MANUAL (2008), https://ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf.

³¹ *Id.* at 1.

³² *Id.* at 249. S. DOC. NO. 108–1, SELECT COMM. ON ETHICS, 108TH CONG., SENATE ETHICS MANUAL (2003) (Rule 37(1) states: “A member, officer, or employee of the Senate shall not receive any compensation . . . from any source . . . which would occur by virtue of influence improperly exerted from his position . . .”).

³³ *Statutes and Rules Governing Disclosure of Financial Interests*, COMM. ON ETHICS, <https://ethics.house.gov/financial-disclosure/statutes-and-rules-governing-disclosure-financial-interests>. The Senate Ethics Manual creates

Both the House and Senate Ethics Manuals explicitly apply to members themselves as well as certain staff members. They even mention the regulation of Congressional Members' family, but in an attempt to make restrictions on the activities of members of Congress' family members appear unwarranted, the Senate Ethics Manual begins the Employment Considerations for Spouses sections as follows: "Being married to a Senator or Senate staff member does not, of course, preclude one from earning a salary."³⁴ However, as this article will lay out, an individual's membership in Congress does in itself have ramifications on the finances and opportunities for the spouses, children, and even extended family of that member. While it may appear drastic, this article proposes placing the same restrictions on spouses and children of members of Congress as it does on the member themselves. Every day, families across the United States make decisions and are impacted by the career choices made by other family members. To regulate these aspects of Congressional Members' families is no different, and as many examples of alleged insider trading demonstrate, are absolutely necessary to fix the problem.

II. EXAMPLES OF ALLEGED INSIDER TRADING

"Insider trading" is typically limited to trading of securities based on inside information. The following examples of alleged insider trading also include conduct by members of Congress and covered individuals unrelated to securities trading, but that results in financial gain, due to access to inside information or power.³⁵

It is important to recognize that it is difficult to prove insider trading. A successful prosecution for insider trading must show that the individual charged knew of information that would affect the price of a

the same problem: "Members...need not...divest themselves of assets...nor must Members disqualify themselves from voting on issues that generally affect their personal financial interests." S. DOC. NO. 108-1, SELECT COMM. ON ETHICS, 108TH CONG., SENATE ETHICS MANUAL 124 (2003).

³⁴ SELECT COMM. ON ETHICS, 108TH CONG., SENATE ETHICS MANUAL 93 (2003).

³⁵ These examples show the wide temporal range and the different types of information members of Congress and covered individuals may have traded securities on or otherwise financially profited from. This is a problem that plagues both major parties and the party membership of members of Congress is irrelevant when considering the problems that these activities create.

security *and* then acted on that information in either the purchase or sale of that security.³⁶ As a result, a common defense to insider trading allegations is simply to claim that the trade was made based on public information.³⁷ Absent contrary evidence or circumstances where the related information has been shielded from the public, this requirement effectively nullifies this element of the crime.³⁸ In the wake of a 60 Minutes report detailing alleged insider trading among members of Congress, Megan McArdle, a journalist at *The Atlantic*, articulated this problem:

[E]ach of these trades does have an innocent explanation. In late September 2008, it was getting fairly obvious that there was big trouble afoot in the markets. Similarly, it was clear that the public option was dead long before its obituary ran. And Nancy Pelosi is a very wealthy lady; those types of accounts do get preferential access to IPOs. The problem is, they also have a non-innocent explanation. And there's the rub: *we don't know*. We ought to be able to trust our congressmen. But when they won't take even small steps to improve their transparency--Louise Slaughter's STOCK Act has gone nowhere even though its requirements are hardly onerous--then the mistrust gets even worse.³⁹

³⁶ *O'Hagan*, 521 U.S. at 651–53.

³⁷ See Charles L. Slamowitz, *Profiteering Off Public Health Crises: The Viable Cure for Congress*, 77 WASH. & LEE L. REV. ONLINE 31, 43 (2020) (“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...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.”).

³⁸ See generally Megan McArdle, *Is Your Congressman Trading on Inside Information?*, ATL. (Nov. 14, 2011), <https://www.theatlantic.com/business/archive/2011/11/is-your-congressman-trading-on-inside-information/248445/>.

³⁹ *Id.*

A. *Securities Trading*

Members of Congress and covered individuals manipulating their portfolios after speaking with high-ranking members of the executive branch is a common theme that permeates this issue.

In 2007, Senator Ben Nelson spoke with Treasury Secretary Hank Paulson three times.⁴⁰ On January 10, 2007, Senator Nelson spoke with Paulson regarding regulations on Fannie Mae and Freddie Mack.⁴¹ On January 11, 2007, Senator Nelson purchased between \$100,000 and \$200,000 in Treasury notes.⁴² Senator Nelson and Paulson next spoke on February 12, 2007. That same day, Senator Nelson purchased between \$50,000 and \$100,000 in Treasury bills.⁴³ *The Washington Post* reported that Senator Nelson declined to be interviewed regarding the transactions, but that a spokesman stated that nothing Senator Nelson learned in these meetings would have influenced his trade, and that he would not “have conversations with Executive Branch officials about matters affecting his personal finances.”⁴⁴

On August 13, 2007, Senator Kent Conrad, chairman of the Budget Committee, spoke to Paulson on the phone.⁴⁵ The next day, Senator Conrad’s wife moved between \$150,000 and \$300,000 into lower-risk, money-market funds.⁴⁶ Perfectly demonstrating the difficulty of proving insider trading, especially among members of Congress, Senator Conrad said his conversation with Paulson had nothing to do with the reason he made the trades and that the decision “had everything to do with what was happening on the front pages over every paper.”⁴⁷

Representative John Boehner faced at least two accusations of improper trading during his time in office. In 2008, Representative Boehner served as the House Minority Leader and became the Bush administration’s “point person” to negotiate the stimulus package.⁴⁸ On

⁴⁰ Kindy, *supra* note 8.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Kindy, *supra* note 8.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

January 23, 2008, Representative Boehner met with Paulson.⁴⁹ That same day, he transferred between \$50,000 and \$100,000 from “a more aggressive mutual fund” and moved money into “a safer investment.”⁵⁰ The next day, January 24, the Bush administration released its stimulus package to the public.⁵¹ Representative Boehner would not discuss the transactions, but his spokesman stated that “[the transactions] did not pose a conflict because a financial adviser executed them and they were made in diversified mutual funds.”⁵² Peter Schweizer, Research Fellow at Stanford Hoover Institution, explained:

If you were a corporate executive and there was a pattern of stock behavior linked to inside information and you just told the SEC, ‘I don’t do it,’ the SEC wouldn’t just walk away,’ [Schweizer] said on CBS. The SEC would actually look and investigate and see if there is a link, and that’s what I think is troubling here — the SEC simply doesn’t have the authority or the power to go in and look and see, there is this interesting pattern linked to your legislative activity. Was there communication that took place that made this pattern exist?⁵³

Representative Boehner’s transactions were not unique during this time. Using members of Congress’ calendars and financial disclosure forms, *The Washington Post* found that thirty-four members of Congress had phone calls or meetings with Paulson, Timothy Geithner, Paulson’s successor, or Federal Reserve Chairman Ben Bernanke immediately before recasting their investments during the financial crises.⁵⁴ Within two business days of these conversations, these 34 members of Congress manipulated their portfolio positions a combined 166 times.⁵⁵ Richard W. Painter, President George W. Bush’s chief ethics lawyer commented: “They shouldn’t be making these trades when they know what they are going to do, . . . [a]nd what they are going to do is then going to influence the market. If this was going on in the private sector or . . . executive

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ MJ Lee, *Schweitzer Rips ‘Ridiculous Excuse’*, POLITICO (Nov. 11, 2011), <https://www.politico.com/story/2011/11/schweitzer-rips-ridiculous-excuse-068297>.

