

# OUTLAWING HONEST GRAFT

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*The American public believes that Congress is dishonest and corrupt, and this perception was recently reinforced by reports that members of Congress were immune from insider trading laws. In response to the public backlash, and in an overwhelming display of bipartisanship, Congress passed the Stop Trading on Congressional Knowledge Act of 2012 (STOCK Act). The Act clarified that members of Congress are indeed subject to prohibitions on insider trading, and subjected congressional securities transactions to new and more rigorous disclosure requirements. Nevertheless, some observers were disappointed with the strength of the STOCK Act, and there is also reason to fear that the Speech or Debate Clause of the U.S. Constitution may frustrate most attempts to prosecute members of Congress for insider trading, despite the passage of the Act.*

*This Note analyzes the merits of the STOCK Act as an enforcement mechanism and concludes that it is likely a mostly ineffective tool for combatting congressional insider trading. This Note then asks whether the Act may have independent value because it addresses the appearance of congressional impropriety, or whether such appearances may be detrimental if the Act fails as an enforcement device. Finally, this Note suggests that increasing transparency, and requiring Congress to police its own corruption may be more attractive alternatives for combatting congressional insider trading.*

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#### INTRODUCTION

*Everybody is talkin’ these days about Tammany men growin’ rich on graft, but nobody thinks of drawin’ the distinction between honest graft and dishonest graft. There’s all the difference in the world between the two. Yes, many of our men have grown rich in politics. I have myself. I’ve made a big fortune out of the game, and I’m getting richer every day, but I’ve not gone in for dishonest graft . . . . There’s an honest graft, and I’m an example of how it works. I might sum the whole thing up by sayin’:* “I seen my opportunities and I took ‘em.” – George Washington Plunkitt<sup>1</sup>

Congress has an image problem. Increasingly, many Americans think members of Congress are not only incompetent,<sup>2</sup> but also dis-

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1. GEORGE WASHINGTON PLUNKITT & WILLIAM L. RIORDON, *PLUNKITT OF TAMMANY HALL* 9 (1905).

2. According to a Gallup poll taken in January 2013, only fourteen percent of Americans approved of Congress’s performance—down from eighteen percent in November and December of 2012. See Frank Newport, *Congress Begins 2013 with 14% Approval*, GALLUP POLITICS (Jan. 11, 2013), <http://www.gallup.com/poll/159812/congress-begins-2013-approval.aspx>. The same poll noted that Congress’s fifteen percent approval rating for all of 2012 was the lowest annual average in “Gallup’s 38-year history of asking the question,” and that roughly seventy-five percent of Ameri-

honest,<sup>3</sup> and corrupt.<sup>4</sup> In fact, according to one recent poll, Americans believe that reducing corruption in government should be one of the President's highest priorities.<sup>5</sup> And for good reason. Government has been described as "the largest producer of information capable of having a substantial effect on stock-market prices,"<sup>6</sup> and American history is littered with examples of public officials and other government in-

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cans "believe [that] the way politics works in Washington is harmful to the United States[.]" *Id.* (internal quotation marks omitted). These specific figures track with more anecdotal evidence of American dissatisfaction with Congress. *See, e.g.,* Gail Collins, Op-Ed., *Looking Forward*, N.Y. TIMES, Jan. 3, 2013, at A25 (noting that the 112th Congress's "favorability rating . . . once polled lower than the idea of a Communist takeover of America").

3. In November 2012, fifty-four percent of Americans gave the honesty and ethical standards of members of Congress a rating of "very low" or "low." *See* Frank Newport, *Congress Retains Low Honesty Rating*, GALLUP POLITICS (Dec. 3, 2012), <http://www.gallup.com/poll/159035/congress-retains-low-honesty-ratings.aspx>. Compared against polling on the ethical standards and honesty of twenty-one other professions, members of Congress ranked dead last, lower than stockbrokers (thirty-nine percent "low" or "very low"), car salespeople (forty-nine percent), and even *lawyers* (thirty-eight percent). *Id.* Nor was 2012 a uniquely bad year for Congress's honesty rating; in a similar poll conducted in 2011, sixty-four percent of respondents gave the honesty and ethical standards of members of Congress a "very low" or "low" rating—tying for worst in Gallup poll history. *See* Jeffrey M. Jones, *Record 64% Rate Honesty, Ethics of Members of Congress Low*, GALLUP POLITICS (Dec. 12, 2011), <http://www.gallup.com/poll/151460/Record-Rate-Honesty-Ethics-Members-Congress-Law.aspx> (noting that Congress's mark matched the rating given to "Lobbyists" in 2008).

4. A USA Today/Gallup poll taken in April of 2006 found that forty-seven percent of Americans believed most members of Congress were corrupt—up from thirty-eight percent in January of that year. Joseph Carroll, *Americans Increasingly View Most Members of Congress as Corrupt*, GALLUP (May 17, 2006), <http://www.gallup.com/poll/22837/Americans-Increasingly-View-Most-Members-Congress-Corrupt.aspx>. Five years later, in 2011, forty-six percent of Americans surveyed in a Rasmussen poll still believed that most members of Congress were corrupt. *See* Erik Hayden, *Poll: Americans Are Now Even Angrier at 'Corrupt' Congress*, ATLANTIC WIRE (July 27, 2011), <http://www.theatlanticwire.com/politics/2011/07/poll-americans-are-now-even-angrier-corrupt-congress/40464> (citing *New High: 46% Think Most in Congress Are Corrupt*, RASMUSSEN REPORTS (July 27, 2011), [http://www.rasmussenreports.com/public\\_content/politics/general\\_politics/july\\_2011/new\\_high\\_46\\_think\\_most\\_in\\_congress\\_are\\_corrupt](http://www.rasmussenreports.com/public_content/politics/general_politics/july_2011/new_high_46_think_most_in_congress_are_corrupt)). That figure would increase to forty-eight percent by the end of 2011. *New High: 48% Say Most Members of Congress Are Corrupt*, RASMUSSEN REPORTS (Dec. 31, 2011), [http://www.rasmussenreports.com/public\\_content/politics/general\\_politics/December\\_2011/new\\_high\\_48\\_say\\_most\\_members\\_of\\_congress\\_are\\_corrupt](http://www.rasmussenreports.com/public_content/politics/general_politics/December_2011/new_high_48_say_most_members_of_congress_are_corrupt).

5. Eighty-seven percent of respondents to a 2012 Gallup poll said that reducing corruption was an "extremely important" or "very important" priority. *See* Tim Mak, *Poll: Corruption is No. 2 Issue for 2013*, POLITICO (July 30, 2012, 6:17 AM), <http://www.politico.com/news/stories/0712/79109.html> (citing Jeffrey M. Jones, *Americans Want Next President to Prioritize Jobs, Corruption*, GALLUP POLITICS (July 30, 2012), <http://www.gallup.com/poll/156347/Americans-Next-President-Prioritize-Jobs-Corruption.aspx> (noting that only "creating good jobs" was rated as a higher priority heading into 2013)).

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

siders using nonpublic information to try to corner the market.<sup>7</sup> But the practice of using insider government status to achieve private pecuniary gain—what 19th-century New York “machine politician” George Washington Plunkitt referred to as “honest graft”<sup>8</sup>—may be more than just an historical footnote to the bad old days of Tammany Hall. Indeed, some data on the profitability of stock purchases by members of the Senate and House of Representatives suggests that members of Congress may still be—to paraphrase Plunkitt—seeing their opportunities and taking them by using their insider knowledge to make profitable transactions.<sup>9</sup>

Yet, despite the existence of federal securities laws and evolving judicial doctrines that have placed increasingly stringent constraints on insider trading in the corporate context,<sup>10</sup> no member of Congress has ever been prosecuted for trading on the basis of insider legislative knowledge.<sup>11</sup> Why not? It is possible that the Securities and Exchange Commission (SEC), the primary enforcer of the nation’s securities laws, simply has no appetite for prosecuting those who are ultimately responsible for the agency’s funding.<sup>12</sup> Alternatively, it is also possi-

7. For historical examples of early American “honest graft,” see *infra* note 39 and accompanying text.

8. For example, Plunkitt explained that making profitable investments in real estate based on an inside tip that the government planned to build a park was “honest” because it involved no direct embezzlement of government funds:

My party’s in power in the city, and it’s goin’ to undertake a lot of public improvements. Well, I’m tipped off, say, that they’re going to lay out a new park at a certain place. . . . I buy up all the land I can in the neighborhood . . . and make a profit on my investment.

PLUNKITT, *supra* note 1, at 9–10.

9. See Alan J. Ziobrowski et al., *Abnormal Returns from the Common Stock Investments of the U.S. Senate*, 39 J. FIN. & QUANTITATIVE ANALYSIS 661, 663 (2004) [hereinafter *Senate Abnormal Returns*] (noting that between 1993 and 1998, the blended investment portfolios of U.S. Senators beat the market by roughly twelve percent annually); see also Alan J. Ziobrowski et al., *Abnormal Returns From the Stock Investments of Members of the U.S. House of Representatives*, 13 BUS. & POL. 1, 5 (2011) [hereinafter *House Abnormal Returns*] (noting that a composite portfolio of common stock purchased by members of the U.S. House of Representatives between 1985 and 2001 outperformed the market by over six percent annually). For further explanation of the methodology used in this study and in *Senate Abnormal Returns*, see *infra* text accompanying notes 50–57.

10. See *infra* Part II.

11. Suzy Khimm, *FAQ: the crackdown on insider trading in Congress*, THE WASHINGTON POST (Jan. 31, 2012, 4:57 PM), [http://www.washingtonpost.com/blogs/ezra-klein/post/faq-the-crackdown-on-insider-trading-in-congress/2012/01/31/gIQASpdsfQ\\_blog.html](http://www.washingtonpost.com/blogs/ezra-klein/post/faq-the-crackdown-on-insider-trading-in-congress/2012/01/31/gIQASpdsfQ_blog.html).

12. The notion that regulatory capture or “public choice theory” considerations will prevent congressional insider trading prosecutions under *any* legal regime is beyond the scope of this Note. It should be noted that the SEC has been aware of the possibility that members of Congress are trading on insider information, and likely did pursue

ble that, despite their broad applicability, insider trading laws as they existed prior to 2012 did not prohibit members of Congress from trading on the basis of material, nonpublic information that they obtained during the performance of their official duties.<sup>13</sup>

In light of that possibility, President Obama urged Congress to pass a bill that would “ban[ ] insider trading by members of Congress.”<sup>14</sup> In response—after less than three months and in a rare show of overwhelming bipartisanship—Congress did just that, sending the Stop Trading on Congressional Knowledge Act of 2012<sup>15</sup> (STOCK Act) to the President on March 22, 2012.<sup>16</sup> The bill, which President Obama signed into law on April 4, 2012,<sup>17</sup> specifically clarified that members of Congress are subject to the prohibitions on insider trading arising under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5.<sup>18</sup> Publicly, politicians lauded the STOCK Act as a strong mes-

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investigations. However, as discussed in this Note, practical barriers to investigating members of Congress likely frustrated those efforts. “[A]ccording to some members of its staff, the SEC may not have press[ed] [investigations into insider trading by Senators] because it is hard to win insider-trading cases without detailed knowledge of what, if any, privileged information the subjects received and proof insiders used it to trade.” Donna M. Nagy, *Insider Trading, Congressional Officials, and Duties of Entrustment*, 91 B.U. L. REV. 1105, 1137 (2011) (citing Joseph N. DiStefano, *Senators’ Stock Picks Bring Profit, Scrutiny*, PHILA. INQUIRER, Nov. 7, 2004, at E1) (internal quotation marks removed) (first alteration in original).

13. See Stephen M. Bainbridge, *Insider Trading Inside the Beltway*, 36 J. CORP. L. 281, 285 (2011) (“Congressional staffers and other government officials and employees could be prosecuted successfully for insider trading under the federal securities laws, but the quirks of the relevant laws almost certainly would prevent Members of Congress from being successfully prosecuted.”); Nagy, *supra* note 12, at 1106–08 (noting that the press, a member of Congress, and a former SEC official all concluded, at one time or another, that Congress was effectively “immune” from insider trading laws).

14. President Barack H. Obama, Annual Message to Congress on the State of the Union, 2012 DAILY COMP. PRES. DOC. 48 (Jan. 24, 2012).

15. Stop Trading on Congressional Knowledge Act, Pub. L. No. 112-105, 126 Stat. 291 (2012).

16. See Meredith Shiner, *Senate Sends STOCK Act to Obama*, ROLL CALL (March 22, 2012, 1:45 PM), [http://www.rollcall.com/news/senate\\_sends\\_stock\\_act\\_to\\_obama-213333-1.html](http://www.rollcall.com/news/senate_sends_stock_act_to_obama-213333-1.html) (noting that the bill passed the Senate by a vote of 96-3, after passing the House in February “on a rare and overwhelmingly bipartisan 417-2 vote”).

17. President Barack H. Obama, Remarks on Signing the Stop Trading on Congressional Knowledge Act of 2012, 2012 DAILY COMP. PRES. DOC. 247 (Apr. 4, 2012) [hereinafter President’s Remarks]. President Obama noted that the Act “makes it clear that if members of Congress use nonpublic information to gain an unfair advantage in the market, then they are breaking the law.” *Id.*

18. Stop Trading on Congressional Knowledge Act § 4. Rule 10b-5 prohibits, among other things, using a securities exchange to engage in “any act, practice, or course of business which operates or would operate as a fraud or deceit on any person.” 17 C.F.R. § 240.10b-5 (2009). The SEC promulgated Rule 10b-5 pursuant to its

sage to the American people that members of Congress were not above the law,<sup>19</sup> and an assurance that Representatives and Senators would not profit by trading on information unavailable to the public.<sup>20</sup> Then-Speaker of the House Nancy Pelosi called the Act “a critical step forward for transparency and accountability” and a measure that would begin “restoring trust between public servants and those [they] represent.”<sup>21</sup> Even President Obama thanked members of Congress for reaffirming that they were sent to Washington to serve the American people, and not their own financial interests.<sup>22</sup> In short, the STOCK Act looked for all the world like evidence that Congress was capable of taking real action to address its reputation for corruption.

Yet as is often the case, appearances can be deceiving. Some public advocacy groups immediately expressed disappointment with the strength of the Act.<sup>23</sup> Others, including the President, noted that the STOCK Act did not address more general conflict of interest concerns.<sup>24</sup> What is more, the Speech or Debate Clause<sup>25</sup>—a little-

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authority under the Securities and Exchange Act of 1934. *See* 15 U.S.C. § 78j(b) (2006).

19. *See, e.g.*, Press Release, Senator Robert Portman, Sen. Portman Votes in Support of STOCK Act (Jan. 30, 2012), <http://www.portman.senate.gov/public/index.cfm/2012/1/sen-portman-votes-in-support-of-stock-act> (“Members of Congress and their staff are not above the law, and the STOCK Act ensures that those who abuse their knowledge of inside information will be held accountable[.]”).

20. *See, e.g.*, Press Release, Representative Jim Himes, STOCK Act Heads to President (Mar. 23, 2012), <http://himes.house.gov/press-release/stock-act-heads-president> (“This . . . common-sense law that, frankly, should have been on the books long ago . . . ensures that no Representative or Senator can profit by trading securities based on information unavailable to the public.”).

21. Press Release, Representative Nancy Pelosi, Pelosi Statement on Senate Passage of the STOCK Act (Mar. 27, 2012), <http://pelosi.house.gov/news/press-releases/2012/03/pelosi-statement-on-senate-passage-of-the-stock-act.shtml>.

22. *See* President’s Remarks, *supra* note 17.

23. *See* Press Release, Citizens for Responsibility and Ethics in Washington, CREW Lukewarm on STOCK Act (April 4, 2012), <http://www.citizensforethics.org/press/entry/crew-lukewarm-on-stock-act-insider-trading-ban-should-be-stronger> (noting that the House removed provisions of the Senate bill designed to aid prosecutors); *see also* John Wonderlich, *STOCK Act to be Signed Today*, SUNLIGHT FOUNDATION (Apr. 4, 2012, 9:27 AM), <http://www.http://sunlightfoundation.com/blog/2012/04/04/stock-act-to-be-signed-today/> (describing the Act as weaker than hoped for).

24. *See, e.g.*, President’s Remarks, *supra* note 17 (noting that more could be done to address corruption and stating that “[w]e should limit any elected official from owning stocks in industries that they have the power to impact”).

The appearance or occurrence of congressional corruption might usefully be divided into three categories: (1) traditional insider trading, in which a member buys or sells stock based on nonpublic information obtained through the legislative process; (2) improperly motivated legislative inaction, in which a member forestalls legislation that would be inimical to his financial interests; or (3) improperly motivated legislating, in which a member introduces or supports legislation that would be beneficial to her own—rather than her constituency’s—financial interests.

known<sup>26</sup> part of the U.S. Constitution—may frustrate most efforts to prosecute members of Congress for insider trading.<sup>27</sup>

However, even if the STOCK Act has some deficiencies as an enforcement mechanism, it may have independent value if it helps to avert the appearance of congressional impropriety. “Government officials regularly attempt to build public confidence by taking care of appearances,”<sup>28</sup> and the STOCK Act did so by sending a strong, bipartisan message that Congress is serious about congressional insider trading.<sup>29</sup> But is any law which merely minimizes the appearance of corruption, without attacking it root and branch worth much of anything at all?<sup>30</sup> Might such laws in fact have negative value because they have the potential to assuage public concerns while doing nothing

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The STOCK Act, in theory if not in practice, is addressed to only the first of those problems. *See id.* (noting that STOCK Act does not address conflict of interest). The other two forms of more general conflicts of interest have just as much potential to undermine public faith in government. *See, e.g.,* Daniel Stone & John Solomon, *How Visa Courted Nancy Pelosi, Hoping to Forestall Swipe-Fee Changes*, THE DAILY BEAST (Nov. 14, 2011, 10:21PM), <http://http://www.thedailybeast.com/articles/2011/11/14/how-visa-courted-nancy-pelosi-hoping-to-forestall-swipe-fee-changes.html> (discussing VISA’s efforts to lobby then-Speaker of the House Nancy Pelosi and investments by Pelosi’s husband in VISA stock at a time when Congress was considering imposing new restrictions on the credit card industry).

