

# FAILURES OF THE STOCK ACT AND THE FUTURE OF CONGRESSIONAL INSIDER TRADER REFORM

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## INTRODUCTION

On February 13, 2020, Senator Richard Burr sold personal stocks in thirty-three separate transactions worth between \$628,000 and \$1,720,000.<sup>1</sup> On the same exact day, Burr's brother-in-law, Gerald Fauth, sold between \$97,000 and \$280,000 worth of shares in six companies.<sup>2</sup> As Chairman of the Senate Intelligence Committee at the time, Burr had received closed-door COVID-19 briefings, and had attended the private Senate Health Committee briefing with former Center for Disease Control Director Robert Redfield and Dr. Anthony Fauci on January 24.<sup>3</sup> Shortly after the January 24th briefing, Burr co-authored a Fox News op-ed in which he noted the "alarming" ability of the virus to spread, but also stated that the United States had "a framework in place" that put the nation "in a better position than any other country to respond to a public health threat."<sup>4</sup>

Around three weeks after the op-ed was published, Burr delivered a much grimmer message at a luncheon with a small group of select constituents, warning that the virus was "much more aggressive in its transmission than anything we have seen in recent history."<sup>5</sup> Nonetheless, the Department of Justice quietly closed its months-long investigation into

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

2. Robert Faturechi & Derek Willis, *On the Same Day Sen. Richard Burr Dumped Stock, So Did His Brother-in-Law. Then the Market Crashed*, PROPUBLICA (May 6, 2020), <https://www.propublica.org/article/burr-family-stock>.

3. Ben Mathis-Lilley, *Republican Senators Sold Stock After Closed-Door Coronavirus Meetings in Apparent Insider Trading*, SLATE (Mar. 20, 2020), <https://slate.com/news-and-politics/2020/03/republican-senators-insider-trading-accusations-coronavirus.html>.

4. Senator Lamar Alexander & Senator Richard Burr, *Sen. Alexander & Sen. Burr: Coronavirus prevention steps the U.S. government is taking to protect you*, FOX NEWS (Feb. 7, 2020), <https://www.foxnews.com/opinion/coronavirus-prevention-steps-the-u-s-government-is-taking-to-protect-you-sen-alexander-and-sen-burr>.

5. Robert Faturechi & Derek Willis, *supra* note 1 (noting that the luncheon was "organized by the Tar Heel Circle, a club for businesses and organizations in North Carolina that are charged up to \$10,000 for membership and are promised 'interaction with top leaders and staff from Congress, the administration, and the private sector.'").

Burr's financial activity in January 2021, stating that it would not pursue insider trading charges against him.<sup>6</sup>

Unfortunately, the problem of congressional insider trading is not new. Scandals relating to members of Congress using their offices for private gains date back to at least 1968 and have plagued both political parties.<sup>7</sup> Beyond the prominent scandals, studies consistently show that the investments of members of Congress outperform the market.<sup>8</sup> The optics of congressional trading, particularly in times of national emergency, further erode the public's trust in Congress's ability to legislate fairly.<sup>9</sup>

This Comment suggests that there is a straightforward solution moving forward. Part I provides a brief overview of insider trading law in the United States. Part II outlines the various challenges associated with successfully

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6. Nicholas Fandos & Katie Benner, *Justice Dept. Ends Stock Trade Inquiry into Richard Burr Without Charges*, N.Y. TIMES (Jan. 19, 2021), <https://www.nytimes.com/2021/01/19/us/politics/richard-burr-stock-trades-investigation.html>. Four other senators—Kelly Loeffler (R-GA), David Perdue (R-GA), James Inhofe (R-OK), and Dianne Feinstein (D-CA) were also investigated by the Department of Justice and the Securities and Exchange Commission for possible insider trading relating to the COVID-19 pandemic. *Id.* All but Senator Perdue were cleared in May; Perdue's investigation eventually closed in August of 2020. *Id.*

7. Matthew Barbabella, Daniel Cohen, Alex Kardon, & Peter Molk, *Insider Trading in Congress the Need for Regulation*, 9 J. BUS. & SEC. L. 199, 202–04 (2009).