⁵⁴ Kindy, *supra* note 8.

⁵⁵ *Id.*

branch, I think the SEC would be investigating.”⁵⁶ In fact, Congress itself has imposed ethic laws on Treasury Secretaries prohibiting this exact conduct by Treasury Secretaries and other government officials.⁵⁷ Congress has even restricted positions far away from the financial sector, such as the deputy secretary of defense, from holding stocks while purposefully excluding its members from these restrictions.⁵⁸

Members of Congress’ responses to these accusations gained little attention although *The Washington Post* reported that some members of Congress stated that their trades were handled by their financial advisors. The report also stated, “[the] timing of the trades and the conversations was ‘coincidental’ and that they did not adjust their portfolios based on what they were told by the administration officials.”⁵⁹

In 2009, Representative Boehner’s conduct again raised red flags. This time, Representative Boehner purchased health-care stocks just before the universal health care option was dropped from the Democratic health care bill.⁶⁰ When faced with these accusations, Representative Boehner said: “I have not made any decisions on day-to-day trading activities of my account and haven’t for years. I do not do it, haven’t done it and wouldn’t do it”⁶¹

In 2011, while serving as the head of the House Financial Services Committee, Representative Spencer Bachus also faced allegations of insider trading.⁶² Peter Schweizer drew attention to these allegations in his book, *Throw Them All Out*, which detailed Representative Bachus’s use

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See Peter Schweizer, *THROW THEM ALL OUT: HOW POLITICIANS AND THEIR FRIENDS GET RICH OFF INSIDER STOCK TIPS, LAND DEALS, AND CRONYISM THAT WOULD SEND THE REST OF US TO PRISON*, 154 (Houghton Mifflin Harcourt ed., 2011).

⁵⁹ *Id.*

⁶⁰ John Bresnahan, ‘60 Minutes’ on ‘honest graft’, *POLITICO* (Nov. 13, 2011), <https://www.politico.com/story/2011/11/60-minutes-on-honest-graft-068271>.

⁶¹ *Id.*

⁶² Adam Martin, *Rep. Spencer Bachus Facing Insider Trading Ethics Probe*, *ATL.* (Feb. 10, 2012), <https://www.theatlantic.com/politics/archive/2012/02/rep-spencer-bachus-facing-insider-trading-ethics-probe/331975/>.

of inside information to profit during the 2008 financial crisis.⁶³ Representative Bachus attended a private briefing by Hank Paulson and Ben Bernanke with Congressional leaders on September 18, 2008.⁶⁴ Communication devices often were not allowed in the room.⁶⁵ In this meeting, Bernanke shared his prediction that: “[T]he financial crisis could spill into the real economy. As stocks dropped perhaps a further 20 percent, General Motors would go bankrupt, and unemployment would rise . . . [and that] it [was] a matter of days before there is a meltdown in the global financial system.”⁶⁶ The next day, September 19, Representative Bachus bought options to short the market, specifically an Exchange Traded Fund (ETF) called Proshares Ultra-Short QQQ (NASDAQ: SQQQ)—a 200% inverse of the Nasdaq-100 (NASDAQ: NDX) index.⁶⁷ For consumers without inside information, such a trade could result in enormous losses. Essentially, the trade was a bet the economy would collapse. In fact, just four days later, the market fell dramatically, and Representative Bachus sold the options, nearly doubling his investment.⁶⁸ In April of 2012, the Office of Congressional Ethics found Representative Bachus had not violated any insider trading rules.⁶⁹

An incomplete list of members of Congress who traded securities immediately following these meetings includes Senator Dick Durban, the Democratic Whip who attended the September 18 meeting as well as a September 16 meeting with Henry Paulson and Ben Bernanke, and who sold over \$100,000 from his portfolio on September 17 and 18; Representative Jim Moran who attended the September 16 meeting and sold shares in ninety companies on September 17; Representative Shelley Capito who attended the September 17 meeting and sold between \$100,000 and \$250,000 in Citigroup on September 17; and Senator Sheldon Whitehouse who sold between \$250,000 and \$600,000 between September 18 and 24.⁷⁰

⁶³ David Weigel, *Spencer Bachus, Rouge Trader*, SLATE (Nov. 14, 2011), <https://slate.com/news-and-politics/2011/11/spencer-bachus-rogue-trader.html>; see generally Schweizer, *supra* note 58.

⁶⁴ Weigel, *supra* note 63.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Mike Zapler, *Bachus Cleared After Insider Trading Probe*, POLITICO (Apr. 30, 2012), <https://www.politico.com/blogs/on-congress/2012/04/bachus-cleared-after-insider-trading-probe-122119> [<https://perma.cc/9QZK-75GG>].

⁷⁰ Schweizer, *supra* note 58 at 332–34; Michael Brendan Dougherty, *FULL DETAILS: How Congress Insider Traders Abused the Public's Trust*

1. 2020 COVID-19 SELLOFF

In the run-up to the 2020 COVID-19 Pandemic, Senator Burr was receiving daily coronavirus briefings when he sold between \$628,000 and \$1.72 million in stock.⁷¹ Additionally, documents provided to the Office of Government Ethics show Senator Burr's brother-in-law sold between \$97,000 and \$280,000 of stock on the same day Senator Burr unloaded his holdings.⁷² Prior to this, Senator Burr co-authored an op-ed where he stated, "the United States today is better prepared than ever before to face emerging public health threats, like the coronavirus."⁷³ However, On February 27, 2020, Senator Burr spoke at a private luncheon with North Carolina businesses and organizations where he stated the coronavirus is "more aggressive in its transmission than anything that we have seen in recent history."⁷⁴

After these allegations of insider trading arose, Senator Burr requested an investigation by the Senate Ethics Committee.⁷⁵ In March,

During the Financial Crisis, BUSI. INSIDER (Nov. 14, 2011), <https://www.businessinsider.com/heres-how-congressmen-gamed-the-financial-crisis-to-make-big-bucks-in-the-stock-market-2011-11#sen-dick-durbin-d-il-1> [<https://perma.cc/B49T-97XY>].

⁷¹ Renato Mariotti, *Why Burr's Stock Sales Are Easier to Condemn than Prosecute*, POLITICO (March 23, 2020), <https://www.politico.com/news/magazine/2020/03/23/richard-burr-stocks-trading-coronavirus-prosecute-142976> [<https://perma.cc/EKL6-DV6G>].

⁷² Del Quentin Wilber & Jennifer Haberkorn, *FBI Serves Warrant On Senator In Investigation of Stock Sales Linked to Coronavirus*, L.A. TIMES (May 13, 2020), <https://www.latimes.com/politics/story/2020-05-13/fbi-serves-warrant-on-senator-stock-investigation>.