25. U.S. CONST. art. I, § 6, cl. 1.

26. *See* Sarah Letzkus, Note, *Damned if You Do, Damned if You Don’t: The Speech or Debate Clause and Investigating Corruption in Congress*, 40 ARIZ. ST. L.J. 1377, 1377 (2008) (“[I]f you ask someone on the street what he or she thinks about the Speech or Debate Clause . . . you will likely receive a blank look . . . in reply.”).

27. Former SEC Chairwoman Mary Shapiro has noted that the Speech or Debate Clause makes it difficult for the SEC to investigate allegations of congressional insider trading. *See* Seung Min Kim, *STOCK Act limps towards passage*, POLITICO (Feb. 29, 2012 7:01 PM), <http://www.politico.com/news/stories/0212/73474.html>; *see also Preventing Unfair Trading by Government Officials: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Fin. Servs.*, 111th Cong. 35–36 (2009) [hereinafter *Unfair Trading Hearings*] (testimony of Professor Peter J. Henning, noting that traditional insider trading investigations use techniques, such as subpoenaing of documents, which may implicate the Speech or Debate Clause).

28. Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1565, 1566 (2012) (discussing codes of judicial conduct and campaign finance regulations which attempt “to minimize the appearance and the reality of corruption”).

29. *See* Press Release, Citizens for Responsibility and Ethics in Washington, CREW Lukewarm on STOCK Act (April 4, 2012), <http://www.citizensforethics.org/press/entry/crew-lukewarm-on-stock-act-insider-trading-ban-should-be-stronger> (stating that trade reporting requirements of STOCK Act increase transparency and may “deter members from trading on confidential information”).

30. Samaha, *supra* note 28, at 1567 (noting that appearance based arguments can be “slippery and . . . troublesome when asserted by those who claim to be working for the public good”).

to safeguard the public good?<sup>31</sup> Or is the fortification of public confidence, in and of itself, a valuable outcome if we accept that no law can eradicate or prevent every instance of public corruption?<sup>32</sup>

This Note analyzes the STOCK Act as an enforcement mechanism, and attempts to answer some of those questions. Part I reviews evidence which suggests that some members of Congress trade securities on the basis of nonpublic legislative information, and summarizes arguments in favor of outlawing that practice. Part II discusses the structure of insider trading prohibitions and explains how the STOCK Act brings members of Congress within their scope. Part III then explains why the Speech or Debate Clause may frustrate any meaningful effort to enforce insider trading prohibitions against members of Congress, despite the passage of the STOCK Act. Part IV analyzes how the STOCK Act may affect public perceptions about congressional corruption despite its shortcomings as an enforcement mechanism. It considers whether the Act has independent value because it creates the appearance that Congress is serious about policing congressional insider trading. Finally, Part V surveys potential solutions to the problem of congressional insider trading and argues that—given the weaknesses of the STOCK Act as an enforcement lever—Congress can and should do more to increase transparency and prevent insider trading by policing itself using its own disciplinary authority.

## I.

### THEY SEEN THEIR OPPORTUNITIES AND THEY TOOK 'EM: ASSESSING THE PROBLEM OF CONGRESSIONAL INSIDER TRADING

Before assessing the merits of the STOCK Act, this Part briefly examines the problem that the law was enacted to address: congressional insider trading. The reasons that members of Congress might be tempted to engage in the practice are not difficult to intuit. Nonpublic information obtained from government sources can be extremely valuable because “many corporate entrepreneurial developments will be

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31. Samaha has poignantly framed the question this way: “Are we supposed to think that government is entitled to appear noncorrupt even if it is, in fact, riddled with corruption?” *Id.*

32. *Id.* at 1567 & n.11 (asking whether “regulation for the sake of *generating* appearances” can be justified). Samaha has argued that appearance generating regulations can be justified, at least some of the time, “[w]hen a self-fulfilling prophecy is underway. . . . [and] [h]ow things appear will turn into how things actually are.” *Id.* at 1568. In the context of the STOCK Act, the question worth considering is whether a law which sends strong reformist signals—that Congress is serious about insider trading and subject to the same rules as everyone else—can still be justified if, as I argue, it is actually a very clumsy tool for punishing congressional insider trading. See discussion *infra* Part IV.



known to government officials before the value has been exploited in the stock market by corporate insiders.”<sup>33</sup> On the other hand, a new piece of legislation—or the repeal of an existing law—can also have a profound market-moving effect on private companies,<sup>34</sup> or entire sectors of the economy.<sup>35</sup> For example, during the debate over the Patient Protection and Affordable Care Act in 2009, the market waited anxiously to see whether the bill would include a “public option”: a government-backed insurance policy which would have competed with—and transformed the market for—private insurance.<sup>36</sup> When legislative support for the public option stalled and it became clear that the government would not be entering the private insurance market, the share price of several health insurance companies went up.<sup>37</sup>

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33. MANNE, *supra* note 6, at 171.

34. See Matthew Barbabella et al., *Insider Trading in Congress: The Need for Regulation*, 9 J. BUS. & SEC. L. 199, 200 (2011) (“Imagine you are a financially savvy United States congressional representative. In a week, you intend to announce the proposal of an appropriations bill that will award a huge, no-bid contract to a publicly traded energy company. You expect the news to sharply increase the price of that company’s stock. Enticed by this foolproof investment opportunity, you decide to purchase shares of stock in the company that will be receiving the contract . . . . A week after your stock purchase, you make your announcement. The stock price rises, and the privileged few who knew your announcement was coming make handsome capital gains.”).

35. See Bud W. Jerke, Comment, *Cashing in on Capitol Hill: Insider Trading and the Use of Political Intelligence for Profit*, 158 U. PA. L. REV. 1451, 1453 (2010). Jerke describes how, on November 15, 2005 stock in a Chicago building materials company called USG began trading at nearly double its normal volume, despite the absence of any “publicly available news about the company, or industry” that could explain the sudden rise in trading volume. *Id.*; see also Press Release, Representative Brian Baird, Reps. Baird and Slaughter Introduce Legislation to Prohibit Insider Trading on Capitol Hill (May 16, 2007), [http://www.louise.house.gov/index.php?option=com\\_content&task=view&id=816&Itemid=](http://www.louise.house.gov/index.php?option=com_content&task=view&id=816&Itemid=). “The following day Senate Majority Leader Bill Frist delivered news promising a full Senate vote on a bill that would create a \$140 billion government-backed trust fund for liability claims against asbestos-using manufacturers” such as USG. Jerke, *supra*, at 1453. The impending bill helped explain the jump in the trading volume of USG stock: “when the Senate Judiciary Committee gave its approval to a similar bill in 2003, USG’s share price immediately rose by 8.3 percent . . . .” *Id.*

36. An early Senate version of the Patient Protection and Affordable Care Act included the public option, see *Senate Says Health Plan Will Cover Another 31 Million*, N.Y. TIMES (Nov. 18, 2009), [http://www.nytimes.com/2009/11/19/health/policy/19health.html?\\_r=1](http://www.nytimes.com/2009/11/19/health/policy/19health.html?_r=1), but it was eventually eliminated from the final bill, see *Democrats Clinch Deal for Deciding Vote on Health Bill*, N.Y. TIMES (Dec. 19, 2009), <http://www.nytimes.com/2009/12/20/health/policy/20health.html>. In the interim, the share prices of several health insurance companies teetered.

37. For example, shares of United Health Care closed at \$29.44 on November 23, 2009, just a few days after the Senate introduced a bill including the public option. The next week, the price of United Health Care’s stock fell nearly two dollars to \$27.46. By December 21, 2009, when it was clear that the public option was dead, the price of United Stock had rebounded to \$31.68. See *Unitedhealth Group, Inc.*, YA-

Clearly, anyone who knew that the public option was doomed to fail before the general public did was in a position to make some potentially profitable investments. According to a report by CBS's *60 Minutes*, Representative John Boehner, the Speaker of the House of Representatives, bought affected stock during that period, though he attributed the trades to his portfolio manager, with whom he claimed not to have shared any nonpublic information.<sup>38</sup> Nevertheless, the clear market-moving power of such legislative information, coupled with even the appearance of possible impropriety raises two nagging questions: Are members of Congress using their legislative positions to increase their personal wealth by trading on nonpublic information? And, if so, should it be against the law for them to do so?

### A. *Evidence of Congressional Insider Trading*

Anecdotal examples and statistical analysis suggest that some government insiders use their access to legislative information for personal pecuniary gain.<sup>39</sup> In 1995 *Mother Jones* magazine published the

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HOO! FINANCE, <http://finance.yahoo.com/echarts?s=UNH+Interactive#symbol=unh;range=5y;compare=;indicator=volume;charttype=area;crosshair=on;ohlvalues=0;log-scale=off;source=undefined> (last visited Apr. 30, 2012).

In addition to United Health Care, prices of stock in Wellpoint, Inc (which owns BlueCross/Blue Shield) rose by approximately \$2 on December 21, 2009—the first day of trading after the death of the public option. See *WellPoint Inc. (WLP) Historical Stock Prices*, NASDAQ, <http://www.nasdaq.com/symbol/wlp/historical> (last visited Apr. 30, 2012).

38. See *60 Minutes: Congress: Trading stock on inside information?* (CBS television broadcast Nov. 13, 2011), available at <http://www.cbsnews.com/video/watch/?id=7388130n&tag=contentBody;storyMediaBox> (describing Speaker Boehner's purchases of stock during the debate on the Affordable Care Act).

39. Indeed, using nonpublic information from government sources to gain an advantage on the market is a practice as old as the country itself. Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 348–49 (2009) (“In 1778, Samuel Chase lost his position—and his reputation—after trying to use insider information to make money on the flour market” after the “Continental Congress authorized flour purchases for troops.”).

Other early examples include William Duer who, in 1792, made highly leveraged investments in newly issued United States debt, believing that inside information gained from his personal connections to Secretary of Treasury Alexander Hamilton would give him a speculative advantage. See STEVE FRASER, EVERY MAN A SPECULATOR: A HISTORY OF WALL STREET IN AMERICAN LIFE 6–8 (2005). Although not a member of Congress at the time, Duer was the epitome of an early government insider: “He was a member of the Continental Congress, a New York judge, and a signer of the Articles of Confederation. He was also secretary to the Board of the Treasury, a position that made him privy to the inner workings of American finance . . . .” CHARLES R. GEISST, WALL STREET: A HISTORY: FROM ITS BEGINNINGS TO THE FALL OF ENRON 11 (2004) [hereinafter WALL STREET: A HISTORY]. Duer's gamble back-fired, and when the debt bubble on which he had speculated eventually burst, Duer's wealth and much of the New York City economy was destroyed,

findings of a study conducted by University of Memphis marketing professor Gregory Boller which revealed anomalous patterns of stock purchases by members of Congress between 1990 and 1995.<sup>40</sup> For example, Boller found that:

Senator Lloyd Bentsen (D-Texas) had bought stock in a dairy processor and sold it ten months later, days before the Justice Department began investigating the company for rigging bids to sell milk in public schools. Senator Bob Dole (R-Kansas) had purchased stock in Automatic Data Processing four days before President George H.W. Bush signed a law with new rules for military data processing. [And] Representative Newt Gingrich (R-Georgia) bought Boeing stock just before he helped kill amendments that would have cut funding for the International Space Station—an outcome that helped Boeing secure a contract.<sup>41</sup>

A more recent report found evidence of more suspicious trading.<sup>42</sup> Specifically, CBS noted that in September of 2008, Representative Spencer Bachus (R-Alabama) participated in closed door briefings in which Treasury Secretary Hank Paulson and Federal Reserve Chairman Ben Bernanke warned several members of Congress that a global financial crisis was imminent.<sup>43</sup> Shortly thereafter, ac-

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prompting an enraged mob to threaten him with disembowelment. See FRASER, *supra*, at 6–8. Yet despite threats of violent reprisal, Duer’s actions were not technically illegal. Although he was ultimately jailed in debtor’s prison, it was because his failed gamble had bankrupted him—not because he had engaged in insider trading or committed fraud. See WALL STREET: A HISTORY, *supra*, at 11.

Like Duer, George Washington Plunkitt was never a member of Congress, but he did hold positions as a state senator and assemblyman in New York and gleefully boasted about the ways in which he used his inside access for pecuniary gain:

[S]upposin’ it’s a new bridge they’re goin’ to build. I get tipped off and I buy as much property as I can that has to be taken for approaches. I sell at my own price later on and drop some more money in the bank. . . . Up in the watershed I made some money, too. I bought up several bits of land there some years ago and made a pretty good guess that they would be bought up for water purposes later by the City. Somehow, I always guessed about right . . . .

PLUNKITT, *supra* note 1, at 10.

40. Joy Ward, *Taking Stock in Congress*, MOTHER JONES, Sept.–Oct. 1995, at 16.

41. Megan McArdle, *Capitol Gains*, THE ATLANTIC, Nov. 2011 (summarizing some of Boller’s findings). Trades by spouses of members of Congress have also occasionally raised some eyebrows. In 2004, Representative Anne Northup’s spouse purchased between \$15,001 and \$50,000 worth of stock in each of Shell/Royal Dutch Petroleum, ExxonMobil, and Schlumberger, an oil and gas drilling company, prior to Representative Northup’s vote to open the Arctic National Wildlife Refuge to oil drilling. See Sheila Kaplan, *Trust Busters*, MOTHER JONES, Sept.–Oct. 2005, at 19.

42. *60 Minutes: Congress: Trading stock on inside information?* (CBS television broadcast Nov. 13, 2011), available at <http://www.cbsnews.com/video/watch/?id=7388130n&tag=contentBody;storyMediaBox>.

43. *Id.*

ording to CBS, Congressman Bachus began buying option funds that would increase in value if the market went down.<sup>44</sup>

Even more recently, *The Washington Post* reported that, over the last several years alone, members of Congress traded hundreds of millions of dollars worth of stock in companies registered to lobby on bills that were then-pending before a variety of congressional committees.<sup>45</sup> Specifically, the article noted that in early 2005, Representative David Dreier (R-California) purchased between \$15,000 and \$50,000 worth of stock in the pharmaceutical company Merck & Co.<sup>46</sup> On the same day, a medical malpractice bill, which Dreier co-sponsored and which contained a provision that would have limited the liability of pharmaceutical companies, was introduced in the House of Representatives.<sup>47</sup> “As the bill moved through the House” over the next several months, “the value of Merck’s stock grew by 15 percent.”<sup>48</sup>

Statistical studies of the performance of congressional stock portfolios also suggest that some members of Congress benefit from their access to nonpublic information.<sup>49</sup> Intrigued by the anecdotal evidence presented in the Boller study, Alan Ziobrowski, Ping Cheng, James Boyd, and Brigette Ziobrowski conducted a study (Ziobrowski Senate Study) which analyzed the trades listed in financial disclosure reports of Senators between the years 1993 and 1998.<sup>50</sup> They found that, on average, stocks purchased by Senators outperformed the market by approximately one percent per month, while stocks sold by Senators

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44. *Id.* The Office of Congressional Ethics found probable cause to believe that Bachus had violated insider trading rules and investigated his conduct; however, the investigation ultimately uncovered no evidence of insider trading. See Scott Higham, *Congress Ethics Office Clears Bachus of Insider Trading*, WASHINGTON POST (April 30, 2012), [http://http://www.washingtonpost.com/investigations/ethics-office-clears-bachus-of-insider-trading/2012/04/30/g1QAVwvZsT\\_story.html](http://http://www.washingtonpost.com/investigations/ethics-office-clears-bachus-of-insider-trading/2012/04/30/g1QAVwvZsT_story.html).

45. See Dan Keating et al., *Members of Congress Trade in Companies While Making Laws that Affect Those Same Firms*, WASH. POST, June 24, 2012, at A01.

46. *Id.*

47. *Id.*

48. *Id.*

49. See *Senate Abnormal Returns*, *supra* note 9; *House Abnormal Returns*, *supra* note 9. A more recent, but unpublished, study found that congressional investment strategies from 2004 to 2008 *underperformed* the market by 2-3% annually. See Andrew Eggers & Jens Hainmueller, *Capitol Losses: The Mediocre Performance of Congressional Stock Portfolios, 2004-2008* 1-2 (Mass. Inst. Tech. Political Sci. Dep’t, Research Paper No. 2011-5), available at [http://http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1762019](http://http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762019). However, the paper does not dispute the conclusion that “isolated members of Congress may unethically or even illegally trade based on political information,” but rather takes aim at the notion that the problem is “widespread.” *Id.* at 2.