8. See Annie Lowrey, *An Invitation to Corruption*, ATLANTIC (Mar. 20, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/congress-insider-trading-problem/608488/>. One such analysis built model portfolios based on politicians' financial disclosures and charted their performance, and ultimately found that House members outperformed that market by six percentage points, while Senators did even better. Schwartz, John, *Not-So-Representative Investors*, N.Y. TIMES: ESSAY (July 9, 2011), <https://www.nytimes.com/2011/07/10/business/mutfund/congressional-portfolios-outpacing-the-market-essay.html>. Additional research suggests that it is difficult to consistently beat the market. See generally Eugene F. Fama & Kenneth R. French, *Luck Versus Skill in the Cross-Section of Mutual Fund Returns*, 65 J. FINANCE 1915 (2010); Patrick Augustin, Francis Cong, & Marti G. Subrahmanyam, *Insider trading by Congress? It's time to fix the law*, THE HILL (Apr. 19, 2020), <https://thehill.com/opinion/criminal-justice/493497-insider-trading-by-congress-its-time-to-fix-the-law?>; Christopher Ingraham, *Lawmakers with stock holdings vote in ways that juice their portfolios, data shows*, WASH. POST (Dec. 10, 2020), <https://www.washingtonpost.com/business/2020/12/10/congress-votes-stock-portfolio/> (discussing new research that finds “parallels between lawmakers’ stock holding and their votes, even after controlling for potential confounding factors”).

9. See generally Donna Nagy, *Duties of Entrustment*, B.U. L. REV. 1133 (2011) (“[I]nsider trading by members of Congress nonetheless involves personal gain from the use of government information, a practice, which, in and of itself, undermines the public's trust and confidence in the government.”); Nicholas Fandos, *To Gain Public's Trust, Should Members of Congress Stop Trading Stock?*, N.Y. TIMES (June 15, 2020), <https://www.nytimes.com/2020/06/15/us/politics/congress-trading-stock-loeffler-burr.html> (noting the “lack of public trust that grows out of questions about whether or not members of Congress are gaming financial markets when they have insights as to what is going on in public policy”); Zack Smith, *Senators' Images as Insider Traders Erode Public Trust in Rule of Law*, HERITAGE FOUNDATION (Mar. 24, 2020), <https://www.heritage.org/crime-and-justice/commentary/senators-images-insider-traders-erode-public-trust-rule-law>; Fandos & Benner, *supra* note 6; Lowrey, *supra* note 8.

bringing congressional insider trading cases. Finally, Part III argues that, in light of the lessons learned from the COVID-19 congressional insider trading scandals, Congress should completely ban its members from trading individual stocks.

## I. THE EXISTING INSIDER TRADING LEGAL FRAMEWORK

This Part provides an overview of generally applicable insider trading laws, as well as one law that addresses Congress specifically.

The federal law of insider trading in the United States is judge-made—Congress has not passed a securities statute specifically defining insider trading.<sup>10</sup> Instead, insider trading law has developed through the courts’ interpretation of the various anti-fraud provisions of the Securities Exchange Act of 1934, primarily Section 10(b) and Rule 10b-5, promulgated thereunder.<sup>11</sup>

In 2002, Congress also passed 18 U.S.C. § 1348, a generally applicable criminal securities fraud statute.<sup>12</sup> Its legislative history demonstrates that Congress intended the law to provide a more flexible and less technical securities fraud provision than Rule 10b-5.<sup>13</sup> However, the language of § 1348 contains marked similarities to 10b-5.<sup>14</sup> The statute prohibits the obtaining of any money or property “by means of false or fraudulent pretenses, representations, or promises . . . with the purchase or sale of any commodity . . . or any security.”<sup>15</sup>

In recent years, prosecutors have increasingly begun to bring “twin” charges under Section 10(b) and § 1348 in charging insider trading cases.<sup>16</sup>

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10. Jed S. Rakoff, *A Statutory Solution to Insider Trading*, AM. BAR ASS’N (Feb. 6, 2017), <https://www.americanbar.org/groups/litigation/committees/securities/articles/2017/winter-2017-0117-a-statutory-solution-to-insider-trading/> (“Although insider trading in one form or another is centuries old, Congress has never passed a statute that specifically defines it or that bans it per se.”); Jessica Hostert, *Great Expectations, Good Intentions, and the Appearance of the Personal Benefit in Insider Trading: Why the Stage Needs Reset After Martoma*, 43 S. IL. U. L. J. 703, 704 (2019).