⁷³ Robert Faturechi & Derek Willis, *Senator Dumped Up to \$1.7 Million of Stock After Reassuring Public About Coronavirus Preparedness*, PROPUBLICA (Mar. 19, 2020), <https://www.propublica.org/article/senator-dumped-up-to-1-7-million-of-stock-after-reassuring-public-about-coronavirus-preparedness> [<https://perma.cc/6VVK-K4JE>]; Sen. Lamar Alexander & Sen. Richard Burr, *Coronavirus Prevention Steps the U.S. Government is Taking to Protect You*, FOX NEWS OP. (Feb. 7, 2020), <https://www.foxnews.com/opinion/coronavirus-prevention-steps-the-u-s-government-is-taking-to-protect-you-sen-alexander-and-sen-burr> [<https://perma.cc/6HSX-3ER4>].

⁷⁴ Mariotti, *supra* note 71.

⁷⁵ J. Edward Moreno, *Burr Requests Ethics Investigation Into Stock Sale, Denies Wrongdoing*, THE HILL (Mar. 20, 2020),

the United States Department of Justice (DOJ) launched an investigation into Senator Burr's transactions; in May, the United States Federal Bureau of Investigation (FBI) seized his cellphone as part of the investigation.⁷⁶ The next day, Senator Burr stepped down as Chairman of the Senate Intelligence Committee.⁷⁷ It is also worth noting, Senator Burr was one of only three senators who opposed the STOCK Act in 2012.⁷⁸

Senator Burr's conduct demonstrates many of the difficulties of investigating and prosecuting potential insider trading by public officials. Senator Burr's defense rests solely on his word that his financial decisions were made only on public information, and because of broad speech and debate protections for members of Congress, investigators could be prevented from questioning Senator Burr about the information he received in nonpublic briefings.⁷⁹

Senator Burr was not the only member of Congress, or only covered individual, to avoid huge losses during the COVID-19 collapse. Senator Feinstein and her husband sold between \$1.5 and \$6 million in biotech company, Allogene Therapeutics, stocks on January 31 and February 18.⁸⁰ Senator Feinstein's spokesman stated that all her assets are in a blind trust and she is not involved in her husband's financial decisions.⁸¹

<https://thehill.com/homenews/senate/488621-burr-requests-ethics-investigation-into-stock-sale-denies-wrongdoing> [<https://perma.cc/P6QN-4M8Z>].

⁷⁶ David Shortell et al., *Exclusive: Justice Department Reviews Stock Trades by Lawmakers After Coronavirus Briefings*, CNN POL. (Mar. 30, 2020), <https://www.cnn.com/2020/03/29/politics/justice-stock-trades-lawmakers-coronavirus/index.html> [<https://perma.cc/6DQ5-LU5L>]; Katie Benner & Nicholas Fandos, *Richard Burr Steps Back From Senate Panel as Phone is Seized in Stock Sales Inquiry*, N.Y. TIMES (May 14, 2020), <https://www.nytimes.com/2020/05/14/us/politics/richard-burr-stocks.html> [<https://perma.cc/44YP-EQPM>].

⁷⁷ Shortell, *supra* note 75.

⁷⁸ Faturechi, *supra* note 73.

⁷⁹ Katie Benner & Nicholas Fandos, *Justice Dept. Ends Inquiries Into 3 Senators' Stock Trades*, N.Y. TIMES (May 26, 2020), <https://www.nytimes.com/2020/05/26/us/politics/senators-stock-trades-investigation.html> [<https://perma.cc/63BQ-5UNA>].

⁸⁰ Eric Lipton & Nicholas Fandos, *Senator Richard Burr Sold a Fortune in Stocks as G.O.P. Played Down Coronavirus Threat*, N.Y. TIMES (Mar. 19, 2020), <https://www.nytimes.com/2020/03/19/us/politics/richard-burr-stocks-sold-coronavirus.html> [<https://perma.cc/WAE4-S4RX>].

⁸¹ *Id.*

Senator Kelly Loeffler, who sat on the Senate Health Committee, and her husband, Jeffrey C. Sprecher, chairman of the New York Stock Exchange, sold between \$1.2 and \$3.1 million in stocks from January 24, 2020 to February 14, 2020 and invested between \$450,000 and \$1 million in companies including Citrix, which sells remote-working software, and Dupont, a medical supply manufacturer.⁸² Some of these trades occurred the same day Senator Loeffler attended a private coronavirus briefing with the director of the Centers for Disease Control and Prevention (CDC) and Dr. Anthony Fauci with the Senate Health Committee.⁸³ After allegations of insider trading arose, Senator Loeffler's office stated that neither the senator nor her husband makes investment decisions for their portfolios.⁸⁴ Senator Loeffler also announced her plan to liquidate and move her and her husband's managed accounts into exchange-traded funds and mutual funds.⁸⁵ However, as this article discusses below, these steps are inadequate.⁸⁶

Other members of Congress who traded shortly after receiving classified COVID-19 briefings include Senator David Perdue, who purchased stock in Dupont on January 24, 2020, and Senator Jim Inhofe, who sold up to \$400,000 of stocks on January 27, 2020.⁸⁷ Senator Perdue's office stated that Senator Perdue was not involved in day-to-day decisions

⁸² Shortell, *supra* note 76; Katelyn Burns, *Kelly Loeffler and 2 Other Senators Are No Longer Being Investigated for Insider Trading*, VOX (May 27, 2020), <https://www.vox.com/policy-and-politics/2020/5/27/21271726/kelly-loeffler-senators-investigation-insider-trading>; Grace Panetta, *New Disclosure Reveals Sen. Kelly Loeffler and Her Husband Dumped Retail Stock and Bought Shares in a Company That Manufactures Medical Supplies*, BUS. INSIDER (Apr. 1, 2020), <https://www.businessinsider.com/sen-loeffler-dumped-more-retail-stock-in-new-disclosures-coronavirus-2020-4> [<https://perma.cc/MQM3-TXMB>].

⁸³ Burns, *supra* note 82.

⁸⁴ Lipton, *supra* note 80.

⁸⁵ Kelly Loeffler, *I Never Traded on Confidential Coronavirus Information*, WALL ST. J. OP. (Apr. 8, 2020), <https://www.wsj.com/articles/i-never-traded-on-confidential-coronavirus-information-11586365056> [<https://perma.cc/4C28-W66E>].

⁸⁶ See discussion *infra* Section IV.

⁸⁷ Lipton, *supra* note 80; Sonam Sheth, *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), <https://www.businessinsider.com/coronavirus-david-perdue-bought-stock-company-producing-ppe-after-briefing-2020-4> [<https://perma.cc/6RDN-5YT4>].

in his personal finances.⁸⁸ These are the most publicized examples that arose out of the COVID-19 pandemic, and as of January 2021, the investigations of all members of Congress have concluded due to insufficient evidence of wrongdoing.⁸⁹ However, as demonstrated, some members of Congress were cleared simply by stating that they did not trade on inside information.⁹⁰

B. *Land Deals*

While securities trading has made many members of Congress wealthy, land deals have been equally lucrative for many members of Congress and covered individuals. While not insider trading in terms of traditional securities trading, members of Congress and covered individuals have nonetheless bought and sold land based on inside knowledge or power that their positions as elected officials grant them.

Representative Dennis Hastert came to Washington D.C. in 1986 with his farm being his largest asset, worth \$50,000 to \$100,000.⁹¹ During his twenty years in office, Representative Hastert's assets grew to amass between \$3.1 and \$11.3 million.⁹² A large portion of that money came from a land deal Representative Hastert struck in 2005 while serving as Speaker of the House.⁹³ Representative Hastert purchased land under a blind land trust near the site of a planned real estate development.⁹⁴ Because he held the land in a blind trust, there was no record of Representative Hastert's financial interest.⁹⁵ He then placed an earmark

⁸⁸ Sheth, *supra* note 87.