50. See *Senate Abnormal Returns*, *supra* note 9, at 661. For an explanation of the methodologies used to conduct the study, see *id.* at 663-66.

underperformed slightly compared to the market.<sup>51</sup> All totaled, “Senators outperform[ed] the market by 97 basis points (nearly 1%) per month on a trade-weighted basis” when both the buy and sell transactions during the period studied were combined into one hypothetical portfolio and analyzed.<sup>52</sup> The Ziobrowski Senate Study also concluded that the stocks Senators were buying weren’t just outperforming the market—according to an analysis of cumulative abnormal returns (CARs), which measure the difference between the expected return on a given stock and the actual return over a specified time period, the stocks purchased by Senators were also beating their own expectations.<sup>53</sup>

The CARs of stocks purchased by U.S. Senators were “near zero” over the calendar year prior to being purchased. CARs increased to more than twenty-five percent over the twelve months following the purchase of the stock by a U.S. Senator, meaning that these stocks exceeded expectations. Abnormal returns on common stocks sold by U.S. Senators were “near zero” over the twelve months after being sold but had been twenty-five percent positive over the twelve months prior to being sold. The point of sale usually represented a peak in abnormal return value. “These results suggest that Senators knew appropriate times to both buy and sell their common stocks.”<sup>54</sup>

Ziobrowski, Boyd, Peng, and Ziobrowski conducted a similar analysis of trades by members of the House of Representatives between 1985 and 2001 (Ziobrowski House Study).<sup>55</sup> The results indicate that a “portfolio that imitates the common stock purchase of U.S. Representatives on a trade-weighted basis outperforms the market by 55 basis points per month (over 6% per year).”<sup>56</sup> Among the more specific findings, the study noted that the trade-weighted sample portfolio “significantly outperform[ed] the equal-weighted portfolio indicating that Representatives invested much larger amounts in those stocks that performed best.”<sup>57</sup>

Evidence that Senators and Representatives annually beat the market by twelve and six percent, respectively, is striking; but the stock-picking skills of members of Congress begin to look even more

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51. *Id.* at 663.

52. *Id.* at 675.

53. *Id.*

54. Jerke, *supra* note 35, at 1466 (citing and quoting *Senate Abnormal Returns*, *supra* note 9, at 675).

55. See *House Abnormal Returns*, *supra* note 9, at 5–6.

56. *Id.* at 5.

57. *Id.* at 19.

impressive when the abnormal returns on congressional trading are compared to the abnormal returns earned by corporate insiders. On average, over a six month period, corporate insiders' monthly returns beat the market by fifty-two to sixty-eight basis points when they trade on nonpublic information about their own companies.<sup>58</sup> Thus, the abnormal return on trades made by Representatives compare favorably to those made by corporate insiders, and trades made by Senators beat the market by nearly twice as much as those made by corporate insiders.

### B. *Reasons to Prohibit Congressional Insider Trading*

The anecdotal and statistical evidence described above suggests that some members of Congress not only know when to buy and sell stocks, but also pick stocks that beat the market at unprecedented rates. But is this necessarily problematic? Perhaps as George Washington Plunkitt argued, using nonpublic government information for private financial gain constitutes justifiable "honest graft" because no money is embezzled from the public fisc.<sup>59</sup> On the other hand, it seems readily apparent that both Congress and the general public perceive congressional insider trading to be a corrupt practice that should be prohibited. During a period otherwise characterized by fierce partisan gridlock, Congress took up and passed the STOCK Act by overwhelming, bi-partisan margins,<sup>60</sup> and a nationwide telephone poll of registered voters recently revealed that eighty-six percent of voters surveyed believe that insider trading bans should be enforced against members of Congress.<sup>61</sup> In light of the strong congressional and public support for the STOCK Act, the question of whether congressional insider trading *should* be outlawed may well be moot.<sup>62</sup> Nevertheless, it is worth briefly considering some normative reasons why "honest graft" may not be harmless or honest at all, and should indeed be outlawed. Although there are undoubtedly more,<sup>63</sup> three commonly

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58. Leslie A. Jeng, Andrew Metrick & Richard Zeckhauser, *Estimating the Returns to Insider Trading: A Performance-Evaluation Perspective*, 85 REV. ECON. & STATS. 453, 455 (2003).

59. See *supra* note 8 and accompanying text.

60. See *supra* note 16 and accompanying text.

61. See Press Release, Judicial Watch, New Judicial Watch Poll Shows Strong Dissatisfaction With Washington Corruption (Jan. 19, 2012), <http://www.reuters.com/article/2012/01/19/idUS209720+19-Jan-2012+MW20120119>.

62. FRANK ANECHARICO & JAMES JACOBS, *THE PURSUIT OF ABSOLUTE INTEGRITY* 3-4 (1996) (noting that what qualifies as "corruption" is largely a matter of positive definition).

63. A full examination of the negative externalities associated with congressional insider trading is beyond the scope of this Note. Rather, this section briefly surveys

cited reasons to ban insider trading in the corporate context also weigh in favor of prohibiting congressional insider trading.

First, “the ability of elected officials to profit on the basis of material nonpublic information creates perverse incentives for these officials, and introduces innumerable distortions and the potential for immeasurable harm in a legal system in which public trust and confidence is critical.”<sup>64</sup> Professor Larry Ribstein has pointed out that congressional insider trading may be “worse than trading by corporate insiders” because it creates incentives for Congress to hurt or help particular firms,<sup>65</sup> and Professor Stephen Bainbridge notes that the practice incentivizes members of Congress to steal proprietary information and game the legislative process in order to maximize personal trading profits.<sup>66</sup>

Second, insider trading may distort market integrity because investors will not trade in a market they believe is unfair, just as “a card player will [not] put his chips on the table in a poker game that may be fixed.”<sup>67</sup> Of course, concerns about insider trading will not drive every investor away from fundamentally sound investments, but the practice may also distort markets by increasing price volatility. Indeed, a cross-country analysis of international stock markets conducted by Julian Du and Shang-Jin Wei concluded that price volatility increases in countries with a higher incidence of insider trading, even when other factors such as the volatility of monetary and fiscal policies and the maturity of the markets are accounted for.<sup>68</sup>

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three commonly cited arguments for banning the practice. For a more robust treatment of these issues, see Bainbridge, *supra* note 13, at 297–301; Barbabella et al., *supra* note 34, at 224–34; Jerke, *supra* note 34, at 1500–10.

64. Jonathan R. Macey & Maureen O’Hara, *Regulation and Scholarship: Constant Companions or Occasional Bedfellows?*, 26 YALE J. ON REG. 89, 108 (2009); see also Bainbridge, *supra* note 13, at 299.

The “perverse incentive” argument for banning *corporate* insider trading similarly posits that allowing corporate insiders to profit from negative developments within a firm through short-selling creates perverse incentives that encourage managerial indifference to firm performance. See Dennis W. Carlton & Daniel R. Fischel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857, 873 (1983).

65. See Larry E. Ribstein, *Congressmen as Securities Traders*, 14 GREEN BAG 2d. 269, 270 (2011). Ribstein ultimately concludes, however, that congressional insider trading should be *allowed* because it would give members of Congress a stake in regulating. *Id.* at 273–74.

66. See Bainbridge, *supra* note 13, at 299–300.

67. Jerke, *supra* note 35, at 1501.

68. See Julian Du & Shang-Jin Wei, *Does Insider Trading Raise Market Volatility?*, 114 ECON. J. 916, 940 (2004). Specifically, the study notes that “a rise in the extent of insider trading from what prevails in the US to what prevails in China would increase the annual stock market volatility by 245 basis points.” *Id.* at 940–41.

Third, scholars have advanced the more straightforward argument that “something is inherently wrong when one trader possesses information unknown by another trader,”<sup>69</sup> and that “[giving members of Congress the opportunity to earn abnormally high returns by virtue of their service as elected officials] strikes many people as unfair.”<sup>70</sup> Although there may be a “widely shared belief that insider trading is inherently sleazy,”<sup>71</sup> insider trading law has never mandated that access to market-moving information must be available to all traders on a completely equal basis.<sup>72</sup> Rather, as Bud Jerke has argued, congressional insider trading in particular is unacceptably unfair because members hold an informational advantage that outsiders “‘cannot [ ] overcome with research or skill.’”<sup>73</sup> Professor Bainbridge has also advanced a second “fairness” rationale for banning congressional insider trading. He argues that it is simply unfair for members of Congress to enact and impose rules against insider trading that do not apply to their own conduct.<sup>74</sup> Thus, under a theory of good government, insider trading by members of Congress should be prohibited because “legislators ought not to stand above the law they create but ought generally to be bound by it as are ordinary citizens.”<sup>75</sup>

It is not difficult to imagine the manifold ways in which each of these concerns is implicated by congressional insider trading. A member of Congress might buy or sell stock based on nonpublic information obtained through the legislative process, stall legislation that

69. Jerke, *supra* note 35, at 1501.

70. Bainbridge, *supra* note 13, at 300 (quoting Barbabella et al., *supra* note 34, at 223 (2009)) (alteration in original). In 2005, then-Speaker of the House of Representatives Dennis Hastert (R-Illinois) secured \$207 million in funds earmarked for the construction of a highway adjacent to farmland which Hastert owned and subsequently sold at a profit of roughly \$2 million. Comments by Hastert’s neighbor, Jan Strasma, illustrate the public attitude towards congressional insider trading nicely. When asked what he thought about the land deal, Strasma simply replied: “It stinks.” 60 *Minutes*, *supra* note 42.

71. Bainbridge, *supra* note 13, at 300.

72. See *Dirks v. SEC*, 463 U.S. 646, 657 (1983) (“[O]ur opinion in *Chiarella* repudiat[ed] any notion that all traders must enjoy equal information before trading . . . .”); see also Bainbridge, *supra* note 13, at 300 (noting that it is difficult to translate the basic proposition that insider trading is unfair into a reasoned policy for restricting the practice).

73. Jerke, *supra* note 35, at 1503 (quoting *United States v. O’Hagan*, 521 U.S. 642, 658–59 (1997)).

74. See Bainbridge, *supra* note 13, at 301.

75. *Id.* (quoting *Gravel v. United States*, 408 U.S. 606, 615 (1972)). In support of the STOCK Act, Senator Scott P. Brown (R-Massachusetts), one of the bill’s co-sponsors, articulated this good-governance brand of the fairness rationale, noting that “[t]hose who make the laws should live under the same laws as everyone else.” Robert Pear, *Insider Trading Ban for Lawmakers Clears Congress*, N.Y. TIMES, Mar. 23, 2012, at A13.



would be inimical to his financial interests, or support legislation that would be beneficial to her own—rather than her constituency’s—financial interests. Even if members of Congress do not trade at a sufficient volume to directly contribute to price volatility,<sup>76</sup> they *can* significantly affect the outcome of potentially market moving legislation. If their individual trades don’t move markets, their power and influence as legislators certainly might. Likewise, even if legislation does not rise or fall solely because it would create a trading opportunity, it is not implausible to think that a financially-significant detail of a bill’s design might be quietly altered by a member of Congress with a pecuniary interest. If market prices and conditions are affected, at least in part, by these forms of self-interested congressional behavior, the result is a distortion of the market and a misallocation of capital that corresponds to neither the market-efficient outcome nor, necessarily, to the public interest. Moreover, just as large-scale insider trading may undermine confidence in markets, more limited congressional insider trading may undermine confidence in government and the legislative process.<sup>77</sup> Even if no member of Congress ever engaged in any of these behaviors, the obvious opportunities for members of Congress to enrich themselves on the basis of nonpublic legislative information creates a risk that public trust and confidence in government might be compromised.<sup>78</sup>

Reducing the risk of any one of these concerns is a sound public policy rationale for prohibiting government insiders from using their official positions for private gain.<sup>79</sup>

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76. See Jerke, *supra* note 35, at 1511 & n.294.

77. The primary danger stemming from congressional insider trading is “not a loss in public confidence in the financial system but rather a loss in confidence in the political system.” *Id.* at 1510–11.

To rebut this potential loss in public confidence, members of Congress faced with a presumption of improper motives might even waste political capital on efforts to signal that legislative acts are *not* corrupt, or feel obligated to avoid voting for otherwise meritorious legislation in order to avoid the appearance of impropriety.

78. I am particularly grateful to Niral Shah for his help in developing this discussion.

79. See Bainbridge, *supra* note 13, at 301 (“In sum, there is no plausible justification for allowing members of Congress or other governmental actors to use material nonpublic information they learn as a result of their position for personal stock trading gains.”).

## II.

THE CONGRESSIONAL RESPONSE: THE STOCK ACT AND  
PROHIBITIONS AGAINST INSIDER TRADING

Given the existence of general prohibitions against insider trading, it is reasonable to wonder why a specific measure to address congressional insider trading was even necessary.<sup>80</sup> The answer lies in the somewhat unusual nature of American prohibitions against insider trading. There is no federal statute that specifically prohibits the practice.<sup>81</sup> Instead, U.S. insider trading law—namely § 10(b) of the Securities Exchange Act of 1934,<sup>82</sup> which makes it illegal to employ manipulative or deceptive practices that violate Security and Exchange Commission (SEC) Rule 10b-5<sup>83</sup>—is built on the foundation of common-law theories of fraud and duty.<sup>84</sup> Specifically, a sale or purchase of securities violates § 10(b) and Rule 10b-5 if it is made “on the basis of material nonpublic information . . . in breach of a duty of trust or confidence that is owed directly, indirectly, or derivatively” to the issuer of the securities, the shareholders of the issuer, or the source of the nonpublic information.<sup>85</sup> Thus, one of the critical questions on which the application of insider trading law turns is whether the party with access to nonpublic information is under a duty to keep that information confidential.

Such a duty can arise in several contexts.<sup>86</sup> Under the classical theory of insider trading liability, § 10(b) and Rule 10b-5 are violated when a corporate insider—such as an officer, director, or employee—trades in the securities of his corporation on the basis of material non-

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80. See Khimm, *supra* note 11.

81. Congress has considered various specific statutory prohibitions of insider trading including, for example, The Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264, The Insider Trading Proscriptions Act of 1987, S. 1380, 100th Cong. (1987), and The Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677.

82. 15 U.S.C. § 78j(b) (2006).

83. 17 C.F.R. § 240.10b-5 (2009).

84. The Supreme Court first tried to clarify the line between savvy investing and illegal insider trading in 1909. See *Strong v. Repide*, 213 U.S. 419, 431–33 (1909) (holding that possession of “special facts” can give rise to a duty to disclose before trading). In short, trading on certain nonpublic information was wrong because it defrauded the other party to the transaction. *Id.* at 431–33.

85. 17 C.F.R. § 240.10b5-1(a) (2009).

86. A full discussion of the nature of insider trading liability is beyond the scope of this Note. For a detailed explanation of the various contexts in which trading on the basis of nonpublic material information violates § 10(b) and Rule 10b-5 see, JAMES D. COX & THOMAS LEE HAZEN, 2 TREATISE ON THE LAW OF CORPORATIONS § 12:10 (3d ed. 2011).

public information.<sup>87</sup> This is so because there exists a “relationship of trust and confidence between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position within that corporation.”<sup>88</sup> When an insider trades on material nonpublic information he defrauds the shareholders by using his insider status (and access to information) for personal gain.

Alternatively, under the misappropriation theory, an individual violates § 10(b) and Rule 10b-5 by trading on the basis of material nonpublic information in breach of a duty owed to the source of that information.<sup>89</sup> Under this theory, the trader, though not himself an insider, nevertheless owes a duty of loyalty and confidentiality to the source of the material nonpublic information.<sup>90</sup> Trading on the basis of that information for self-serving purposes breaches that duty because it defrauds the source of the information of the exclusive use of, and control over, the information.<sup>91</sup>

“Tipper” and “tippee” liability can arise under either the classical or misappropriation theory when material nonpublic information is passed or “tipped” from an individual under a duty to maintain the confidentiality of that information to a third party. If the tipper receives a personal benefit from disclosing the information, the tippee inherits the insider’s duty to maintain the confidentiality of the information.<sup>92</sup>

The open question—at least until the STOCK Act was passed last year—was whether members of Congress were under any duty not to trade on the basis of confidential information they acquired during the performance of their official duties. Nothing in § 10(b) or Rule 10b-5 specifically exempts members of Congress from liability.<sup>93</sup> Nevertheless, there was a widely held belief that congressional insider

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87. *See Chiarella v. United States*, 445 U.S. 222, 227–30 (1980).

88. *Id.* at 228. Certain individuals may also become “temporary insiders” under circumstances which create a similar relationship of trust and confidence. Examples include lawyers, accountants, and consultants who enter into a “special confidential relationship in the conduct of the business of the enterprise and are given access to [material nonpublic] information solely for corporate purposes.” *Dirks v. SEC*, 463 U.S. 646, 655 n.14 (1983).

89. *See United States v. O’Hagan*, 521 U.S. 642, 652 (1997).

90. *Id.* at 653–54.

91. *Id.*; *see also Carpenter v. United States*, 484 U.S. 19, 27–28 (1987) (holding that author of popular Wall St. Journal column “Heard on the Street” who traded on the basis of the contents of forthcoming columns breached a duty of loyalty and confidentiality to the newspaper, who owned the right to control the contents of the column).

92. *See Dirks*, 463 U.S. at 659–63.