11. Rakoff, *supra* note 10. The Securities and Exchange Commission (SEC) and the DOJ cooperate in prosecuting securities fraud and often conduct concurrent investigations. See Anna Currier, *The Rule of Lenity and the Enforcement of the Federal Securities Laws*, 5 AM. U. B. L. R. 79, 87 (2015); *Division of Enforcement Manual*, SEC 1, 83 (June 4, 2015), <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf> (“In furtherance of the SEC’s mission . . . the staff is encouraged to work cooperatively with criminal authorities, to share information, and to coordinate their investigations.”).

12. Karen E. Woody, *The New Insider Trading*, 52 ARIZ. ST. L.J. 594, 614 (2020).

13. *Id.*

14. See S. REP. NO. 107–146, at 14 (2002) (statement of Sen. Leahy) (“The provision would supplement the patchwork of existing technical securities law violations with a more general and less technical provision, with elements and intent requirements comparable to current bank fraud and health care fraud statutes.”).

15. 18 U.S.C. § 1348.

16. See *e.g.*, Second Superseding Indictment at 60–61, *United States v. Turino*, 2010 WL 4023000 (D. Nev., Mar. 24, 2010) (No. 2:09-CR-132-RLH-RJJ); Complaint at 1–3, *United States v. Fei Yan* (S.D.N.Y. July 11, 2017) (No. 17-MAG-5156) (involving an alleged

This approach became especially popular following the landmark decision in *United States v. Blaszczak*,<sup>17</sup> in which the Second Circuit interpreted § 1348 to prohibit a broader range of activities than Rule 10b-5 does. First, the Second Circuit held that § 1348, unlike Rule 10b-5, does not incorporate a personal benefit requirement, making it easier for prosecutors to show insider trading.<sup>18</sup> Specifically, prosecutors no longer have to demonstrate that the insider disclosed the nonpublic information in exchange for a “personal benefit,” which has been a source of doctrinal confusion and continued litigation.<sup>19</sup> Second, the court held that “in general, confidential government information may constitute government ‘property’ for purposes of § 1348.”<sup>20</sup> This interpretation flowed from the law’s purpose, the court reasoned, which was to equip prosecutors with different “and broader” securities fraud enforcement mechanisms than those available under 10b-5.<sup>21</sup>

Finally, the Stop Trading on Congressional Knowledge (“STOCK”) Act of 2012 targets members of Congress specifically, as well as members of

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misappropriation case). See also Mark D. Cahn, Elizabeth L. Mitchell & Brett Atanasio, *Insider Trading Law Alert: Better the Devil You Know? Tipping Liability, Martoma and the Rise of 18 U.S.C. § 1348*, WILMERHALE (May 14, 2019), <https://www.wilmerhale.com/en/insights/client-alerts/20190514-better-the-devil-you-know-tipping-liability-martoma-and-the-rise-of-18-usc-1348> (“Against the backdrop of uncertainty under Section 10(b) tipping jurisprudence, prosecutors have begun increasingly to charge insider trading . . . under 18 U.S.C. § 1348 in tandem with Section 10(b).”); Sandra Moser and Justin Weitz, *18 U.S.C. § 1348—A Workhorse Statute for Prosecutors*, 66 DOJ J. FED. L. & PRAC. 111, 120–22 (2018), <https://www.justice.gov/usao/page/file/1106771/> (noting the many benefits of § 1348 for prosecutors, including “a fresh start in interpreting a securities fraud statute,” a “simpler approach,” a lower “mens rea requirement,” and “a stiffer maximum penalty” in comparison to Section 10b-5).

17. *United States v. Blaszczak*, 947 F.3d 19 (2d Cir. 2019).

18. John C. Coffee, Jr., *The Blaszczak Bombshell: A Return to the “Parity of Information” Theory of Insider Trading?*, CLS BLUE SKY (Feb. 26, 2020), <https://clsbluesky.law.columbia.edu/2020/02/26/the-blaszczak-bombshell-are-we-returning-to-a-parity-of-information-theory-of-insider-trading/> (noting that in light of *Blaszczak* “[t]o prosecutors, the implication is obvious: Forget Rule 10b-5 and prosecute under the simpler § 1348”).

19. Jonathan E. Richman, *Second Circuit Holds that a “Personal Benefit” Is Not Required for Insider Trading Under Criminal Securities Statute*, NAT’L L. REV., <https://www.natlawreview.com/article/second-circuit-holds-personal-benefit-not-required-insider-trading-under-criminal>. See also *United States v. Newman*, 773 F.3d 438, 452 (2d Cir. 2014) (holding that a jury cannot infer the requisite personal benefit to an insider from the insider’s gift of confidential information to a trading relative or friend absent proof that the relationship between the insider and that friend or relative is “meaningfully close”); *Salman v. United States*, 137 S. Ct. 420, 427–28 (2016) (finding that the personal benefit test is satisfied when a tipper makes “a gift of confidential information to ‘a trading relative’”); *United States v. Martoma*, 894 F.3d 64, 76 (2d Cir. 2017) (finding that, on rehearing, the personal-benefit requirement is met by of proof of a quid pro quo relationship or that the tipper’s disclosure of inside information was intended to benefit the tippee).