⁸⁹ Vanessa Romo, *DOJ Drops Insider Trading Investigation into Sen. Richard Burr*, NAT'L PUB. RADIO (Jan. 19, 2021), <https://www.npr.org/2021/01/19/958622574/doj-drops-insider-trading-investigation-into-sen-richard-burr>.

⁹⁰ *See e.g., id.*

⁹¹ Matea Gold & Anu Narayanswamy, *How Dennis Hastert Made a Fortune in Land Deals*, WASH. POST (May 29, 2015), https://www.washingtonpost.com/politics/how-dennis-hastert-made-a-fortune-in-land-deals/2015/05/29/680f357a-0628-11e5-bc72-f3e16bf50bb6_story.html [<https://perma.cc/54ND-ZUCK>].

⁹² *Id.*

⁹³ Grace Wyler & Zeke Miller, *Beyond Insider Trading: Here's How Members of Congress Get Rich Off Earmarks*, BUS. INSIDER (Nov. 15, 2011), <https://www.businessinsider.com/congress-insider-trading-earmarks-real-estate-nancy-pelosi-rich-tax-payer-money-2011-11#former-house-speaker-dennis-hastert-r-il-3> [<https://perma.cc/GYV8-NNF2>].

⁹⁴ Wyler, *supra* note 93; Gold, *supra* note 91.

⁹⁵ Gold, *supra* note 91.

for \$207 million of funding for a parkway into the Federal Highway Bill, which, upon passing, drastically increased the land's value and netted Representative Hastert between \$2 and \$10 million.⁹⁶

Representative Nancy Pelosi has also reaped personal profits from federal money that has helped her real estate investments. In 2011, Representative Pelosi reportedly owned an office building “located at a prime distance” from a light rail stop that she had secured more than \$890 million in federal money to build.⁹⁷ Additionally, in 2006, Representative Pelosi secured a \$20 million earmark for waterfront redevelopment—blocks away from that same office building.⁹⁸ Further, Representative Pelosi reportedly secured \$12 million in funding for a beautification project that abutted one of her properties and also had a stake in properties had potential to benefit from earmarks for the Napa Valley Airport.⁹⁹

In 2005, Senator Harry Reid sponsored an \$18 million earmark to build a bridge a few miles from a 160-acre parcel of land he owned, allegedly leveraging his position over the local zoning board to reap profits from this land.¹⁰⁰ The county lobby Senator Reid's office for federal earmarks was the same county in which his land was located. During that time, the zoning board agreed to rezone that land, drastically increasing its value.¹⁰¹

Additional examples of members of Congress profiting off of land deals include: Representative Carolyn Maloney, who worked to secure \$641 million in federal earmarks for the Second Avenue Subway in New York City, blocks away from where she owned a business building; Representative Maurice Hinchey, who secured \$800,000 in federal earmarks for land improvements in Saugerties, New York, where 25% of the land improved upon was owned by the Representative himself; and Senator Judd Gregg, who secured \$66 million in earmarks to develop a

⁹⁶ Wyler, *supra* note 93.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Wyler, *supra* note 93; Chuck Neubauer & Tom Hamburger, *A Deal In the Desert for Senator Reid?*, L.A. TIMES (Jan. 28, 2007), <https://www.latimes.com/archives/la-xpm-2007-jan-28-na-reid28-story.html> [<https://perma.cc/V88M-6RZW>].

¹⁰¹ Wyler, *supra* note 93.

business park, which his brother developed, and on which Senator Gregg netted between \$240,000 and \$650,000.¹⁰²

C. IPO & Corporate Board Seats

Speaker of the House, Nancy Pelosi, has participated in at least eight IPOs, and in March 2008, her husband, Paul Pelosi, bought \$2 million of VISA stock.¹⁰³ That same month, VISA raised \$17.9 billion on its IPO, reaping huge profits for the Pelosi family.¹⁰⁴ Then, in October 2008, the House Judiciary Committee passed a bill concerning card charges after VISA lobbyists spent the last year lobbying to Congress and Representative Pelosi personally, including a direct donation to Representative Pelosi's re-election campaign.¹⁰⁵

Other members of Congress who made huge financial gains with access to IPOs include Senator Robert Torricelli, who participated in nine IPOs in 1997 and who once made \$70,000 in one day off an IPO; Senator Jeff Bingham, whose Avanex IPO investment rose 378% in one day; and Senator Barbra Boxer who participated in the Avenue A and Interwave Communications IPOs, which netted her as much as a 200% return in one day.¹⁰⁶

¹⁰² *Id.*

¹⁰³ Bresnahan, *supra* note 60; Stephanie Condon, *New details on Visa's attempt to influence Pelosi*, CBS NEWS (Nov. 15, 2011, 3:01 PM), <https://www.cbsnews.com/news/new-details-on-visas-attempt-to-influence-pelosi/>.

¹⁰⁴ Lilla Zuill, *Visa raises \$17.9 billion in record IPO*, REUTERS (Mar. 18, 2008, 4:14 PM), https://www.reuters.com/article/us-visa-ipo/visa-raises-17-9-billion-in-record-ipo-idUSWEN458920080319_.

¹⁰⁵ Condon, *supra* note 103.

¹⁰⁶ Schweizer, *supra* note 58, at 47.

Perhaps the most famous example of seemingly misappropriated corporate board seats belongs to Joe Biden's son, Hunter Biden.¹⁰⁷ In 2014, Hunter Biden became a board member of a Ukrainian gas-production company, Burisma Holdings, where it was announced that he would be in charge of Burisma's legal unit.¹⁰⁸ Burisma Holdings paid Hunter Biden as much as \$50,000 per month for his work although he had no experience in Ukrainian business.¹⁰⁹ *The New York Times* reported that Hunter Biden's position was an effort "to bring in well-connected Democrats during a period when the company was facing investigations . . . by officials in the Obama administration."¹¹⁰

Of all the examples above, not one member of Congress was even charged for their actions.¹¹¹ In fact, former representative Chris Collins is the only member of Congress in at least the last twenty years to be convicted of insider trading. On January 17, the court sentenced former Representative Chris Collins to twenty-six months in prison after pleading

¹⁰⁷ This article has chosen to exclude activities related to President Donald J. Trump, his family, or any of the Trump entities for two reasons. First, this article is meant to highlight this problem as it relates to members of Congress. Granted, Joe Biden is not a current member of Congress, but this article aims to illustrate the existence of the institutional problem. Donald J. Trump was President for a single term, but Congress as an institution will exist for the duration of the United States. Second, bringing Donald J. Trump into this article will diminish the severity of this issue as it relates to members of Congress—and thorough accounting of the alleged violations made by Trump and covered individuals would prevent a timely release of this paper concerning the 2020 COVID-19 selloff.

¹⁰⁸ Ellen Cranley et al., *Meet Hunter Biden, the often scandal-plagued middle child of Democratic presidential nominee Joe Biden*, BUS. INSIDER (Oct. 21, 2020, 10:15 AM), <https://www.businessinsider.com/hunter-biden-life-scandals-ukraine-involvement-with-trump-giuliani-2019-9>; Burisma, *Hunter Biden joins the team of Burisma Holdings*, BURISMA PRESS RELEASE (May 12, 2014), <https://www.documentcloud.org/documents/5980032-Burisma-Announces-Hunter-Biden-s-Appointment-to.html>.