93. *See Bainbridge*, *supra* note 13, at 290.

trading was legal.<sup>94</sup> Thomas Newkirk, a former official in the SEC's enforcement division summarized the problem as follows:

If a congressman learns that his committee is about to do something that would affect a company, he can go trade on that because he is not obligated to keep that information confidential . . . . He is not breaching a duty of confidentiality to anybody and therefore would not be liable for insider trading.<sup>95</sup>

The STOCK Act, among other things, clarifies that members of Congress do indeed owe a fiduciary duty not to trade on material nonpublic information obtained in their official positions. Specifically, the Act states that: "Members of Congress and employees of Congress are not exempt from the insider trading prohibitions arising under the securities laws, including section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b thereunder."<sup>96</sup> And the Act amends § 21A of the Securities Exchange Act to clarify that:

[E]ach member of Congress or employee of Congress owes a duty arising from a relationship of trust and confidence to the Congress, the United States Government, and the citizens of the United States with respect to material, nonpublic information derived from such person's position as a Member of Congress or employee of Congress or gained from the performance of such person's official responsibilities.<sup>97</sup>

Accordingly, the STOCK Act lays to rest any argument that § 10(b) and Rule 10b do not apply to members of Congress. Because the Act establishes a relationship of trust and confidence between members of Congress and the institution, there is no question that members of Congress are now subject to existing insider trading prohibitions.

Importantly, the STOCK Act does not create a new, unique statutory crime of "congressional insider trading." Accordingly, any attempt to punish members of Congress for insider trading will rely upon the same legal framework and reasoning that supports any other charge of insider trading: namely, that knowingly failing to disclose material, nonpublic information prior to purchasing or selling securities constitutes a scheme or artifice to defraud. Thus, in order to secure

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94. See, e.g., Ronald L. Delegee, *Congress's Free Pass on Insider Trading*, RESEARCH, May 2011, at 18, 19; see also Bainbridge, *supra* note 13, at 296–97 (arguing that insider trading rules apply to congressional employees but not to members of the House or Senate). *But see* Nagy, *supra* note 12, at 1139–59 (arguing that members of Congress could have been held liable under classical and misappropriation theories as they existed prior to passage of the STOCK Act).

95. Delegee, *supra* note 94, at 296–97.

96. Stop Trading on Congressional Knowledge Act, Pub. L. No. 112-105, § 4(a), 126 Stat. 291, 292 (2012).

97. § 4(b)(2).

convictions, prosecutors or the SEC will be required to make the usual showing that the accused, acting with *scienter*, traded on material, nonpublic information which that individual had a duty to disclose. As discussed, the Act clarifies only the last element—that members of Congress owe a duty to disclose which, if breached in the context of buying or selling securities, may subject them to liability under the existing prohibitions against insider trading found in § 10(b) and Rule 10b if the other elements of the offense are also proved.

### III.

#### OUTLAWING HONEST GRAFT?: ASSESSING THE STOCK ACT AS A REMEDY FOR CONGRESSIONAL INSIDER TRADING

The STOCK Act clearly states that members of Congress are not exempt from insider trading rules.<sup>98</sup> It clarifies that members owe a duty of trust and confidence to Congress, the government, and to their constituents, and that the duty is violated if a member trades on material, nonpublic information derived from his position or the performance of his official duties.<sup>99</sup> What remains to be seen, however, is whether the Act will have more than just rhetorical value as a statement of policy and will indeed provide a mechanism for punishing congressional insider trading when it occurs.

In this context, it bears noting that insider trading is a notoriously difficult crime to prove in any case, because the visible component of the prohibited activity—trading securities—is perfectly legal.<sup>100</sup> Making the case for insider trading depends on knowing what was in the mind of the trader when the trades were made—specifically whether the trader was aware of material, nonpublic information that he or she had a duty to disclose prior to trading—and direct evidence of such knowledge is exceedingly rare.<sup>101</sup> Instead, most insider trading cases are built on webs of circumstantial evidence that, when considered in the aggregate, allow the trier of fact to draw the inference that prohibited trading has occurred.<sup>102</sup>

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98. § 4(a).

99. § 4(b)(2).

100. See Thomas C. Newkirk & Melissa A. Robertson, U.S. Sec. & Exch. Comm'n, Speech by SEC Staff: Insider Trading – A U.S. Perspective (Sept. 19, 1998), <http://www.sec.gov/news/speech/speecharchive/1998/spch221.htm>.

101. See *id.*

102. See *id.* Such inferences can be drawn from, among other things, the accused's access to information, the timing or unusual size of a trade, the temporal proximity between a trade and the receipt of information, attempts to conceal trading or offers of implausible explanations for trading patterns. See *SEC v. Adler*, 137 F.3d 1325, 1341–42 (11th Cir. 1998).

The difficulty of proving insider trading cases based on circumstantial evidence is compounded in the criminal context by the requirement that all elements of the crime must be proved beyond a reasonable doubt. Indeed, successful criminal insider trading prosecutions almost always rely on statements of co-conspirators,<sup>103</sup> wire-tap evidence,<sup>104</sup> or other direct evidence. Although the standard is more relaxed in the civil context, SEC enforcement actions for insider trading must still clear the preponderance bar for every element of the offense.<sup>105</sup> As a practical matter, then, government must prove—either beyond a reasonable doubt or by a preponderance of the evidence—that a member of Congress knowingly traded on the basis of material,<sup>106</sup> nonpublic information which she derived from the performance of her official duties. The STOCK Act addresses only one element of the offense by clarifying that members of Congress do indeed have a duty to either disclose material, nonpublic information derived through the performance of their duties or abstain from trading on it. The Act does nothing to alleviate the remaining requirements that the government prove that trades took place and that a member of Congress, acting with *scienter*, used insider information derived from her official position or performance of her official duties to make them.<sup>107</sup>

In this practical enforcement context, it remains to be seen whether the Constitution and other considerations will frustrate attempts to punish congressional insider trading.

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103. See Newkirk & Robertson, *supra* note 100.

104. See Peter Lattman & Azam Ahmed, *Hedge Fund Billionaire Is Guilty of Insider Trading*, N.Y. TIMES DEALBOOK (May 11, 2011, 10:50 AM), <http://dealbook.nytimes.com/2011/05/11/rajaratnam-found-guilty/> (noting that the government built its successful prosecution of Galleon Fund director Raj Rajaratnam on “powerful wiretap evidence”).

105. See Newkirk & Robertson, *supra* note 100.

106. Nonpublic information is material if a reasonable investor would consider it important or relevant in making an investment decision or where there is a substantial likelihood that “disclosure of the omitted fact would have been viewed by [a] reasonable investor as having significantly altered the ‘total mix’ of information made available.” *Basic v. Levinson*, 485 U.S. 224, 231–32 (1988) (internal quotation marks omitted).

107. The element of *scienter* is a “mental state embracing intent to deceive, manipulate, or defraud.” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.12 (1976). *Scienter* is typically established by showing that the trader either knew or was reckless in not knowing that the insider information was both material and nonpublic. See DONNA M. NAGY, RICHARD W. PAINTER & MARGARET V. SACHS, *SECURITIES LITIGATION AND ENFORCEMENT* 574 (3d ed. 2011).

### A. *The Speech or Debate Clause as an Enforcement Barrier*

The Speech or Debate Clause of the U.S. Constitution provides that “for any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place.”<sup>108</sup> That the Clause provides some form of legislative privilege is well established;<sup>109</sup> however, the precise parameters of that privilege are decidedly less clear.<sup>110</sup> Nevertheless, the application of the Clause is particularly relevant to efforts to investigate and prosecute congressional corruption.<sup>111</sup> “Depending on the nature of the scandal, location of relevant information, and whether the legislator is currently in office and in session,”<sup>112</sup> the extent to which the Clause does or does not confer a privilege may be the single most important factor bearing on the outcome of an investigation or prosecution.<sup>113</sup> Accordingly, some analysis of the Clause and its applicability in the context of congressional insider trading is warranted.

#### 1. *Defining the Privilege*

Defining the precise nature of Speech or Debate Clause immunity is a complex process in part because the Clause itself provides so little textual guidance. As noted above, the Clause states that “for any

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108. U.S. CONST. art. I, § 6, cl. 1.

109. *See* *United States v. Johnson*, 383 U.S. 169, 179 (1966) (noting that “the tradition of legislative privilege is so well established in our polity” that courts have had little occasion to consider its implications).

110. *Id.* (noting that as late as 1966 there was “very little judicial illumination of [the] clause”); *see also* Recent Case, *Constitutional Law—Legislative Privilege—D.C. Circuit Holds That FBI Search of Congressional Office Violated Speech or Debate Clause*, 121 HARV. L. REV. 914, 914 (2008) (noting that the “exact contours of legislative privilege have never been clear in American constitutional law”).

111. Of the relatively few Supreme Court cases to consider the Clause in detail, a significant portion involve the application of federal anti-corruption laws to members of Congress. *See, e.g.*, *United States v. Johnson*, 383 U.S. 169 (1966) (prosecution of former Congressman for conspiracy to defraud the United States and for violation of federal conflict of interest statute); *United States v. Brewster*, 408 U.S. 501 (1972) (prosecution of former Senator for solicitation and acceptance of bribes in return for legislative acts); *United States v. Helstoski*, 442 U.S. 477 (1979) (same, regarding a Congressman).

112. Jay Rothrock, *Striking a Balance: The Speech or Debate Clause’s Testimonial Privilege and Policing Government Corruption*, 24 *TOURO L. REV.* 739, 744 (2008).

113. *See* Susan Schmidt, *U.S. Asks High Court to Nix ‘Speech-or-Debate’ Ruling*, WASH. POST, Dec. 21, 2007, at A3 (reporting that Solicitor General Gregory Garre expressed concern that investigations into congressional corruption could be “seriously and perhaps fatally stymied[ ]” by the operation of the Clause); *see also* Dep’t of Justice, U.S. Attorneys’ Manual, Title 9: Criminal Resource Manual § 2046 (1997) (noting that the Clause applies in the civil as well as criminal context and imposes “significant limits on the type of evidence that can be used” against members of Congress).

Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place.”<sup>114</sup> Thus, construing the Clause requires interpreting the meaning of the terms “Speech or Debate” and “shall not be questioned.” In resolving those two interpretive questions, the Supreme Court has acknowledged that the Clause was “designed to . . . preserve the constitutional structure of separate, coequal, and independent branches of government”<sup>115</sup> by protecting individual legislators—and thereby the legislative process—from intimidation “by the Executive and accountability before a possibly hostile judiciary.”<sup>116</sup> In light of its structural importance, the Court has endeavored to read the Clause “broadly to effectuate its purpose,” but not so broadly as to “make Members of Congress super-citizens, immune from criminal responsibility.”<sup>117</sup> That balancing act is a recurring theme in the Court’s Speech or Debate Clause jurisprudence.

*a. Interpreting “Speech or Debate”*

The Court first attempted to define the parameters of the term “Speech or Debate” in 1880 in *Kilbourn v. Thompson*.<sup>118</sup> In reaching its holding, the Court declined to give the Clause a narrow, literal reading which would have limited the scope of its protections to only “words spoken in debate.”<sup>119</sup> Instead the Court held that the Clause applies not only to literal speech and debate, but also to other activities

114. U.S. CONST. art. I, § 6, cl. 1.

115. *United States v. Helstoski*, 442 U.S. 477, 491 (1979); *accord Eastland v. U.S. Serviceman’s Fund*, 421 U.S. 491, 502 (1975) (“The purpose of the Clause is to insure that the legislative function the Constitution allocates to Congress may be performed independently.”); *United States v. Brewster*, 408 U.S. 501, 524 (1972) (The Clause “preserves the independence and thereby the integrity of the legislative process”); *United States v. Johnson*, 383 U.S. 169, 178 (1966) (“In the American governmental structure, the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders.”).

The Clause was adopted by the Constitutional Convention without debate, *see* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, 246 (M. Farrand, rev. ed. 1966) (describing the uncontested adoption of the Clause), and is modeled on a nearly identical provision of the English Bill of Rights of 1689. An Act Declaring the Rights and Liberties of the Subject, and Setting the Succession of the Crown (Bill of Rights), 1689, 1 W. & M., c. 2, § 97 (Eng.) (“That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.”). For an authoritative historical discussion of the English origins of the clause, *see* generally Robert J. Reinstein & Harvey A. Silvergate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113 (1973).

116. *Johnson*, 383 U.S. at 181.

117. *Brewster*, 408 U.S. at 516.

118. 103 U.S. 168 (1880).

119. *Id.* at 204.



which subsequent cases have broadly defined as “legislative acts.”<sup>120</sup> That functional definition<sup>121</sup> of the phrase “Speech or Debate” has not been revisited;<sup>122</sup> instead, the thrust of the Court’s jurisprudence since *Kilbourn* has been concerned with distinguishing between protected legislative acts and unprotected activity to which the Clause does not apply.<sup>123</sup>

Generally speaking, protected legislative acts include conduct which “forms an integral part of the deliberative and communicative processes by which Members participate in . . . the consideration and passage or rejection of proposed legislation.”<sup>124</sup> Accordingly, speeches given on the floor of the House or Senate,<sup>125</sup> actions taken at legislative committee meetings and hearings (as well as the preparation of committee reports),<sup>126</sup> and introducing and voting on bills and

120. *Brewster*, 408 U.S. at 509 (citing *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880)).

121. The Court asked:

Is what the defendants did in the matter at hand covered by the provision? Is a resolution offered by a member, a speech or debate, within the meaning of the clause? Does its protection extend to the report which they made to the House of Kilbourn’s delinquency? To the expression of opinion that he was in contempt of the authority of the House? To their vote in favor of the resolution under which he was imprisoned? If these questions be answered in the affirmative, they cannot be brought in question for their action in a court of justice or in any other place. And yet if a report, or a resolution, or a vote is not a speech or debate, of what value is the constitutional protection?

*Kilbourn v. Thomas*, 103 U.S. 168, 201 (1880).

122. I do not mean to suggest that the definition of the specific conduct to which the Clause is applicable has remained fixed since 1880, but rather that the Court has not, since *Kilbourn*, seriously entertained the textual argument that the Clause applies only (and literally) to speech or debate carried out on the floor of Congress. See, e.g., *United States v. Renzi*, 651 F.3d 1012, 1021 (9th Cir. 2011) (“Since *Kilbourn* . . . a broad range of activities other than literal speech or debate continue to fall within the contours of a ‘legislative act.’”).

123. Note, *Evidentiary Implications of the Speech or Debate Clause*, 88 YALE L.J. 1280, 1285 (1979).

124. *United States v. Gravel*, 408 U.S. 606, 625 (1972).

125. *United States v. Johnson*, 383 U.S. 169, 184–85 (1966); accord *Cochran v. Couzens*, 42 F.2d 783 (D.C. Cir. 1930) (holding that defamatory words spoken on the floor of Congress could not be basis for slander claim), construed in *Brewster*, 408 U.S. at 516 n.11. In this regard, the Court has noted that because the protections of the Clause are absolute, it has “enabled reckless men to slander or even destroy others with impunity.” *Brewster*, 408 U.S. at 516. But because the “reputation of a private citizen is of less importance . . . than the free and unreserved exercise of the duties of a representative, unawed by the fear of legal prosecutions,” such conduct is protected by the Clause. *Id.* at 516 n.11 (quoting *Coffin v. Coffin*, 4 Mass. 1, 28 (1808)).

126. *Doe v. McMillan*, 412 U.S. 306, 311–12 (1973) (citing *Gravel v. United States*, 408 U.S. 606 (1972)); see also *id.* at 312–13 (holding that suit for invasion of privacy and defamation based on introduction and discussion of committee report was barred by Speech or Debate Clause).

resolutions,<sup>127</sup> are all protected activities. The Clause may even protect a congressperson's status as a member of a committee or subcommittee, though likely only when membership in a committee is offered as evidence that a member knows the particulars of a certain piece of legislation because of that membership.<sup>128</sup>

On the other hand, the Clause does not protect taking a bribe in exchange for future legislative action.<sup>129</sup> It also does not protect a member of Congress's direct communications with constituents and the public in the form of speeches outside of Congress, newsletters, press releases, or the private republication of committee reports and other materials.<sup>130</sup> Interstate travel is not protected unless undertaken as a fact-finding exercise in relation to legislation dealing specifically

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127. See *Kilbourn v. Thomas*, 103 U.S. 168, 203 (1880) (making report to Congress on plaintiff's alleged delinquency and failure to comply with subpoena as grounds for contempt and subsequent vote on resolution holding plaintiff in contempt were legislative acts); see also *Powell v. McCormack*, 395 U.S. 486 (1969) (holding that action against members of Congress for voting in favor of resolution expelling elected member had to be dismissed in keeping with protections of Clause).

128. Compare *United States v. Swindall*, 971 F.2d 1531, 1543 (11th Cir. 1992) (holding that defendant's status as a committee member was inadmissible), with *United States v. McDade*, 28 F.3d 283, 291 (3d Cir. 1994) ("Speech or Debate Clause does not require dismissal of any count of the indictment simply because it refers to the defendant's status as a ranking member of two congressional committees.").

In *Swindall*, the government accused Congressman Swindall of perjury based on statements he made to a grand jury, in which he denied being aware of the illegality of the conduct of an associate (who had subsequently been indicted for money laundering) with whom he was engaged in negotiations to complete a transaction. 971 F.2d at 1535-39. To refute Swindall's claim of ignorance, the government attempted to introduce the fact that while Swindall was serving on the House Banking and Judiciary Committees, each committee considered proposed legislation prohibiting money laundering and sham transactions. *Id.* at 1539-40. The Eleventh Circuit concluded that Swindall's status as a member of the committees was protected by the Clause, and therefore impermissible as a basis for prosecution. The court reasoned that the inquiry into Swindall's committee memberships actually constituted an inquiry into legislative acts because it depended on the inference that a member of the committee would have read the bills in question, and would have therefore been aware that the conduct in question was illegal. *Id.* at 1543. In the court's view, reading the bill was a legislative act that clearly would have been protected by the Clause, and therefore evidence of status that would lead to the inference that the same legislative act had been performed was also privileged. See *id.*

In *McDade*, the Third Circuit distinguished *Swindall* on narrow grounds and clarified that committee membership alone does not constitute a privileged status or act. 28 F.3d at 290-91. But the court did not disagree with *Swindall's* conclusion that "the legislative process and legislative independence would be undermined if prosecutors could inquire into a member's committee status for the purpose of showing that the member had acquired knowledge of the contents of the bills considered by his or her committees". *Id.* at 293.

129. See *Brewster*, 408 U.S. at 526.

130. See *id.* at 512 (speeches outside of Congress, newsletters, and press releases not covered by Clause); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (press release re-

with transportation issues.<sup>131</sup> Likewise, the perfectly routine and legal “political acts” that legislators do on behalf of constituents, such as setting appointments with executive branch officials, or helping to obtain government contracts, are also not protected.<sup>132</sup>

*b. A Multifaceted Privilege*

When implicated, the Clause protects members of Congress from being “questioned in any other place,” and that term has been interpreted to shield legislative acts in a variety of ways.<sup>133</sup> Specifically, the Clause can act as a substantive privilege, an evidentiary privilege, a testimonial privilege, and—perhaps—a document non-disclosure privilege.<sup>134</sup> Where any of these protections apply, the Court has emphasized that they provide an “absolute barrier to interference” from the executive or the judiciary.<sup>135</sup>

In its most fundamental form, the Speech or Debate Clause simply serves to immunize members of Congress from civil and criminal liability arising out of their legislative acts. The critical question, highlighted by the Court in *United States v. Brewster*, is “whether it is necessary to inquire into how [a member] spoke, how he debated, how he voted, or anything he did in the chamber or in committee[,]” or his motives for doing any of those acts, “in order to make out a violation of th[e] statute.”<sup>136</sup> If the answer is yes, the prosecution is barred by the Speech or Debate Clause.

The practical effects of this test can be seen in the divergent outcomes reached in two seemingly very similar cases—*Brewster* and *United States v. Johnson*, decided six years earlier. In *Johnson*, a former member of Congress sought to overturn his conviction for con-

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peating libelous statements made in Congress was not privileged); *Gravel v. United States*, 408 U.S. 606 (1972) (private publication of Pentagon Papers not privileged).

131. See *United States v. Biaggi*, 853 F.2d 89, 104 (2d Cir. 1988) (holding that the act of transporting oneself from one place to another is not an “integral part” of the legislative process unless the focus of the legislation is transportation).

132. *Brewster*, 408 U.S. at 512 (making appointments with executive agencies or helping to obtain government contracts are not legislative acts).

133. *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 415 (D.C. Cir. 1995) (remarking that the terse, deceptively simple language of the Speech or Debate Clause has yielded “a somewhat complicated privilege, with several strands”).

134. See Brief of Petitioner at 14, *United States v. Rayburn House Office Bldg.*, 522 U.S. 1295 (2008) (No. 07-816) (acknowledging the existence of the substantive, testimonial, and evidentiary strands of the privilege and arguing against the non-disclosure privilege). For additional discussion of each category, see *infra* notes 136–169 and accompanying text.

135. *E.g. Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 503 (1975) (citing *Doe v. McMillan*, 412 U.S. 306, 314 (1973)).

136. *Brewster*, 408 U.S. at 526 (emphasis added).

spiring to defraud the U.S. government by accepting compensation in exchange for making a speech in Congress in which he pressed for the dismissal of indictments against a Maryland savings and loan company.<sup>137</sup> To meet its burden, the prosecution was required to prove that Johnson's speech was "made solely or primarily to serve private interests, and that Johnson was not acting in good faith" when he delivered it.<sup>138</sup> To do so, the government relied on extensive and highly specific evidence about the content of the speech, the factual basis for the statements made in the speech, and the manner in which the speech was prepared.<sup>139</sup> Accepting Johnson's Speech or Debate Clause arguments, the Court admonished that such evidence was inadmissible and had to be "wholly purged" if Johnson were to be retried,<sup>140</sup> but the Court also noted that "[t]he constitutional infirmity infecting [the] prosecution [was] not merely a matter of the introduction of inadmissible evidence."<sup>141</sup> Rather, the prosecution's conspiracy theory violated the "express language" of the Clause because it was "dependent" on inquiring into legislative acts (Johnson's speech),<sup>142</sup> and those acts were not merely "an incidental part of the Government's case."<sup>143</sup>

In *Brewster*, the Court considered facts seemingly quite similar to those at issue in *Johnson*. Senator Brewster had been indicted for accepting bribes in exchange for promises of favorable action on postage-rate legislation "which might at any time be pending before him in his official capacity" as a member of the Senate Committee on Post Office and Civil Service.<sup>144</sup> Brewster moved to dismiss the indictment before trial, arguing that he was immune from prosecution and the District Court agreed, ruling that, "particularly in view of the interpretation given [to the Speech or Debate Clause] in *Johnson*," the Constitution barred "prosecution for alleged bribery to perform a legislative act."<sup>145</sup> On appeal, the Supreme Court affirmed *Johnson*'s holding that the Clause prohibits prosecution of a member of Congress based

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137. United States v. Johnson, 383 U.S. 169, 171–72, 184–85 (1966).

138. *Id.* at 177.

139. *Id.* at 173–76.

140. *Id.* at 185.

141. *Id.* at 176.

142. *Id.* at 184–85.

143. *Id.* at 176–77.

144. The indictment specifically charged that Brewster had "directly and indirectly, corruptly asked, solicited, sought, accepted, received, and agreed to receive (sums) . . . in return for being influenced in his performance of official acts . . ." 408 U.S. 501, 502 (1972) (internal quotation marks omitted).

145. *Id.* at 503–04 (internal quotation marks omitted). Justice Brennan agreed, arguing that even if:

on legislative acts or the motivation for those acts,<sup>146</sup> yet it nevertheless distinguished *Johnson* in two ways and reinstated the indictment against Brewster. First, the Court clarified that “[t]aking a bribe is, obviously, no part of the legislative process or function” and therefore not a legislative act.<sup>147</sup> Second, the Court held that because it was taking the bribe—rather than casting a paid-for congressional vote—that constituted the charged offense, there was no need for the government to inquire into Brewster’s legislative acts or motives in order to make out its *prima facie* case.<sup>148</sup> In other words, the Clause was no barrier to prosecution because unlike the case in *Johnson*, proving the offense charged did not require knowing why or even if Senator Brewster had cast his vote.

The divergent outcomes in *Johnson* and *Brewster* demonstrate that the nature of the offense in question is relevant to the Speech or Debate Clause analysis. In easy cases, the Clause applies where, for example, a member of Congress’s speech on the floor of the House or Senate is *itself* alleged to be defamatory.<sup>149</sup> But in more complex cases, the Clause also applies where legislative acts or the motivation for performing those acts are essential elements of the *prima facie* case alleged in an indictment or complaint. This strong form of the privilege can be most easily conceived of as a prophylactic device: where an indictment or complaint is so thoroughly dependent on legislative acts that judicial inquiry into those acts is inevitable, the Clause is implicated.<sup>150</sup>

In addition to protecting members of Congress from prosecution based on the substance of their legislative acts, the Speech or Debate Clause also acts as an evidentiary privilege in otherwise permissible

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[T]he indictment did not call into question the “speeches or debates” of [Senator Brewster], it certainly laid open to scrutiny the motives for his legislative acts; and those motives, I had supposed, were no more subject to executive and judicial inquiry than the acts themselves . . . .

*Id.* at 530 (Brennan, J., dissenting).

146. *Id.* at 512 (“*Johnson* thus stands as a unanimous holding that a Member of Congress may be prosecuted under a criminal statute provided that the Government’s case does not rely on legislative acts or the motivation for legislative acts.”).

147. *Id.* at 526.

148. *Id.* at 525–26.

149. *See id.* at 510, 516 (noting that the Clause has “enabled reckless men to slander or even destroy others with impunity”).

150. *See United States v. Johnson*, 383 U.S. 169, 184–85 (1966) (holding that a prosecution that depends on inquiries into legislative acts or the motivation for performing legislative acts “necessarily contravenes the Speech or Debate Clause”) (emphasis added); *see also id.* at 176–77 (noting that “constitutional infirmity infecting” prosecution was not merely admission of legislative act evidence, but fact that legislative acts were not an “incidental” part of Government’s case).

prosecutions. As the Court explained in *United States v. Helstoski*,<sup>151</sup> the holdings in *Johnson* and *Brewster*, “leave no doubt that evidence of a legislative act of a Member may not be introduced by the Government” to prove its case.<sup>152</sup> This conclusion follows from a quite literal reading of the Clause: in effect, “[r]evealing information as to a legislative act . . . to a jury would subject a Member to being ‘questioned’ in a place other than the House or the Senate, thereby violating the explicit prohibition of the Speech or Debate Clause.”<sup>153</sup>

The evidentiary bar of the Clause also follows logically from a functionalist, separation-of-powers-based understanding of the privilege. The Clause is designed to preserve legislative independence by protecting the legislative branch from executive intimidation and/or a hostile judiciary,<sup>154</sup> and the Supreme Court has recognized that both criminal and civil prosecution “infringes upon the independence which the Clause is designed to preserve” because it “creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks . . . .”<sup>155</sup> Thus, even when the Clause does not preclude a prosecution altogether, the evidentiary bar still works to preserve the separation of powers by insulating members from the burden and distraction of defending themselves against inquiries into their legislative acts.<sup>156</sup>

Nevertheless, the protections of the evidentiary privilege are not absolute. Although the Clause bars the introduction of evidence of the performance of past legislative acts, it does not apply to promises to engage in future legislative acts.<sup>157</sup> As the Court clarified in *Helstoski*, the Clause “precludes any showing of how [a legislator] acted, voted,

151. 442 U.S. 477, 487 (1979).

152. *Id.*; see also *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 415, 415 n.5 (D.C. Cir. 1995) (“Nevertheless, the Clause restricts the manner in which [a permissible] prosecution can be conducted. Even when properly subject to suit, members of Congress are privileged against the evidentiary use against them of any legislative act, even if the act is not claimed to be itself illegal, but is offered only to show motive, such as behavior in furtherance of a bribe.”).

153. *Helstoski*, 422 U.S. at 490.

154. *Id.* at 491.

155. *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 503 (1975).

156. See *id.* (“In reading the clause broadly we have said that legislators . . . ‘should be protected not only from the consequences of litigation’s results but also from the burden of defending themselves.’” (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967))).

157. Compare *United States v. Johnson*, 383 U.S. 169, 176–77 (1966) (holding that evidence concerning speech allegedly made in Congress in exchange for bribe concerned completed legislative acts and was inadmissible), with *United States v. Brewster*, 408 U.S. 501, 526–27 (1972) (holding that promise to engage in future legislative acts in exchange for bribe could be introduced without offending Clause).

or decided,” but “[p]romises by a Member to perform an act in the future are not legislative acts.”<sup>158</sup>

The third variant of the Speech or Debate Clause provides a testimonial privilege that protects members or their aides from testifying about any matter that concerns or impugns a legislative act.<sup>159</sup> The testimonial privilege was first articulated in *Gravel v. United States*, in which the Court held that a Senator and his aides could “not be made to answer—either in terms of questions or in terms of defending [themselves] from prosecution—for” legislative acts.<sup>160</sup> The testimonial privilege is yet another logical outgrowth of the functional, separation-of-powers-based understanding of the Clause. Like the evidentiary privilege, it is designed to protect the legislative branch from “hostile questioning by the executive branch before a possibly hostile judiciary.”<sup>161</sup>

The privilege, of course, does not completely immunize a member of Congress from questioning in the criminal context.

In *Gravel*, the Court held that a grand jury *could* probe the manner by which [the Senator] had obtained classified government documents (the Pentagon Papers) and could consider allegations that the Senator had arranged for private publication of those materials, but . . . could not inquire into the conduct or motives of the Senator or his aides at a subcommittee meeting during which the Senator placed the Pentagon Papers in the public record.<sup>162</sup>

Thus, the testimonial privilege extends only as far as the Clause itself. It shields members of the legislative branch from being subjected to hostile questioning about legislative acts, but not conduct otherwise outside the scope of the Clause’s protections.

Finally, the Circuit Court of Appeals for the D.C. Circuit has held that the Clause includes a non-disclosure privilege that allows members of Congress to withhold documents from review by the executive branch during investigations.<sup>163</sup> In *United States v. Rayburn House Office Building*, the D.C. Circuit considered whether an FBI search of

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158. *Helstoski*, 442 U.S. at 489.

159. See *Gravel v. United States*, 408 U.S. 606, 622 (1972).

160. *Id.* at 616.

161. *In re Grand Jury Investigation into Possible Violations of Title 18*, 587 F.2d 589, 596 (3d Cir. 1978).

162. TODD B. TATELMAN, CONGRESSIONAL RESEARCH SERV., RL30843, *SPEECH OR DEBATE CLAUSE CONSTITUTIONAL IMMUNITY: AN OVERVIEW* 5 (2001) (citing *Gravel*, 408 U.S. at 609, 622–29) (emphasis added).

163. See *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 420 (D.C. Cir. 1995) (holding that documents are protected by the Clause because they can be just as revealing as oral statements with respect to the thoughts and machinations of Congress).

Congressman William “Cold Cash” Jefferson’s House office pursuant to a valid warrant violated the Speech or Debate Clause.<sup>164</sup> The court concluded that the search and compelled disclosure of documents disrupted the legislative process, and that the specter of compelled disclosure would chill the exchange of ideas between and among legislators and their staff, thereby further disrupting the legislative process.<sup>165</sup> Accordingly, the court held that a member of Congress must be permitted to assert his or her privileges prior to the search, and that searches which expose privileged material to the executive branch without the member’s consent would violate the Clause.<sup>166</sup> The Ninth Circuit recently considered a similar question and concluded that the Clause does *not* embrace a document non-disclosure privilege,<sup>167</sup> but the Supreme Court has thus far declined to resolve the split in authority.<sup>168</sup> Thus, the *Rayburn* holding remains good law in the D.C. Circuit where, importantly, by far the largest number of cases involving the Speech or Debate Clause are litigated.<sup>169</sup>

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164. 497 F.3d 654, 656–59 (2007). Jefferson was under investigation for bribery of a public official, wire fraud, bribery of a foreign official, and for conspiracy to commit the same. Acting on information that evidence of these crimes was located in Jefferson’s office in the Rayburn House office building, the FBI obtained a warrant to search the office. Pursuant to the warrant, the FBI conducted an eighteen-hour investigation which began on the night of Saturday, May 20, 2006, and involved over a dozen agents reviewing all of Congressman Jefferson’s files, copying computer hard drives, and ultimately removing two boxes of documents in addition to the copied electronic records. The files were then to be turned over to a “filter team” of Department of Justice lawyers who were to review the documents to ensure that any privileged material was returned to the Congressman and not turned over to the prosecution. Questionable documents were to be submitted to a federal district court for review. *Id.*

165. *See id.* at 661.

166. *See id.* at 662–63. *Cf.* Powell v. McCormack, 395 U.S. 486, 505 (1969) (“The purpose of the protection afforded legislators is . . . to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions.”).

167. *See* United States v. Renzi, 651 F.3d 1012, 1036–37 (11th Cir. 2011) (holding that “[c]oncern for distraction alone cannot bar disclosure and review when it takes place as part of an investigation” into conduct not substantively protected by the Speech or Debate Clause and rejecting the D.C. Circuit’s analysis in *Rayburn*).

168. Several observers believed that the *Renzi* decision would be certified for *certiorari*. *See, e.g.,* Jonathan Adler, *Circuit Split Over Speech and Debate Clause*, THE VOLOKH CONSPIRACY (June 24, 2011, 4:00 PM), <http://volokh.com/2011/06/24/circuit-split-over-speech-and-debate-clause/>. However, it was not. *Renzi v. United States*, 132 S. Ct. 1097 (2012) (mem.).

169. As a rough indicator, a Westlaw search of cases involving the Speech or Debate Clause and corruption reveals that fifteen of the thirty-nine cases (38.4%) were tried in the D.C. Circuit. The next most popular circuit court was the Third Circuit, which tried just six (15.3%) of the total number. At the district court level, nine of the thirty cases were tried in the D.C. District. The next highest total was three in the district of Arizona.