¹⁰⁹ Kenneth P. Vogel & Iuliia Mendel, *Biden Faces Conflict of Interest Questions That Are Being Promoted by Trump and Allies*, N.Y. TIMES (May 1, 2019), <https://www.nytimes.com/2019/05/01/us/politics/biden-son-ukraine.html?module=inline>.

¹¹⁰ *Id.*

¹¹¹ See Consider Schweizer, *supra* note 58, at 47; Wyler, *supra* note 93.

guilty to insider trading.¹¹² However, unlike members of Congress who may be making financial decisions based on nonpublic information they learned through their roles as public officials, former Representative Collins received the nonpublic information as a member of the board of Innate Immunotherapeutics Limited, an Australian biotechnology company.¹¹³ Because of his position as a board member, former Representative Collins received advanced notice that the company's multiple sclerosis clinical trial had failed, of which he informed his son, who then traded on that nonpublic information.¹¹⁴ As such, former Representative Chris Collins' actions demonstrate a need for regulation regarding both corporation board positions and family members of public representatives.

III. FAILED AND INADEQUATE ATTEMPTS TO FIX THE PROBLEM

While the allegations above may read like an indictment in a criminal racketeering case, Representative Collins was the only member of Congress to be convicted. While the investigation into Senator Burr is ongoing, on May 26, 2020, the DOJ announced that it did not find sufficient evidence that Senators Kelly Loeffler, James Inhofe, or Dianne Feinstein had broken the law and that insider trading charges would not be pursued.¹¹⁵ In the course of the investigation, Senators Loeffler, Feinstein, and Inhofe were all asked to produce "records and other information related to the sales," but as this article has demonstrated, absent direct evidence that the decision to trade was based on such inside information, a conviction is nearly impossible.¹¹⁶

The New York Times reported that the Senate Ethics Committee may be investigating these Senators.¹¹⁷ However, the panel works in secret, raising transparency problems.¹¹⁸ The best illustration of the problems that arise out of such lack of transparency is the fact that no one

¹¹² Jonathan Allen, *Former U.S. Congressman Collins Sentenced to 26 Months for Insider Trading*, REUTERS (Jan. 17, 2020, 3:07 AM), <https://www.reuters.com/article/us-usa-congressman-insidertrading/former-u-s-congressman-collins-sentenced-to-26-months-for-insider-trading-idUSKBN1ZG16N>.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Benner, *supra* note 79; *see also* Lipton, *supra* note 80 (stating that one does not make their own investment decisions appears to end probes).

¹¹⁶ Benner, *supra* note 79.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

has been successfully prosecuted under the STOCK Act.¹¹⁹ In 2010, discussing the House Ethics Committee, *ProPublica* reported: “It’s hard for reporters—for anyone, really—to figure out exactly what the ethics committee is up to.”¹²⁰ Similarly, the watchdog group “Citizens for Responsibility and Ethics” in Washington called the ethics committee “notoriously lax.”¹²¹

While there have been countless proposals by both Washington politicians and outsiders concerning these activities among members of Congress, most of those proposals by members of Congress focused on insider trading in general and left out any explicit application to members of Congress. This demonstrates that members of Congress continue to be more concerned with stopping and punishing others over engaging in insider trading than regulating themselves. *The New York Times* reported that “many criminal defense lawyers and ethics advocates have come to believe that it may simply be too hard to prosecute a member of Congress under the law,” demonstrating that comprehensive legislation is needed despite the apparent fact that members of Congress cannot seem to support comprehensive reform.¹²²

In fact, while House Majority Leader Mitch McConnell decided years ago that he was more comfortable not owning individual stock, he stated that each member of Congress “should be allowed to invest as they saw fit.”¹²³ It should be clear at this point that members of Congress as a whole should not be allowed to invest as they see fit, because it appears that they and their families consistently profit at the expense of the American public.

In 2015, three bills regarding insider trading were introduced in Congress. Representative Stephen Lynch introduced the Ban Insider

¹¹⁹ Fritz, *supra* note 8 at 312.

¹²⁰ Marian Wang, *Investigating the Investigators: How the House Ethics Committee Works*, PROPUBLICA (March 11, 2010, 12:11 PM), <https://www.propublica.org/article/investigating-the-investigators-how-the-house-ethics-committee-works-311> [<https://perma.cc/XAT4-AVGF>].

¹²¹ *Id.*

¹²² Nicholas Fandos, *To Gain Public’s Trust, Should Members of Congress Stop Trading Stock?*, N.Y. TIMES, (June 15, 2020), <https://www.nytimes.com/2020/06/15/us/politics/congress-trading-stock-loeffler-burr.html> [<https://perma.cc/3NTJ-MTRC>].

¹²³ *Id.*

Trading Act of 2015, which died after referral to the House Financial Services Committee.¹²⁴ Senator Jack Reed introduced The Stop Illegal Insider Trading Act, which died after referral to the Senate Banking, Housing, and Urban Affairs Committee.¹²⁵ These bills proposed amending Section 10 of the Exchange Act and removing the “personal benefit” requirement, which could have made a conviction under the act easier.¹²⁶

Representative Jim Himes first introduced the Insider Trading Prohibition Act in 2015. After it died in committee, Himes introduced a similar bill, the Himes Bill, which was passed by the House 410–3 in December 2019.¹²⁷ Former Southern District of New York federal prosecutor and chairman of the Bharara Task Force, Preet Bharara, noted that the bill “shifts the focus to information that is ‘wrongfully’ obtained as opposed to having to rely entirely on concepts of fraud or deception.”¹²⁸ However, the House also removed the “personal benefit” requirement the night before the bill was brought to a vote, and replaced it with a standard that only applied to cases where a breach of duty resulted in “wrongfully obtained” information.¹²⁹ The Task Force concluded that this replacement standard “undermines much of the improvement and simplification that the Himes Bill otherwise achieves.”¹³⁰ Charles L. Slamowitz writes that this reinstatement of the “personal-benefit” requirement may preempt the recent *Blaszczak* ruling.¹³¹ This bill has not yet been addressed in the Senate.¹³² However, In January 2020, the House passed the 8-K Trading Gap Act, which “requires public companies to establish policies,

¹²⁴ Preet Bharara & Bharara Task Force, *Report on Insider Trading by the Bharara Task Force*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 13, 2020), <https://corpgov.law.harvard.edu/2020/02/13/report-on-insider-trading-by-the-bharara-task-force/> [<https://perma.cc/Q2P5-TD93>]; Ban Insider Trading Act of 2015, H.R. 1173, 114th Cong. (2015).

¹²⁵ Bharara, *supra* note 124; Stop Illegal Insider Trading Act, S. 702, 114th Cong. (2015).

¹²⁶ Bharara, *supra* note 124.

¹²⁷ Insider Trading Prohibition Act, H.R. 1625, 114th Cong. (2015); Insider Trading Prohibition Act “The Himes Bill,” H.R. 2534, 116th Cong. (2019); Bharara, *supra* note 124.

¹²⁸ Bharara, *supra* note 124.

¹²⁹ Bharara, *supra* note 124; Coffee, *supra* note 24, at 4.