## 2. Application to Congressional Insider Trading

Scholars have considered whether prosecuting members of Congress for insider trading will be impacted by the Speech or Debate Clause and either concluded that the Clause poses no major barrier, or passed lightly over the question.<sup>170</sup> Professor Bainbridge, for example, notes that trading securities—like taking a bribe—is in no way a legislative act, and therefore not conduct protected by the Clause. Analogizing to *Brewster*, Bainbridge concludes that “a prosecution for insider trading would not require ‘inquiry into a legislative act or the motivation for a legislative act’” and therefore would not offend the Clause.<sup>171</sup> But the analysis may not be quite so straightforward. It is true, as far as it goes, that trading securities, like receiving a bribe, is not a purely legislative act. However, the crime of insider trading differs in some significant respects from the bribery offense for which *Brewster* was indicted. Accordingly, the Court’s specific holding in *Brewster* may not completely control the analysis.

As discussed above, the Clause applies either when a legislative act is the basis for liability or when it is necessary to inquire into a member of Congress’s motivation for performing a legislative act.<sup>172</sup> The critical question, highlighted by the Court in *Brewster*, is “whether it is necessary to inquire into how [a member] spoke, how he debated, how he voted, or anything he did in the chamber or in committee[,]” or his motives for doing any of those acts, “in order to make out a violation . . . .”<sup>173</sup> In *Brewster* no such inquiry was necessary because the crime was established merely by the receipt of a bribe, which in and of itself was not a legislative act.<sup>174</sup> As the *Brewster* Court explained, the conduct at issue was not protected by the Clause because all that was required to make out a *prima facie* case of a violation of the bribery statutes under which *Brewster* was indicted was evidence of the bribe itself—no evidence of a “specific [legislative] act, speech, debate, or decision” was required to show the violation.<sup>175</sup> In the earlier case of *United States v. Johnson*, on the other hand, the Clause was implicated because the government did rely on

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170. See, e.g., Bainbridge, *supra* note 13, at 303 (arguing that Clause will not frustrate prosecutions); Nagy, *supra* note 12, at 1136 n.180 (acknowledging with relatively little analysis the possibility that Clause might pose a barrier to prosecutions).

171. Bainbridge, *supra* note 13, at 303 n.153 (quoting *United States v. Brewster*, 408 U.S. 501, 526 (1972)).

172. See *supra* text accompanying notes 136–150.

173. *United States v. Brewster*, 408 U.S. 501, 526 (1972).

174. *Id.*

175. *Id.* at 528. The indictment in *Brewster* demonstrates the more amorphous nature of the charges at issue. Counts one, three, five, and seven charged that *Brewster*:

an inquiry into legislative acts and the motivation for them in order to demonstrate that Johnson intended to defraud the government.<sup>176</sup> The relevant question, then, is whether insider trading prosecutions are likely to look more like *Johnson* or *Brewster*.

Culpability for insider trading cannot be established merely by showing that a member of Congress executed a trade, or by generally demonstrating that the member possessed some nonspecific legislative information and also traded generally in securities.<sup>177</sup> Rather, the government must show that a trade was made in derogation of a duty to refrain from trading on some *specific* nonpublic information derived from the member's official duties because that information was materially relevant to a *specific* trade. Unfortunately, determining what members of Congress knew, when they knew it, and whether they traded on that specific information likely depends on making specific inquiries into legislative acts done in committee or in Congress.<sup>178</sup> For

directly and indirectly, corruptly asked, solicited, sought, accepted, received and agreed to receive [sums] . . . in return for being influenced in his performance of official acts in respect to his action, vote, and decision on postage rate legislation which might at any time be pending before him in his official capacity . . . .

*Id.* at 502 (alteration in original). Count nine charged that appellee:

directly and indirectly, asked, demanded, exacted, solicited, sought, accepted, received and agreed to receive [a sum] . . . for and because of official acts performed by him in respect to his action, vote and decision on postage rate legislation which had been pending before him in his official capacity . . . .

*Id.* at 503 (alteration in original).

176. *See supra* text accompanying notes 137–143.

177. Such a standard would, essentially, amount to a strict liability prohibition on stock trading for members of Congress. Though perhaps an attractive solution to the issue of congressional insider trading, such a regime is emphatically not created by the STOCK Act, which merely clarifies that members of Congress are subject to the same prohibitions against insider trading that apply to the rest of the public.

178. A hypothetical based on the facts set forth in an actual indictment for insider trading is particularly helpful in demonstrating why the standard for establishing a *prima facie* case of insider trading does involve specific inquiries into specific legislative acts of the sort not required in *Brewster*:

In the recent *Galleon* case, counts eight and nine of the indictment charged Raj Rajaratnam with insider trading based on trades of ClearWire stock executed on March 24 and March 25 of 2008. The government charged that Rajaratnam made the ClearWire trades based on material nonpublic information obtained from CC-1, an insider at ClearWire. The indictment charged that Rajaratnam knew that CC-1 was appropriating nonpublic information from ClearWire, and that CC-1 made a telephone call to Rajaratnam on March 20, 2008—four days before the ClearWire trades were executed. Indictment, *United States v. Rajaratnam*, No. 1:09CR01184, (S.D.N.Y. Dec. 15, 2009), 2009 WL 4807008.

A hypothetical indictment of a member of Congress might similarly charge that Congressman Doe made trades of ClearWire on March 24 and March 25 of 2008 based on material nonpublic information obtained during a committee meeting con-

example, a member may obtain potentially market-moving information about how a colleague's vote will impact the status of a bill or regulation, or about when (or whether) a piece of market-moving legislation will be introduced or forwarded from committee for a vote on the floor. Alternatively, a member might infer that market-moving changes are in the offing after reading the draft of a proposed piece of legislation. As discussed above, reading bills and discussing legislation in committee or in Congress are protected legislative acts because they are "integral part[s] of the deliberative and communicative processes by which Members" consider proposed legislation.<sup>179</sup> Thus, establishing a key component of an insider trading violation—the source and substance of material, nonpublic information—is likely to require precisely the inquiry into specific legislative acts which was not at issue in *Brewster*, but was held to "violate[ ] the express language of" the Clause "and the policies which underlie it" in *Johnson*.<sup>180</sup> The critical distinction is that, in an insider trading case, legislative acts are likely to be the source of material, non-public information, and proving when and where a member of Congress obtained that information will not be an "incidental part of the Government's case."<sup>181</sup>

Even if an indictment is not dismissed outright for relying on legislative acts, the bar on the use of legislative act evidence, the testimonial privilege, and (at least in D.C.) the non-disclosure privilege will significantly undermine attempts to prosecute congressional insider trading. As discussed above,<sup>182</sup> these "use" variants<sup>183</sup> of the Speech or Debate Clause privilege prevent the introduction of a legis-

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cerning regulation of the broadband service industry (of which ClearWire is a member) on March 20, 2008.

Thus, whereas the indictment in *Brewster* alleged only that Brewster had accepted a bribe in exchange for being influenced with regard to an amorphous category of official acts, or in exchange for possibly affecting postage rate legislation that might come before him at some future date, *see supra* note 175, an indictment for insider trading would, of necessity, reference a specific source of insider information, received on a specific date, relating to a specific stock transaction.

179. *United States v. Johnson*, 383 U.S. 169, 177 (1966).

180. *Id.*

181. *Id.* at 176–77. To see even more clearly the manner in which insider trading prosecutions are unlikely to resemble the indictment in *Brewster*, compare *supra* note 175 (vague allegations of possible misuse of legislative office), with *supra* note 178 (specific allegations linking specific nonpublic information to specific trades on specific dates).

182. *See supra* text accompanying notes 151–169.

183. I refer to the evidentiary privilege, the testimonial privilege, and the non-disclosure privilege individually, but also collectively as the "use privileges" because they dictate the manner in which the executive branch can use legislative acts in a prosecution for conduct not otherwise within the scope of the Clause's substantive privilege.

lative act as evidence in a prosecution which is otherwise not protected by the Clause's substantive privilege,<sup>184</sup> protect members from being forced to testify about legislative acts,<sup>185</sup> and also impair the ability of the executive branch to gather evidence without first obtaining the consent of a member of Congress.<sup>186</sup> Thus, the challenge for prosecutors and the SEC, despite the passage of the STOCK Act, is to prove that a member of Congress knowingly or recklessly traded on material nonpublic information derived from the performance of her official duties without introducing evidence of legislative acts, subpoenaing members to testify about legislative acts, or searching a member's files for any shred of useful unprivileged evidence without prior permission. To say, then, that the Clause may present some practical barriers to insider trading prosecutions is an understatement.<sup>187</sup>

These practical realities were not lost on the SEC even prior to the passage of the STOCK Act. Indeed, "according to some members of its staff, the SEC may not have 'press[ed] the issue' of [investigations into insider trading by senators] 'because it is hard to win insider-trading cases without detailed knowledge of what, if any, privileged information the subjects received and proof insiders used it to trade.'"<sup>188</sup> What is more, the Supreme Court has specifically rejected the argument that legislative act evidence should be admitted because it is necessary to prove a member of Congress's motivation for engaging in allegedly criminal behavior, or because excluding such evidence will make prosecutions more difficult.<sup>189</sup> In essence the Court has acknowledged that, although it may frustrate prosecutions of the otherwise unprivileged, criminal acts of a member of Congress, the robust operation of the evidentiary bar is required to fully animate the protections of the Clause.<sup>190</sup>

184. *See supra* text accompanying notes 151–158.

185. *See supra* text accompanying notes 159–162.

186. *See supra* text accompanying notes 163–169.

187. *See* Nagy, *supra* note 12, at 1135 & n.177 (noting that Clause might afford some protection from investigation).

188. *Id.* at 1137 (quoting Joseph N. DiStefano, *Senators' Stock Picks Bring Profit, Scrutiny*, PHILA. INQUIRER, NOV. 7, 2004, at E1 (alterations in original)).

189. *See* United States v. Helstoski, 422 U.S. 477, 487–89 (1979) ("The Government . . . argues that exclusion of references to past legislative acts will make prosecutions more difficult because such references are essential to show the motive for taking money. . . . We do not accept the Government's arguments; without doubt the exclusion of such evidence will make prosecutions more difficult. . . . We . . . agree . . . that references to past legislative acts of a Member cannot be admitted without undermining the values protected by the Clause.").

190. *See id.* at 488 n.7 ("Of course, a Member can use the Speech or Debate Clause as shield against prosecution by the Executive Branch, but . . . [t]hat is the clear purpose of the Clause. The Clause is also a shield for libel and beyond doubt it has

There is no need to belabor the point; the operation of the Clause's use privileges will make it extremely difficult for investigators and prosecutors to know what members of Congress knew, when they knew it, and whether they traded on that information. Thus, even if the Clause does not substantively immunize members of Congress from insider trading prosecutions in every case, the use privileges will make the already notoriously difficult crime of insider trading even more difficult to prove, and the STOCK Act does nothing to address that reality.

### B. Other Practical Shortcomings

Apart from any concerns about the impact of the Speech or Debate Clause, there are at least two other practical reasons to doubt the efficacy of the STOCK Act as a mechanism for outlawing congressional graft which merit brief discussion.

First, as President Obama noted when he signed the bill into law, the STOCK Act does not prohibit members of Congress from owning stock in companies while simultaneously considering legislation that would affect those companies, or sitting on congressional committees with the power to affect industries in which they are personally invested.<sup>191</sup> Admittedly, this omission has nothing at all to do with the STOCK Act's utility as a prohibition on *insider trading*. But many of the same normative public policy rationales that argue in favor of outlawing congressional insider trading also apply to these more general conflict of interest concerns.<sup>192</sup> For example, the ability to introduce or stall legislation that would affect a member of Congress's current stock holdings is just as likely to introduce perverse incentives into the legislative process and undermine public faith and confidence in Congress as would the buying and selling of securities in response to non-public legislative developments.

Second, the House of Representatives stripped provisions from the STOCK Act shortly before it was passed which would have subjected firms that collect and sell "political intelligence" to the same registration and reporting requirements imposed on political lobbying firms.<sup>193</sup> Political intelligence firms "gather information and analysis

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enabled reckless men to slander and even destroy others with impunity, but that was the conscious choice of the Framers.") (internal quotation marks and citation omitted).

191. See President's Remarks, *supra* note 17.

192. See *supra* notes 64–66 and accompanying text.

193. Robert Pear, *Senate to Choose an Insider Trading Bill*, N.Y. TIMES, Mar. 6, 2012, at A18 (noting that House version of STOCK Act killed provision for regulating political intelligence firms).

about activities in Congress, the White House, and federal agencies and sell these insights to investors looking for an edge.”<sup>194</sup> As in the case of congressional insider trading, such nonpublic government information can be extremely valuable.<sup>195</sup> In fact, Wall Street investors may pay as much as \$400 million a year for political intelligence;<sup>196</sup> but unlike lobbyists, political intelligence firms do not have to “disclose anything about their clients, activities or fees.”<sup>197</sup> The version of the STOCK Act passed by the Senate would have changed that,<sup>198</sup> but the version which passed the House and ultimately became law only required the Comptroller General and Congressional Research Service to conduct a report on “the role of political intelligence in the financial markets.”<sup>199</sup>

In light of these omissions, the STOCK Act fails to fully account for the value of nonpublic information derived from government sources, and the full range of ways that it can be exploited for private gain. Thus, whatever its shortcomings as a tool for punishing congressional insider trading, the STOCK Act is also a poor answer to more general concerns about congressional corruption.

#### IV.

##### KEEPING UP APPEARANCES

As we have seen, the STOCK Act is likely to be an ineffective tool for punishing congressional corruption. Although the Act closes a potential loophole by clarifying that members of Congress are subject to existing insider trading law, the Speech or Debate Clause may pose a significant constitutional barrier to successful investigations and prosecutions. Moreover, the Act’s failure to address more general congressional conflicts of interest, or the burgeoning political intelligence

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194. Brody Mullins & Susan Pulliam, *Buying ‘Political Intelligence’ Can Pay Off Big for Wall Street*, WALL ST. J., Jan. 18, 2003, at A1.

195. For example, in the autumn of 2010, the Marwood Group, a political intelligence firm, warned its hedge fund clients that a drug which was pending approval before the FDA might be subjected to further testing and delay. The warnings came several weeks before the FDA announced its decision to delay the drug, leading to a one-day 46 percent reduction in the drugmaker’s stock value. *Id.*; see also Jerke, *supra* note 35, at 1471–76 (describing the emergence of the political intelligence industry and the need for regulation).

196. Mullins & Pulliam, *supra* note 194 (citing a report by Integrity Research Associates).

197. *Id.*

198. See S. 2038, 112th Cong. §17 (2012) (subjecting political intelligence firms to registration and reporting requirements imposed on lobbying firms).

199. Stop Trading on Congressional Knowledge Act of 2012, Pub. L. No. 112-105, § 7, 126 Stat. 291, 293–94.

industry, leaves significant avenues for the corrupt use of legislative information open and unregulated. Nevertheless, this Part considers whether the STOCK Act has some independent value because it reduces the appearance of congressional corruption.

Addressing the *appearance* of corruption may not have been the STOCK Act's primary purpose; but its passage was surely designed to—or at least motivated by a desire to—address the appearance of congressional impropriety to some extent. It is no coincidence that a bill first introduced in 2006, which failed to gain any traction whatsoever,<sup>200</sup> suddenly rocketed through both houses of Congress less than six months after *60 Minutes* drew attention to the issue of congressional insider trading on national television,<sup>201</sup> and less than three months after President Obama publically called for the practice to be outlawed in his State of the Union address.<sup>202</sup> The desire to address the appearance of impropriety is also reflected in the comments of proponents of the Act, who placed considerable emphasis on the law's expressive value. For example, some politicians lauded the STOCK Act for sending a strong message to the American people that members of Congress were not above the law.<sup>203</sup> Likewise, then-Speaker of the House Nancy Pelosi emphasized the appearance-sanitizing qualities of the Act, describing it as “a critical step forward for transparency and accountability” and a measure that would begin “restoring trust between public servants and those [they] represent.”<sup>204</sup>

But does this sweeping rhetoric alone make the STOCK Act a worthwhile piece of legislation, particularly in light of the Act's practical shortcomings as an enforcement mechanism? The answer may depend, at least in part, on how much avoiding the appearance of corruption matters. In other cases involving governmental corruption, the Supreme Court has recognized that “averting the appearance of cor-

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200. The original version of the STOCK Act was introduced by co-sponsors Brian Baird (D-Washington) and Louise Slaughter (D-New York) on March 28, 2006. Stop Trading on Congressional Knowledge Act, H.R. 5015, 109th Cong. (2006).

201. CBS aired its report on November 13, 2011, and the STOCK Act was signed into law on April 4, 2012.

202. See *supra* note 14 and accompanying text.

203. See, e.g., Press Release, Representative Jim Himes, STOCK Act Heads to President (Mar. 23, 2012), <http://himes.house.gov/press-release/stock-act-heads-president>; Press Release, Senator Robert Portman, Sen. Portman Votes in Support of STOCK Act (Jan. 30, 2012), <http://www.portman.senate.gov/public/index.cfm/2012/1/sen-portman-votes-in-support-of-stock-act> (“Members of Congress and their staff are not above the law, and the STOCK Act ensures that those who abuse their knowledge of inside information will be held accountable[.]”).