¹³⁰ Bharara, *supra* note 124; Coffee, *supra* note 24, at 4 (writing that the re-insertion of the personal benefit test “is a strange mismatch of a bill that both expands and contracts the scope of the insider trading prohibition”). Coffee further explains that the “personal benefit test” creates an incongruity between subparagraph (c)(1)(D) and (c)(1)(C), thus trivializing subparagraph (c)(1)(D). *Id.*

¹³¹ Slamowitz, *supra* note 37, at 38.

¹³² Insider Trading Prohibition Act, H.R. 2534, *supra* 127.

procedures, and controls to prohibit executives and directors from trading in equities in advance of the announcement . . . of certain corporate events.”¹³³ This illustrates how Congress is consistently more concerned with policing the public rather than themselves.

Slamowitz writes that prohibiting members of Congress from trading altogether, what he calls “[a] more drastic position,” is becoming more widely held.¹³⁴ In March 2020, Representatives Alexandria Ocasio-Cortez, Raja Krishnamoorthi, and Joe Neguse announced their intentions to introduce legislation that would balance conflicts of interest by forcing members of congress to sell their individual stocks, transfer them into a blind trust, or simply hold onto them for the entirety of their time in office.¹³⁵ This legislation was originally introduced in 2018 by Senator Jeff Merkley where it died after being referred to the committee.¹³⁶ Although members of Congress would still be permitted to hold broad-based investments under this legislation, it would restrict their ability to create net short positions in securities or to serve as officers or board members at for-profit entities.¹³⁷

On June 15, 2020, Representatives Chip Roy and Abigail Spanberger introduced another bill that includes necessary restrictions but is not comprehensive enough.¹³⁸ The introduced legislation would require members of Congress to hold their assets in a blind trust during their tenure.¹³⁹ This would also extend to the spouses and dependent children of members of Congress.¹⁴⁰

¹³³ Bharara, *supra* note 124.

¹³⁴ Slamowitz, *supra* note 37, at 43.

¹³⁵ Faturechi, *supra* note 73.

¹³⁶ Aila Slisco, *Alexandria Ocasio-Cortez to Co-Sponsor House Bill Banning Members of Congress From Trading Stocks*, NEWSWEEK (March 23, 2020, 6:41 PM), <https://www.newsweek.com/alexandria-ocasio-cortez-co-sponsor-house-bill-banning-members-congress-trading-stocks-1493851> [<https://perma.cc/7JVX-PV5T>]. Under AOC’s plan, members of Congress and covered individuals could still hold broad-based investments. *Id.* Ban Conflicted Trading Act, S. 3718, 115th Cong. (2018).

¹³⁷ Faturechi, *supra* note 73; Slisco, *supra* note 136.

¹³⁸ Fandos, *supra* note 122.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

Megan McArdle proposes a simple solution: all assets of members of Congress, with exceptions for family-owned businesses and real estate, go into a blind trust or into index funds that can only be reallocated once per year.¹⁴¹ McArdle explains that this “would eliminate both the appearance of impropriety, and the temptation that any human being must feel to lean on the scales in a way that benefits their portfolio.”¹⁴² However, this article demonstrates that allowing members of Congress to keep family-owned business and real estate without regulation prevents any comprehensive solution to the problem.

Finance professor Patrick Augustin also proposes limiting trading by public officials to broad market indices for securities trading.¹⁴³ Augustin cautions that a “total prohibition of securities trading may deter qualified candidates from running for office altogether.”¹⁴⁴ However, he also notes that this limitation would lower the cost of monitoring public officials and would help regain public trust.¹⁴⁵

These pieces of legislation and proposals include important restrictions, such as the inability to create net short positions in securities, the inability to serve as an officer or board member of for-profit entities, and the extension of the restrictions to family members of members of Congress. The legislation and proposals also place too much emphasis on blind trusts, the use of which has not been effective in combating insider trading thus far.

A blind trust operates at a trustee’s direction to ensure that the owner does not know what assets he holds.¹⁴⁶ However, a blind trust often absolves members of Congress and covers certain individuals from thorough investigation into the matter.¹⁴⁷ Fritz points out additional problems with blind trusts as some members of Congress and covered individuals utilize them.¹⁴⁸ First, Fritz explains that some blind trust investments have no disclosure requirements.¹⁴⁹ Second, and more

¹⁴¹ McArdle, *supra* note 38.

¹⁴² *Id.*

¹⁴³ Patrick Augustin et al., *Insider Trading by Congress? It’s Time to Fix the Law*, THE HILL (April 19, 2020), <https://thehill.com/opinion/criminal-justice/493497-insider-trading-by-congress-its-time-to-fix-the-law>.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See Fritz, *supra* note 8, at 311.

¹⁴⁷ See Kimberly, *supra* note 8; Lipton, *supra* note 80.

¹⁴⁸ Fritz, *supra* note 8, at 311–12.

¹⁴⁹ *Id.*

importantly, the member of Congress or covered individual chooses the trustee to manage their assets, making it virtually impossible to enforce a prohibition of communication between the two.¹⁵⁰ Because of these reasons, blind trusts are not the answer to the issue of alleged insider trading by members of Congress. This article's proposal does not utilize blind trusts but instead places an emphasis on transparency and disclosures.

Slamowitz suggests that "timely heightened pandemic-specific securities disclosure requirements for members of Congress in an easily publicly-accessible manner" will "[curtail] congressional insider trading."¹⁵¹ He argues that heightened disclosure requirements limited to public health crises are more sensible than "prosecuting all congresspersons alleged of insider trading, barring them from owning any securities, or doing nothing."¹⁵² While he is correct that heightened disclosure requirements are better than doing nothing, like other proposals, Slamowitz's solution does not go far enough to actually solve the problem.

The Bharara Task Force explains many of the current issues and questions that "[lack] clear answers" with insider trading laws in his Report on Insider Trading.¹⁵³ The report includes unanswered questions such as, "When precisely does a person breach a duty owed to the owner of the information?" and, "What if information was shared mistakenly or overheard by others?"¹⁵⁴ The report also notes that what constitutes a "personal benefit" is ambiguous.¹⁵⁵ Beyond securities, these obscurities can also be seen to have an effect when members of Congress or covered individuals are involved in real estate transactions or receiving benefits from federal earmarked money that they sought.¹⁵⁶ Last, the report notes that there is no clear answer as to whether someone who trades on illegally obtained confidential information has committed insider trading, or whether "downstream tippees" committed insider trading.¹⁵⁷

¹⁵⁰ *Id.*

¹⁵¹ Slamowitz, *supra* note 37, at 45.

¹⁵² *Id.*

¹⁵³ See Bharara, *supra* note 124, at 3.

¹⁵⁴ *Id.* at 3–4.

¹⁵⁵ *Id.*

¹⁵⁶ See Wyler, *supra* note 93; Gold, *supra* note 91.

¹⁵⁷ Bharara, *supra* note 124.

The Task Force, when considering how insider trading regulation could best be reformed, concluded that because the SEC must follow Supreme Court precedent when promulgating new rules, new legislation is necessary for real clarity and reform.¹⁵⁸ The Task Force outlined four principles to guide new legislation: (1) “Aim for clarity and simplicity”; (2) “Focus on ‘wrongful’ use of material nonpublic information, not exclusively on ‘deception’ or ‘fraud’”; (3) “Eliminate the ‘personal benefit’ requirement”; and (4) “Clearly and explicitly define the state of mind requirement for criminal and civil insider trading, as well as the knowledge required for tippees.”¹⁵⁹ These guiding principles are also necessary for applying insider trading legislation to members of Congress and covered individuals, which is expanded upon in this proposal.