204. Press Release, Representative Nancy Pelosi, Pelosi Statement on Senate Passage of the STOCK Act (Mar. 27, 2012), <http://pelosi.house.gov/news/press-releases/2012/03/pelosi-statement-on-senate-passage-of-the-stock-act.shtml>.

ruption” is “important but *not quite* as important as preventing corruption” itself.<sup>205</sup> This is so, the Court has said, because “the avoidance of the appearance of improper influence ‘is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.’”<sup>206</sup> Perhaps, then, a clear legislative signal (albeit an imperfect one) that Congress is serious about tackling congressional insider trading is valuable because it helps address the appearance of impropriety, thereby reinforcing faith in government.<sup>207</sup> On the other hand, regulating the appearance of corruption without addressing the problem itself may present a different set of risks. For example, one commentator has stated with respect to the STOCK Act that, “[p]assing a law for the sake of public perception when it could not be enforced would be the height of cynicism.”<sup>208</sup> Under this view, the efficacy of the STOCK Act would be further diminished precisely *because* it sends certain signals to the public without doing much to address congressional insider trading in reality. In this instance, the

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205. Robert F. Bauer, *The Varieties of Corruption and the Problem of Appearance: A Response to Professor Samaha*, 125 HARV. L. REV. F. 91, 92 (2012) (citing *Buckley v. Valeo*, 424 U.S. 1 (1976); see also *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (“Of almost equal concern as the danger of actual quid pro arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime . . .”).

206. *Buckley*, 424 U.S. at 27 (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973)); see also Bauer, *supra* note 205, at 92 (stating that “safeguarding citizen confidence in the political process” is a “weighty” basis for government regulation).

207. Judges have not universally agreed on the independent value of confidence-enhancing regulations. See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) (opinion of Stevens, J.) (stating that safeguarding “public confidence in the integrity of the electoral process has *independent* significance”) (emphasis added). *But see id.* at 253 (Souter, J., dissenting) (arguing that interest in safeguarding voter confidence “collapses” if asserted public perception of election fraud is not empirically tied to reasons to suspect election fraud). Justice Breyer’s separate dissent did not discuss the merits of the independent public confidence rationale at all. See *id.* at 237–41 (Breyer, J., dissenting).

208. Peter J. Henning, *Murky Signals for Congress on Insider Trading*, DEALBOOK (Nov. 25, 2011, 8:38 AM), <http://dealbook.nytimes.com/2011/11/25/murky-signals-for-congress-on-insider-trading/>.

Even on the day it was signed, public advocacy groups questioned whether the STOCK Act was more a hurried attempt to assuage public outrage over congressional insider trading, than an honest effort to aid the prosecution of congressional insider trading. See Press Release, Citizens for Responsibility and Ethics in Washington, CREW Lukewarm on STOCK Act (April 4, 2012), <http://www.citizensforethics.org/press/entry/crew-lukewarm-on-stock-act-insider-trading-ban-should-be-stronger> (“The likelihood this legislation will result in a member of Congress being prosecuted for insider trading? Minimal. The likelihood negative campaign ads have been averted? High.”); see also John Wonderlich, *STOCK Act to be Signed Today*, SUNLIGHT FOUNDATION (Apr. 4, 2012, 9:27 AM), <http://www.sunlightfoundation.com/blog/2012/04/04/stock-act-to-be-signed-today/> (describing STOCK Act as “game of hot potato” and calling for “thoughtful, sustained attention”).



perception that government is managing appearances without addressing problems might undercut, rather than reinforce, faith in government.

What is clear is that assessing the effectiveness of the STOCK Act solely as an enforcement mechanism is not enough. The potential that the Act might create a divergence between appearance—that Congress has taken meaningful action to address congressional insider trading—and reality—that the STOCK Act is a weak enforcement tool—raises additional questions that should inform debate about the overall value of the Act. To assess these questions, however, it is first necessary to apply some theoretical framework for thinking about the merits of such appearance-generating laws and regulations. Fortunately, Professor Adam Samaha has already devised one.<sup>209</sup> Part IV.A briefly lays out Samaha’s framework, and Part IV.B analyzes the STOCK Act as an appearance-generating device.

#### A. *The “Bridge Model” of Appearance-Generating Regulation*

Professor Samaha has articulated three models of the relationship between appearance and reality that provide some basis for normative evaluation of appearance-generating laws and regulations. They include: (1) the “bridge model,” in which “reality is insulated from appearance;”<sup>210</sup> (2) the “bank model,” in which appearances push reality towards a self-fulfilling prophecy over time;<sup>211</sup> and (3) a “clock model,” in which “reality collaps[es] into appearance from the outset.”<sup>212</sup> The bridge model is particularly useful for analyzing the STOCK Act.

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209. See generally Samaha, *supra* note 28 (creating a theoretical taxonomy for appearance generating laws and regulations).

210. *Id.* at 1575–77.

211. *Id.* at 1577–80. Samaha notes, importantly, that appearances alone do not create changes in reality. Rather “people rely on (their perception of) an appearance to form beliefs or attitudes, which then influence decisions to behave in some way” which “[o]ver time . . . may influence the pertinent reality, such as the level of corruption . . . .” *Id.* at 1575 n.35.

For example, Samaha describes the various visual cues—marble facades, granite cladding, deposit-insurance decals—that banks use to create the appearance of stability. See *id.* at 1577–78. These appearance-generating devices *can* influence reality, because increased depositor confidence reduces the real possibility of a run on the bank. *Id.* As such, seemingly-aesthetic mechanisms designed to create the appearance of stability can create a self-fulfilling prophecy of stability over time. *Id.* at 1579.

212. *Id.* at 1580–82. Under the clock model, “appearance and reality are essentially the same from the start.” *Id.* at 1582. For example:

Clock towers . . . are reminders that appearance and reality may, roughly speaking, collapse. In the case of standard time used for coordination purposes, the reality in question is constructed from beliefs that follow sali-

The bridge model describes “appearance-based efforts to influence public opinion,” such as outfitting a newly constructed bridge with “fresh paint, visible rivets” or other non-structural, visual cues that convey a “perception[ ] of sturdiness” but do nothing to make the bridge any more structurally sound.<sup>213</sup> Such efforts are not necessarily disingenuous. There may be perfectly valid reasons for using appearances to influence public perception and behavior. Samaha notes, for example, that building a structurally sound bridge that drivers are unwilling to use because of its unsafe appearance would be a wasteful outcome that government should want to avoid.<sup>214</sup> On the other hand, appearance-generating devices can become undesirable when they are used to mask a dangerous reality. For example, “An unsafe bridge designed so that the untrained eye sees safety puts typical bridge users at risk without the ability to accept, reject, or change that risk based on either the objective truth or the best available belief.”<sup>215</sup>

The critical insight is that, under the bridge model, appearances may “diverge, perhaps radically, from reality[,]” but “appearance will not influence reality” in any direction.<sup>216</sup> In other words, although appearances may affect public beliefs and behaviors, they will not directly affect reality.<sup>217</sup> Thus, even if appearance-based efforts succeed and drivers believe that a bridge is safe and are willing to drive across it as a result, neither the appearance of safety nor the driver’s belief will do anything to make the bridge itself any safer.<sup>218</sup> This insight is essential to understanding the value of appearance-generating devices that fall under the bridge model. Because appearances can only change public perceptions and behaviors and not reality itself, whether an appearance-generating device is normatively good or bad must depend on the relationship between appearance and reality, and the public’s ability to perceive the connection between the two.<sup>219</sup>

For instance, appearance-generating devices are least troubling when “a good appearance is paired with a good reality [ ], as when a bridge looks and is reasonably safe.”<sup>220</sup> On the other hand, “a good

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ent representations of time. There is no deeper truth to be discovered. The widespread belief that it is 12:00 PM basically *is* the reality of the matter.

*Id.* at 1581.

213. *Id.* at 1575.

214. *See id.* at 1575.

215. *Id.*

216. *Id.* at 1576.

217. *See id.* at 1576.

218. *Id.*

219. *See id.* at 1585–86.

220. *Id.* at 1587.

appearance joined with a bad reality” is considerably more troubling because, as in the case of a “sturdy-looking yet rickety bridge[,] . . . uninformed observers are made to live with problems they cannot perceive, much less combat.”<sup>221</sup> In both cases, transparency is critical. Even the seemingly innocuous “good appearance/good reality” paradigm is only valuable if appearance and reality continue to track independently. If appearances remain good but reality degrades in ways that the public is unable to perceive, the previously valuable “good appearance” may become detrimental, particularly if it prevents the uninformed observer from accurately assessing an increasingly bad reality.

With these analytical tools on the table, it is possible to make some normative judgments about the value of appearance-generating laws and regulations. To sum up, efforts to influence public perception by managing appearances are valuable when they help to align perception with reality, or encourage an appropriate degree of public faith in an institution. On the other hand, efforts to create good appearances are harmful when they mislead the public about a bad reality, or discourage the public from accurately assessing the risks of a potentially bad reality.

### *B. The STOCK Act as an Appearance-Generating Device*

The analytical structure sketched above is readily applicable to the STOCK Act. “[L]ike the bridge, one might say that a corrupt government that appears virtuous is terrible while a virtuous government that appears corrupt is useless.”<sup>222</sup> Assuming, as polling data seems to indicate, that the public generally perceives Congress to be dishonest, corrupt, or both,<sup>223</sup> analysis of the appearance-generating value of the STOCK Act is particularly important.

Assuming further that the Act has the potential to improve public perceptions of congressional behavior,<sup>224</sup> it may serve as the

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221. *Id.*

222. *Id.* at 1576.

223. *See supra* notes 3–4 and accompanying text.

224. This is by no means an unassailable assumption. Some research in the electoral context indicates that public perceptions of governmental corruption are not influenced by campaign finance regulations, but rather track other seemingly unrelated variables such as presidential approval ratings or the general state of the economy. *See* Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 121, 149 n.90 (2004), *cited in* Bauer, *supra* note 205, at 94 n.9.

The possibility that the STOCK Act has no ameliorative impact on public perceptions of congressional corruption is explored in the “bad appearance/bad reality”

equivalent of the fresh paint and ornamental rivets on a bridge. In other words, the STOCK Act may create the appearance that government is more virtuous because members of Congress are prohibited from trading on the basis of information they learn while performing their official duties. But if, as argued above, the Act has relatively little utility as an enforcement device, it may not be able to significantly affect the reality of congressional corruption. In this case appearance and reality may diverge significantly, or not at all depending on actual levels of corruption. The important normative question then becomes whether “the *actual* incidence and likelihood of corruption is *at least as low* as the appearance that the regulators hope to create.”<sup>225</sup> Put another way, it is important to ask whether the STOCK Act is inducing uninformed drivers to cross a rickety bridge, or encouraging the overly cynical to utilize a perfectly safe one.

On one hand, the STOCK Act may pair a good appearance with a bad reality if it creates the perception that the problem of congressional insider trading has been addressed, but is largely ineffective as an enforcement mechanism. This may lead to the risk that “political outsiders underestimate corruption levels because of a regulation that only looks effective,” and therefore fail to “monitor the political system as closely as they otherwise would, and . . . might not demand reform as strongly as they should.”<sup>226</sup> Under this scenario, the STOCK Act becomes something worse than just an ineffective enforcement device because it may actually help insulate from scrutiny the very behavior it seeks to prevent.

On the other hand, even if congressional insider trading does take place at some level, public perceptions of the extent of the problem may be widely overblown.<sup>227</sup> In this context, the STOCK Act may pair a good appearance with a (relatively) good reality if it more closely aligns an overly cynical public’s perception of corruption with actual rates of congressional insider trading. This may represent an acceptable (even desirable) outcome, but only if rates of congressional insider trading remain relatively low, something which the STOCK Act may contribute precious little to achieving. And the existence of a

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and “bad appearance/good reality” hypotheticals sketched out below. *See infra* notes 229–235 and accompanying text.

225. Samaha, *supra* note 28, at 1604 (arguing that the Supreme Court has generally failed to test this relationship when crediting appearance justifications for campaign finance laws).

226. *Cf. id.* at 1604 (arguing that if the “advertising” of the effectiveness of campaign finance regulations is false, the resulting “good appearance/bad reality” dynamic becomes problematic).

227. *See* Eggers & Hainmueller, *supra* note 49 and accompanying text.

regulation that looks effective may still cause the public to fail to monitor elected officials as closely as they would or should. This blunting of the public's oversight impulse may have independently negative value for observers who believe that voters exercise an important structural check on legislative power,<sup>228</sup> even in best-case-scenarios where the "good appearance/good reality" paradigm remains stable over time.

Next, briefly consider the entirely distinct possibility that the STOCK Act will have no ameliorative impact on the public's perception of congressional corruption. The public could, for instance, perceive the STOCK Act as a sign that congressional insider trading is *more* widespread than it actually is;<sup>229</sup> or the Act could have no measurable impact on public perceptions in either direction,<sup>230</sup> leaving existing widespread perceptions of corruption as the default.<sup>231</sup> Such effects might pair a bad appearance with a bad reality; an outcome which "has the virtue of providing observers an accurate basis on which to demand reform," but also presents the possibility that the bad reality is in fact impossible to reform.<sup>232</sup> "In contrast, a bad appearance joined with a good reality" may cause the public to demand reforms that are counterproductive, "wasteful or dangerous."<sup>233</sup> Moreover, if the public came to believe that the STOCK Act itself is an ineffective tool for addressing congressional insider trading, the bad appearances generated by the Act might be compounded. Over time, a law designed to send a message to the American people that members of Congress are not above the law<sup>234</sup> might instead reinforce

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228. See Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process*, 100 NW. UNIV. L. REV. 437, 452 (2006) ("Even under the version of democratic theory that posits an extremely limited role for the electorate in making policy choices, the members of the electorate are assumed to play an important role on election day, by determining whether their elected representatives have done so in a manner the electorate deems acceptable.").

229. Cf. Beth Ann Rosenson, *The Effect of Political Reform Measures on Perceptions of Corruption*, 8 ELECTION L.J. 31, 34–40 (2009) (finding a positive correlation between journalists' perceptions of corruption and existence of campaign finance laws), cited in Samaha, *supra* note 28, at 1608–09 & n.190.

230. Cf. Persily & Lammie, *supra* note 224 and accompanying text.

231. See *supra* notes 3–4 and accompanying text.

232. Samaha, *supra* note 28, at 1587.

233. *Id.* at 1587–88 (noting that public responses to the perceived "risks of terrorism in the 2000s and Communism in the 1950s might be examples" of such counterproductive responses).

234. See *supra* note 203 and accompanying text.

the cynical<sup>235</sup> belief that Congress is unable or unwilling to do anything to address congressional corruption.

Admittedly, the hypothetical scenarios sketched above depend in large part on assumptions about the STOCK Act's ability to cause changes in public perceptions of corruption one way or the other. To fully resolve any of these scenarios, more empirical work will be required to assess the actual impacts of the STOCK Act on public perceptions of corruption over time. For now, less than one year removed from the Act's passage, it is simply too early to tell. Nevertheless, these considerations can and should inform discourse about the value of the STOCK Act as a legislative response. If the Act is simply proverbial paint on a bridge because it lacks bite as an enforcement mechanism, then transparency becomes a paramount concern, and it will matter very much how unsafe the bridge actually is, both now and in the future.

## V.

### POSSIBLE SOLUTIONS

The STOCK Act makes it clear that members of Congress are subject to insider trading prohibitions, but constitutional and practical limitations may render the Act a largely ineffective tool for policing congressional corruption. Moreover, the potential for disconnect between the Act's value as a rhetorical, appearance-generating device as compared to its value as an enforcement mechanism creates additional, independent concerns about how the STOCK Act may affect public perception of congressional corruption. This Part assesses possible solutions to some of these practical and theoretical problems.

#### A. *Increase Transparency*

One option for addressing the concerns raised in Parts III and IV of this Note is to emphasize transparency rather than enforcement of civil and criminal insider trading prohibitions. Importantly, the STOCK Act already includes transparency-enhancing disclosure rules that require members of Congress to document and report securities transactions within forty-five days.<sup>236</sup> Section 8 of the STOCK Act even requires that disclosure records be made available to the public, on the Internet.<sup>237</sup> In the spirit of even greater transparency, Congress

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235. See Henning, *supra* note 208 (stating that STOCK Act would be "cynical" if it proved an ineffective tool for prosecuting congressional insider trading crimes).

236. Stop Trading on Congressional Knowledge Act, Pub. L. No. 112-105, § 6, 126 Stat. 291, 293-94 (2012).

237. § 8.

could further amend the STOCK Act to require disclosure of all congressional stock holdings (not just purchases and sales), as well as the exact dollar amounts of congressional stock transactions.<sup>238</sup> The combination of timely, comprehensive, and more specific disclosure would make it easier for the SEC, DOJ, Office of Congressional Ethics (OCE), and most importantly, the press and the public to monitor congressional trading activities. Assuming that such information is in fact made publicly available on the Internet as the Act requires,<sup>239</sup> it is not inconceivable to think that public advocacy organizations will be able to accurately track and publicize correlations between committee memberships, the consideration of legislation, and the stock holdings and trading of members of Congress.

More rigorous public disclosure requirements may even allow public advocacy organizations to create a targeted grading system for measuring the appearance of congressional corruption. Such systems, like those designed to rate restaurant safety and cleanliness,<sup>240</sup> would in theory reduce monitoring burdens on voters, while creating powerful incentives for members of Congress to avoid conflicted transactions. Of course, the power and utility of such a grading system would depend on the strength of its methodology: for example, ratings would need to be updated regularly so that any given member's grade is representative of her stock trading and ownership activities throughout the year, rather than at one potentially favorable point in time.<sup>241</sup>

Ultimately, however information about congressional investment activity is used, it is at least clear that members of Congress are sensitive to and motivated by public allegations of impropriety. Media coverage of alleged congressional insider trading helped shepherd the STOCK Act—which had been stalled in Congress for six years—to overwhelmingly bi-partisan approval in both houses of Congress. Thus it is not implausible to think that increased, targeted transparency will motivate members of Congress to avoid the appearance of impropriety.

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238. At present, members of Congress are only required to disclose whether a trade is within certain broad dollar ranges.

239. At the time this Note went to press, the House of Representatives appeared to have created a searchable database of disclosure reports, including Periodic Transaction Reports. See *Financial Disclosure Reports*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, [http://clerk.house.gov/public\\_disc/financial-search.aspx](http://clerk.house.gov/public_disc/financial-search.aspx) (last visited Feb. 26, 2013).

240. See, e.g., *How We Score and Grade*, N.Y.C. HEALTH DEP'T, <http://www.nyc.gov/html/doh/downloads/pdf/trii/how-we-score-grade.pdf> (last visited Jan. 30, 2013).

241. For a thorough discussion of the empirical and practical shortcomings of restaurant grading systems, see Daniel E. Ho, *Fudging the Nudge: Information Disclosure and Restaurant Grading*, 122 YALE L.J. 574 (2012).

Increased public disclosure is also an advantageous solution because it would help alleviate appearance-based concerns like those discussed in Part IV. On one hand, the public's inability to independently assess the incidence of congressional insider trading coupled with a belief that the STOCK Act adequately addresses the problem creates a risk that voters will accept a view of congressional corruption that does not match the reality. Accordingly, they may fail to rigorously monitor their representatives, or fail to push for additional reforms. On the other hand, inability to gauge the actual scope of congressional corruption may cause voters to perceive the STOCK Act as a sign that the problem is more widespread than it actually is, dragging down real confidence and faith in government in the process. Increasing transparency would help alleviate both of these concerns. Moreover, if the actual rate of congressional insider trading or conflict of interest is better documented, the need to rely on "avoiding the appearance of corruption" as a regulatory rationale will also be diminished. This, in turn, reduces the need to weigh the nebulous, independent value of enhancing public faith in government, especially where that outcome may be the result of appearance rather than reality.

Admittedly, increasing transparency does absolutely nothing to remove the specific enforcement barriers posed by the Speech or Debate Clause. But the efficacy of the Act matters comparatively less if the public is better able to judge the real rate of congressional insider trading. In this regard, sunlight and an informed electorate—rather than prosecutions—may be the best disinfectant.<sup>242</sup> Empowering voters to police congressional corruption also has the advantage of avoiding thorny separation of powers questions about when, if ever, the executive branch should be permitted to inquire into legislative acts. "Voting the bums out" may be less satisfying in some instances than the sound of a prison cell clinking shut or a front page headline announcing an impressive fine for bad behavior. But what ballot box accountability may lack in retributive heavy-handedness, it amply makes up for in institutional finesse. Emphasizing transparency and empowering voters to discipline members of Congress who abuse their positions for personal financial gain may not "outlaw honest graft" *per se*, but it may be considerably more effective.

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242. *See generally* LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY*, ch. 5 (1914) (arguing for publicity as a supplement to regulation as a mechanism for controlling excessive commissions received by banks for issuing securities).



### B. A Delegation Solution Considered

One possible solution that *does* address the Speech or Debate Clause enforcement problem is the idea that Congress can authorize inquiry into legislative acts by the terms of a narrowly drawn statute. This is a possibility that the Supreme Court has acknowledged but never expressly ruled on. In *United States v. Johnson*, the Court left open the question of whether “a prosecution which, though possibly entailing inquiry into legislative acts or motivations,” would be valid if it were authorized by “a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.”<sup>243</sup> *United States v. Brewster* seemed to present that precise question<sup>244</sup> but, as discussed above, the Court decided the case on other grounds and once more expressly left open the question of whether “an inquiry that probes into legislative acts or the motivation for legislative acts” would be constitutional “if Congress specifically authorizes such [an inquiry] in a narrowly drawn statute.”<sup>245</sup>

The basis for the question is that the power to discipline its members is constitutionally vested in Congress.<sup>246</sup> What remains unresolved is whether Congress can delegate that power to the executive and judicial branches and, if so, whether such a delegation would neutralize the Speech or Debate barriers to prosecution. Professor Laura Krugman Ray has argued that the answer to those questions depends on three related questions: whether Congress is constitutionally permitted to delegate its disciplinary powers; whether Congress can waive the Speech or Debate privilege as to all its members; and whether empowering the executive and judiciary to participate in disciplining members of Congress would violate separation of powers doctrines.<sup>247</sup>

Krugman Ray concludes that discipline through delegation is possible and permissible because the Speech or Debate Clause itself does not prevent it.<sup>248</sup> Specifically, she argues that there is no indica-

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243. 383 U.S. 169, 185 (1966).

244. See 408 U.S. 501, 529 (1972) (Brennan, J., dissenting) (“When this case first came before the Court, I had thought it presented a single, well-defined issue—that is, whether the Congress could authorize by a narrowly drawn statute the prosecution of a Senator or Representative for conduct otherwise immune from prosecution under the Speech or Debate Clause of the Constitution.”).

245. *Id.* at 529 n.18.

246. “Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.” U.S. CONST. art. I, § 5, cl. 2.

247. Laura Krugman Ray, *Discipline Through Delegation: Solving the Problem of Congressional Housecleaning*, 55 U. PITT. L. REV. 389, 428 (1994).

248. *Id.* at 430, 432–33.

tion that the Framers intended to preclude delegation,<sup>249</sup> and that the purposes of the Clause argue in favor of delegation.<sup>250</sup> Moreover, Krugman Ray argues that delegation would be an effective tool because Congress can waive the protections of the Clause for all of its members through an explicit statutory statement that the Clause does not apply in prosecutions for specific conduct.<sup>251</sup> Finally, Krugman Ray concludes that delegating disciplinary power to the executive and the judiciary does not offend separation of powers doctrine because checks on one branch by the co-equal branches is a well-established practice within the constitutional scheme.<sup>252</sup>

Although these arguments in favor of delegation are persuasive, there is reason to doubt whether Congress can delegate away the protections of the Speech or Debate Clause so completely. Although the protections afforded by the Clause were designed to protect the independence of the legislative branch, the Clause does so by protecting individual members of the collective body.<sup>253</sup> In *Helstoski*, the Court suggested that the Clause is not a purely institutional privilege, and quoted with approval the proposition stated in *Coffin v. Coffin* that “the privilege secured . . . is not so much the privilege of the house as an organized body, as of each individual member composing it, who is entitled to this privilege, *even against the declared will of the house.*”<sup>254</sup> Although the Court declined to rule on the issue of whether the privilege belonged to the Congress or to individual legislators, it

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249. *Id.* at 430 (“[T]here is no direct historical evidence of [the Founders’] intent with regard to the enactment of disciplinary statutes.”).

250. Krugman Ray argues that although the Clause was designed to preserve separation of powers, the proper function of an independent legislature has been compromised more by unresolved issues of congressional corruption than by attacks from a hostile executive or judiciary, which have been relatively rare in American history. *See id.* at 432–33 (“The practice of statutory delegation, far from violating the purpose of the Clause, serves that purpose by guarding the integrity of the legislative process.”).

251. *Id.* at 435–37 (arguing that the purpose of the Clause was to protect the legislative body rather than individual members and that a waiver must be explicit in order to be effective).

252. *Id.* at 438–39 (arguing that impeachment power vested in Congress is evidence that delegation of disciplinary authority would not upset separation of powers).

253. “That in order to give the will of the people the influence it ought to have, . . . it was part of the common-law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the co-ordinate branches, Judiciary and Executive.” Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 232 (2003) (quoting 8 WORKS OF THOMAS JEFFERSON 322–23 (1797), *reprinted in* 2 THE FOUNDERS’ CONSTITUTION 336 (Philip B. Kurland & Ralph Lerner eds., 1987)).

254. *United States v. Helstoski*, 442 U.S. 477, 493 (1979) (alteration in original) (quoting *Coffin v. Coffin*, 4 Mass. 1, 27 (1808)) (internal quotation marks omitted).

noted that the *Brewster* Court had similarly described the Clause as designed to “protect the integrity of the legislative process by *insuring the independence of individual legislators*.”<sup>255</sup> Accordingly, it is far from clear that Congress can waive the protections of the Clause as they apply to individual legislators, much less for future members of Congress who play no role in the waiver decision.

Moreover, delegating the task of cleaning up congressional corruption to the executive branch raises a separate appearance issue not discussed above in Part IV. Specifically, observers may wonder why Congress, though empowered by the Constitution with the power to discipline its members, would pass up the opportunity to attend to its own house. To some extent, relying on the executive branch to police congressional insider trading may be perceived by some as congressional buck-passing.<sup>256</sup> Amending the STOCK Act to specifically waive Speech or Debate Clause protections would help alleviate some of these buck-passing concerns, but leaving the imperative to clean up congressional corruption with the executive branch may still create the appearance that Congress is unwilling to tackle its reputation for corruption head-on.

Of course, it is possible to argue that there is very little downside to amending the STOCK Act to test Krugman Ray’s theory. The Act already lodges responsibility for prosecuting congressional insider trading in the executive branch, and amending it to waive Speech or Debate Clause protections would at least create the potential for the Supreme Court to finally resolve the question left open in *Johnson and Brewster*. On the other hand, enforcement through delegation may expose the legislature to precisely the sort of hostile executive and judicial pressures that the Clause was designed to guard against. And assuming that members of Congress targeted by executive branch investigations will continue to assert Speech or Debate Clause protections regardless of any amendment purporting to waive them, the delegation solution will only begin to address the appearance-based concerns discussed above in Part IV if the Court concludes that legislative delegation and waiver is valid.

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255. *Id.* (quoting *United States v. Brewster*, 408 U.S. 501, 507 (1972)) (internal quotation marks omitted).

256. *Cf.* DAVID H. ROSENBLOOM, *BUILDING A LEGISLATIVE-CENTERED PUBLIC ADMINISTRATION* 133–34 (2000) (noting that, in the context of administrative agencies, Congress can delegate its authority to, among other reasons, “avoid a particularly nettlesome political issue”).

### C. *The Constitutional Design Augmented*

Perhaps, then, it would be better to heed the advice of Justice White in his dissenting opinion in *Brewster* and consider the original constitutional design.<sup>257</sup> Addressing the argument that Congress could statutorily exempt specific conduct from the scope of the Clause's protection, Justice White said:

The Speech or Debate Clause does not immunize corrupt Congressmen. It reserves the power to discipline in the Houses of Congress. I would insist that those Houses develop their own institutions and procedures for dealing with those in their midst who would prostitute the legislative process.<sup>258</sup>

In keeping with Justice White's advice, Congress could create an internal mechanism for policing congressional insider trading—and, in fact, some elements of an effective system for doing so are either already in place or could be provided through amendments to the STOCK Act.

In 2008, for example, the House of Representatives created the Office of Congressional Ethics (OCE), an independent investigatory panel with broad powers to investigate and punish members of both parties.<sup>259</sup> In its relatively short history, the OCE has already referred over thirty investigations of possible ethics violations to the House Committee on Standards and Official Conduct.<sup>260</sup> The OCE is an ideal model for a non-partisan congressional ethics investigatory body, and the STOCK Act could be amended to require the Senate to create an analogous, independent office.

Of course, the existence of the OCE or a similar entity alone is not enough to solve the problem. Even if the OCE refers a matter for further action in the House, the House Committee on Standards and Official Conduct still has wide discretion to determine whether a violation of House rules has actually occurred.<sup>261</sup> Nevertheless, the dis-

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257. *United States v. Brewster*, 408 U.S. 501, 563 (1972) (White, J., dissenting).  
258. *Id.*

259. See H.R. Res. 895, 110th Cong. (2008) (enacted). The OCE is comprised of a six-member panel of "individuals of exceptional standing." *Id.* § 1(b)(2). The six panelists are selected evenly by the House majority and minority leaders, and the panel may not instigate an investigation unless such action is requested by at least one member nominated by each party's leader. *Id.* § 1(b)(1), (c)(1). Four members of the board must vote to refer an investigation to the House ethics committee. *Id.* § 1(c)(2)(B).

260. See *Referrals*, OFFICE OF CONG. ETHICS, <http://oce.house.gov/disclosures.html> (last visited Oct. 4, 2012).

261. It is an ethics violation for a member of the House to "use any information coming to him confidentially in the performance of government duties as a means for making private profit." See Code of Ethics for Government Service, H.R. Con. Res. 175, 85th Cong. (1958), *reprinted in* COMM. ON STANDARDS OF OFFICIAL CONDUCT,

closure mechanisms already included in the STOCK Act, or the increased transparency amendments recommended above in Part V.A may cabin Congress's ability to decline to investigate obvious or well publicized instances of potential corruption.<sup>262</sup> Finally, Congress taking charge of its own corruption problems would avoid the potential buck-passing appearance problems mentioned above in Part V.B. It is not too aspirational to expect members of Congress to, as Justice White put it, deal "with those in their midst who would prostitute the legislative process."<sup>263</sup> Indeed, like Justice White, we should insist that they do so.

#### D. *Eliminating the Profit Incentive*

A final practical solution to the enforcement problems posed by the Speech or Debate Clause may be to attempt to reduce congressional insider trading by eliminating the ability to trade on nonpublic legislative information in the first instance. To do so, Congress could further amend the STOCK Act to require all members of Congress to place their investment assets in a blind trust upon taking office.

Some members of Congress have already volunteered to place their assets in blind trusts.<sup>264</sup> And as Bud Jerke has previously argued, the Ethics in Government Act of 1978<sup>265</sup> provides a ready-made model for implementing a trust requirement.<sup>266</sup> The Act creates an incentive structure which permits government officials who place their investments in a qualified blind trust to avoid otherwise mandatory disclosure requirements.<sup>267</sup> To be considered a "qualified" trust the investment vehicle must be blind—meaning that an independent trustee must manage the trust and may not consult with any "interested party" regarding the management of the investments.<sup>268</sup> An "inter-

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U.S. HOUSE OF REPRESENTATIVES, 110TH CONG., HOUSE ETHICS MANUAL 355 (2d Sess. 2008). Notably, the rule can be read to apply only if the member profits from the use of legislative information, whereas the insider trading prohibitions of § 10(b) and Rule 10b-5 are violated by trading on material, nonpublic information—regardless of whether the trades themselves are profitable.

262. The fact that the OCE did indeed investigate Representative Bachus may be evidence that this mechanism is already working. *See supra* note 44 and accompanying text.

263. *See supra* note 258 and accompanying text.

264. *See* Keating et al., *supra* note 45 (noting that former Senator Herb Kohl (D-Wisconsin) held more than \$50 million in a blind trust).

265. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (1978).

266. *See* Jerke, *supra* note 35, at 1513–16 (noting that the Ethics in Government Act of 1978 provides an existing, though optional, model).

267. *Id.* at 1513.

268. 5 U.S.C. app. 4 § 102(f)(3)(A)(ii), (C)(i) (2006).

ested party” is defined as a member of government subject to disclosure requirements, his or her spouse, and any minor or dependent children of the reporting individual.<sup>269</sup> “In essence, only the trustee will know which securities are held in the trust, thereby making the member of Congress ‘blind’ to the composition of the trust.”<sup>270</sup>

The blind trust has the advantage of neutralizing a member of Congress’s ability to make trading decisions based on insider information and, assuming that the assets in the trust change over time, eventually reduces the incentive to make legislative decisions based on previously held investments.<sup>271</sup> Moreover, because a member of Congress’s assets could be invested in a conceivably wide-ranging number of industries and markets, blind trusts have the added advantage of aligning legislators’ interests with the overall health of the market, rather than gains (or losses) to particular sectors or firms. Thus, a blind trust has the potential to mitigate some of the perverse incentive and broader conflict of interest concerns described above in Part I.B.

#### CONCLUSION

To address the appearance of corruption in Tammany Hall, George Washington Plunkitt tried to distinguish honest from dishonest graft, arguing that using inside government information for personal financial gain was justifiable because it did not deplete the public fisc. But even so-called honest graft introduces harmful distortions into the policy making process. Insider trading and other improper uses of nonpublic information by members of Congress may create perverse incentives to favor certain industries, lead to the misallocation of capital, and undermine public faith and confidence in government.

The STOCK Act is a weak solution to these problems. The Act clarifies that members of Congress are subject to insider trading prohibitions, but it does nothing to address the more general conflicts of interest that arise when members of Congress consider legislation that would affect market sectors in which they have a financial interest. Moreover, the Speech or Debate Clause may seriously frustrate efforts to prosecute members for insider trading when they leverage their positions for private pecuniary gain. The Act’s value is even further undermined by the possibility that it may create false impressions about actual levels of congressional corruption that may distort the public’s incentive to monitor government, or, alternatively, further un-

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269. *Id.* § 102(f)(3)(E).

270. Jerke, *supra* note 35, at 1514.

271. *Id.* at 1515.

dermine faith in government, depending on the nature of the false impression.

Nevertheless, the STOCK Act is not irredeemable. Its disclosure requirements can be bolstered so that even more information about congressional investment patterns is generated and made available to the public. This in turn may create incentives for members of Congress to avoid the appearance of impropriety and also empower voters to use the democratic process to punish members of Congress who appear to leverage the public trust for private pecuniary gain.