One unique issue with the STOCK Act that Kevin W. Fritz focused on is the ninety-day disclosure requirement.¹⁶⁰ Fritz explained that corporate insiders must report securities transactions within two days.¹⁶¹ However, Fritz stated it makes sense to hold members of Congress to an even higher standard than corporate insiders.¹⁶² He proposed a 24-hour disclosure requirement for Congress members, which would inform the public of possible conflicts almost immediately.¹⁶³ Fritz explained that “[a]fter three months, the passage of the legislation is ancient history with our fast-paced and short-attention-spanned society, and all of the underhanded transactions that occurred during that time are nowhere near as meaningful because little can be done about it so long afterwards.”¹⁶⁴ Additionally, Fritz proposed eliminating the \$1,000 trigger for disclosure requirements and proposed that all financial transactions be subject to the same disclosure requirements.¹⁶⁵ Together, a ninety-day reporting requirement would only continue to benefit a member that improperly profited by the passage of certain legislation.

IV. PROPOSED SOLUTION

This article proposes new legislation paired with a nonpartisan panel to address the use of inside information by Congress members and to prevent the appearance of impropriety. This article is not drafting the

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Fritz, *supra* note 8, at 309.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 310.

substantive securities portion of the legislation but recommends that it is written to be consistent with four principles outlined by the Bharara Task Force: (1) “Aim for clarity and simplicity”; (2) “Focus on ‘wrongful’ use of material nonpublic information, not exclusively on ‘deception or fraud’”; (3) “Eliminate the ‘personal benefit’ requirement”; and (4) “Clearly and explicitly define the state of mind requirement for criminal and civil insider trading, as well as the knowledge required for tippees.”¹⁶⁶ However, once the substantive securities legislation is crafted under the principles, the work is not done.¹⁶⁷ The most important aspects of the new legislation are (1) the clear applicability of the law to members of Congress and covered individuals; (2) the restrictions that members of Congress and covered individuals must abide by; (3) reporting and disclosure requirements; and (4) penalties and consequences for violations.

There must be clear language that applies these clarified insider trading laws to Congress members, their immediate families, and congressional staff.¹⁶⁸ The issue of applying these laws to the families of members of Congress is complicated and far-reaching. However, it is clearly needed as time and time again, spouses and family members of elected officials appear to be profiting because of their relationships with members of Congress.

The second aspect of the legislation must address what financial investments the members of Congress and covered individuals can be involved in. This proposal limits the opportunities of Congress members and covered individuals, which is necessary to solve, at the very least, the appearance of insider trading. While some proposals have suggested limiting securities available to members of Congress to ETFs or other broad-based holdings, this does not solve the problem because insider trading can still occur based on insider information concerning an entire sector or the economy as a whole.¹⁶⁹ For example, in the COVID-19 selloff, members sold hotel and travel-related holdings and purchased medical supplies and remote technology-related holdings.¹⁷⁰ Because Congress members and covered individuals may have access to

¹⁶⁶ Bharara, *supra* note 124.

¹⁶⁷ *Id.*

¹⁶⁸ These “individuals” are the “covered individuals.”

¹⁶⁹ See Faturechi, *supra* note 73; Slisco, *supra* note 136; Ban Conflicted Trading Act, S. 3718, 115th Cong. (2018).

¹⁷⁰ See Mariotti, *supra* note 71; Shortell, *supra* note 76.

information regarding specific industries or the economy as a whole, simply limiting these individuals to broad-based holdings without changing other aspects of the problem will not solve the issue. The issue can only be solved with strict disclosure requirements. This proposal will continue to allow members of Congress and covered individuals to participate in the purchase and selling of ordinary securities but will restrict investment in options.¹⁷¹

First, these opportunities will likely influence the targeted members' relationship with the subject company throughout their career, even if wholly unintentionally. If a member of Congress makes substantial financial gains by participating in an IPO, similar to Representative Pelosi and her husband in the VISA IPO, it is naive to think their future choices regarding that company will be unaffected by this windfall.¹⁷² Further, if a member of Congress expects the opportunity to participate in an IPO, this expectation may affect that individual's viewpoint and vote regarding any legislative or regulatory issues that may arise with the company before the opportunity to participate even arises, including antitrust and taxation issues that could affect any future investment.

There must also be restrictions regarding the acquisition of land by members of Congress and covered individuals. Too many times members of Congress and covered individuals purchased land in the leadup to some project or federal earmark that member of Congress is advocating for, only to later reap the financial benefits of that federal money.¹⁷³ This proposal would restrict members of Congress and covered individuals from acquiring any land beyond their main dwelling (in their home state) and their Washington D.C. residency during the member's time in office. While this may appear drastic, land transactions based on inside information anecdotally appears to be a leading instance of financial windfalls among members of Congress, and it often occurs at the taxpayer's expense.¹⁷⁴

Additionally, the members of Congress and covered individuals must be restricted from serving on the boards of corporations. As seen with Representative Chris Collins, these positions can, at the very least, create

¹⁷¹ The purpose of allowing securities trading is to prevent money from being funneled into other ventures such as real property.

¹⁷² *Id.*

¹⁷³ See *supra* section III(B) (discussing Representative Hastert, Senator Pelosi, Senator Reid, Representative Maloney, Representative Hinchey, and Senator Gregg).

¹⁷⁴ *Id.*

the appearance of financial enrichment of family members of government officials in exchange for access and favorable treatment, and actively lead to inside trading.

The third aspect expands the reporting requirements required by the members of Congress and covered individuals. This involves the formation of an independent, nonpartisan panel to review and investigate trades. The Panel for Congressional Member Transparency helps serve as a watchdog for both deterrent purposes and as a source of information on any potential conflicts of interest that arise during members of Congress' activities.

Unlike the House and Senate Ethics Committees, members of Congress are not be members of the panel; nor does the panel operate in secret.¹⁷⁵ Instead, the panel is composed of a special prosecutor appointed by the DOJ to serve a six-year term, SEC investigators, individuals from congressional watchdog agencies, and new law school graduates as part of the DOJ Honors Program.¹⁷⁶ The panel has the investigatory resources of the SEC and DOJ and receives intent-to-trade notifications, hears arguments for a waiver of the 24-hour wait period, and reviews all trades as they are disclosed. The panel also releases weekly summaries of the financial activities of members of Congress and covered individuals, which discloses all potential conflicts of interest based on the legislation, earmarks, or hearings in which members of Congress are involved.

In addition to the creation of the Panel for Congressional Member Transparency, reporting requirements will also change. Prior to the STOCK Act, members of Congress were only required to disclose trades annually.¹⁷⁷ With the STOCK Act, members of Congress were required to report their trades every ninety days, but subsequent stripping of the bill

¹⁷⁵ Molly K. Hooper, *New GOP Rules Will Make it Tougher for House to Raise Debt Ceiling*, THE HILL (Dec. 22, 2010), <https://thehill.com/homenews/house/134799-new-gop-rules-will-make-it-tougher-for-house-to-raise-debt-ceiling> (during the by the 112th Congress the Committee on Standards and Official Conduct was renamed to the Committee on Ethics) [<https://perma.cc/Y8YH-3AXQ>].

¹⁷⁶ Including recent law school graduate hires as part of the DOJ Honors program will provide some of the nation's top law students a spot on this panel. It will also provide the benefit of panel members who have not yet become entrenched in the Washington D.C. political system.

¹⁷⁷ Fritz, *supra* note 8 at 303.

weakened the reporting requirements under the guise of rolling back reporting requirements of federal staffers.¹⁷⁸ While Senate Resolution 716 amended the STOCK Act by requiring the reporting of federal staffers, the largest effect of this amendment was the repeal of the requirement that members of Congress' disclosures were accessible and searchable online.¹⁷⁹ This severely limits public access to members of Congress' financial disclosures as they can be viewed only as a paper file accessible in the basement of the Cannon House Office Building for ten cents a page.¹⁸⁰

This proposal would require a twofold reporting requirement. First, the member of Congress or covered individual must notify the panel of the intent to trade. These intent-to-trade disclosures must occur a maximum of one week and a minimum of 24-hours before the activity will take place. These intent-to-trade disclosures would be kept confidential by the panel, and the minimum 24-hour requirement could be overcome by a showing that the individual is intending to trade on public information. This aspect of the disclosure would prevent members from making quick trades based on information that may not be public but will allow one to overcome this restriction to react to changes in the market that happen in full view of the public.

The second reporting requirement is a traditional disclosure that must occur within 24 hours of any financial activities of members of Congress or covered individuals. These disclosures would be instantly available online in a searchable database form, which would allow for careful analysis by the panel, and informal oversight by the media and the public. Additionally, these transactions are currently reported in ranges

¹⁷⁸ See A bill to modify the requirements under the STOCK Act regarding online access to certain financial disclosure statements and related forms, S. 716, 113th Cong. (2013) [hereinafter "S. 716"] (becoming Public Law No. 113-7); Tamara Keith, *How Congress Quietly Overhauled Its Insider-Trading Law*, NAT'L PUBLIC RADIO (April 16, 2013), <https://www.npr.org/sections/itsallpolitics/2013/04/16/177496734/how-congress-quietly-overhauled-its-insider-trading-law> [https://perma.cc/R7FF-T9X8]; Dan Auble, *Action Alert: STOCK Act Reversal Signed by President*, OPEN SECRETS: CTR FOR RESPONSIVE POLS. (April 15, 2013), <https://www.opensecrets.org/news/2013/04/action-alert-stock-act-reversal-signed/> [https://perma.cc/C29C-GLHG].

¹⁷⁹ See S. 716, *supra* 178; Keith, *supra* note 178; Auble, *supra* note 178.

¹⁸⁰ See S. 716, *supra* 178; Keith, *supra* note 178; Auble, *supra* note 178.

such as \$1,001 to \$15,000, \$15,000 to \$50,000, and so on.¹⁸¹ This proposal eliminates reporting ranges and instead requires reporting the precise value of each transaction. This would assist the public and the panel in understanding the true amount that was traded by members of Congress and would also aid the members as Currently, most trades that are reported by the media as a range, such as “between \$15,000 and \$50,000,” may make the member look like there is much more money at stake than was actually involved in the trade.¹⁸² By eliminating the reporting ranges, a more accurate picture of the financial investments of members of Congress could be drawn, and it would be much easier to trace activity that may have been based on inside information because of the increased ability to match dollar amounts to moving funds.

Last, there must be actual, enforced punishments when members of Congress or covered individuals violate the laws. Currently, the only recent member of Congress who has received any punishment for these types of crimes was Representative Collins, and that was for abusing his corporate board seat.¹⁸³ This lack of enforcement or actual penalties for these actions have a twofold impact. First, there is little to no deterrent effect. When the usual course of action is an investigation which almost never results in a finding of wrongdoing, members are not deterred when the financial gain is so lucrative. Second, without penalty, voter confidence in Congress and our governmental institutions as a whole are continuously eroded. Today, the American public views the system as working against it, and when news stories of elected representatives profiting from the pandemic or pocketing profits selling land at the taxpayers’ expense are common parts of the weekly news cycle, public trust in America’s economic system and government is further eroded.

Members of Congress, elected by the people, are obligated to serve the people. For this reason, this proposal treats the argument that

¹⁸¹ H. COMM. ON ETHICS, 116TH CONG., 2018 INSTRUCTION GUIDE FOR FINANCIAL DISCLOSURE STATEMENTS AND PERIODIC TRANSACTION REPORTS, SF-1, (2018) available at <https://ethics.house.gov/sites/ethics.house.gov/files/CY%202018%20Instruction%20Guide%20for%20Financial%20Disclosure%20Statements%20and%20PTRs.pdf>.

¹⁸² See generally Kindy, *supra* note 8.

¹⁸³ Allen, *supra* note 112.

restrictions such as these will deter qualified candidates as moot.¹⁸⁴ Members of Congress currently receive an annual salary of \$174,000.¹⁸⁵ This places members of Congress in the 95th percentile for income of United States individuals and, therefore, utilizing the office as a money-making opportunity should not be an option.¹⁸⁶ If these restrictions deter qualified candidates, perhaps individuals are technically qualified to serve but not wholly qualified, as they are not seeking office solely to serve as a representative of the public.¹⁸⁷ At a time when congressional disapproval hovers around seventy-five percent and politicization is at a high, members of Congress should want to support legislation which makes it clear to the American public and the world that our elected representatives are not seeking to become leaders for their own financial growth.¹⁸⁸

V. CONCLUSION

Ultimately, the voters hold the real power to bring legislation such as this to fruition. As seen before with the gutting of the STOCK Act and the death of countless bills in committee, members of Congress cannot be expected to police themselves. Further, those proposals that have failed have not been nearly as restrictive as the proposal here. As voters, we hold the power to demand new rules that members of Congress must follow, and members of Congress need to remember that they signed up for the job of public servants. If members of Congress do not like the restrictions being a public servant demands, they need not serve. The office should not change to suit personal ambitions for wealth. Today, too many members of Congress fail to conduct themselves as public servants because they went to Washington for personal ambitions. For the citizens of the United States to gain the representation that they are promised by the Constitution, we must limit the amassing of wealth by these representatives by nefarious

¹⁸⁴ See Augustin, *supra* note 143 (arguing that restrictions could deter qualified candidates).

¹⁸⁵ Ida A. Brudnick, *Congressional Salaries and Allowances: In Brief*, CONG. RSCH. SERVS. (April 11, 2018), <https://www.senate.gov/CRSpubs/9c14ec69-c4e4-4bd8-8953-f73daa1640e4.pdf> (a few members in leadership earn between 10-29 percent more).

¹⁸⁶ PK, *Income Percentile Calculator for the United States in 2020*, DON'T QUIT YOUR DAY JOB, <https://dqydj.com/income-percentile-calculator/> (last visited April 4, 2021) [<https://perma.cc/R486-WZZL>].

¹⁸⁷ It could also be fairly argued that many current members of Congress are not technically qualified.

¹⁸⁸ Gallup Poll, *Congress and the Public (May-Aug 2020)*, <https://news.gallup.com/poll/1600/congress-public.aspx> (last visited April 4, 2021) [<https://perma.cc/6Y46-KP9P>].

means, at the expense of the taxpayer, and ensure that those representatives serve the American public, and not their individual pocketbooks.