20. 947 F.3d at 34.

21. *Id.* at 36–37.

the executive branch and their respective staffs.<sup>22</sup> It prohibits the use of nonpublic information “derived from such person’s position” or “gained from the performance of such person’s official responsibilities” as a means to make a profit.<sup>23</sup> The STOCK Act therefore makes explicit that members of Congress are subject to Rule 10b-5 insider trading prohibitions.<sup>24</sup> The Act does also require, however, that covered individuals report any transactions exceeding \$1,000 in stocks, bonds, commodities, or other forms of securities within thirty to forty-five days of the transaction, in addition to complying with general insider trading prohibitions.<sup>25</sup>

## II. CHALLENGES WITH THE EXISTING FRAMEWORK

Despite this legal framework, Senator Burr’s recent scandal illustrates the various challenges associated with congressional insider trading cases.<sup>26</sup> Though it is unclear why the Department of Justice dropped its investigation of Burr,<sup>27</sup> the investigation’s closure may indicate that there was insufficient evidence to prove insider trading using available mechanisms.

Prosecution under § 1348 may have seemed futile. Although *Blaszczak* appears to offer an easier approach to insider trading prosecutions, the decision contains underlying problems that demonstrate the need for further regulation of congressional insider trading. *Blaszczak*’s status as binding precedent is currently on shaky grounds. The Supreme Court vacated and remanded the decision back to the Second Circuit<sup>28</sup> in light of the Court’s holding in *United States v. Kelly* that a property fraud conviction could not stand where the loss of property was only an incidental byproduct of a scheme, as opposed to the object of the fraud.<sup>29</sup> Thus, the Second Circuit must readdress the question of whether the confidential government information at issue in *Blaszczak* is “property.”<sup>30</sup> It is also currently unclear

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22. STOCK Act, Pub. L. No. 112-105, 126 Stat. 291, 292 (2012).

23. *Id.*

24. *Id.*

25. *Id.*; Christopher DeLacy, *What You Need to Know About the STOCK Act*, HOLLAND & KNIGHT (July 3, 2012), <https://www.hklaw.com/en/insights/publications/2012/07/what-you-need-to-know-about-the-stock-act>.

26. Nagy, *supra* note 9, at 1132–37; Kelner, Peter Koski & Clayton Bailey, *The Challenges of Prosecuting Congressional Insider Trading*, COVINGTON & BURLING (June 18, 2020), <https://www.cov.com/-/media/files/corporate/publications/2020/06/the-challenges-of-prosecuting-congressional-insider-trading.pdf>.

27. Fandos & Benner, *supra* note 6.

28. *Blaszczak v. United States*, No. 20-5649, 2021 WL 78043, at \*1 (U.S. Jan. 11, 2021).

29. *Kelly v. United States*, 140 S. Ct. 1565, 1573 (2020); Robert J. Anello & Richard F. Albert, *Days Seem Numbered for Circuit’s Controversial Insider Trading Decision*, N.Y. L.J. (Dec. 9, 2020, 12:15 PM), <https://www.law.com/newyorklawjournal/2020/12/09/days-seem-numbered-for-circuits-controversial-insider-trading-decision/> (noting that district courts “faced with Title 18 securities fraud charges in an insider trading prosecution,” given *Blaszczak*’s uncertain future, “may well find the most prudent approach to include the personal benefit requirement in their jury instructions”).

30. *Kelly*, 140 S. Ct. at 1572.

whether the Second Circuit will leave its personal benefit holding undisturbed on remand.<sup>31</sup> Additionally, per the jury instructions from the district court in *Blaszczak*, the prosecution must demonstrate that the material information was knowingly and willingly “misappropriated” or “embezzled” by the defendants to prove a violation of § 1348. Because one cannot misappropriate from oneself, this could presumably shield someone who could claim to have developed material information on his own, like Burr, from liability.<sup>32</sup>

Furthermore, not a single member of Congress has been prosecuted under the STOCK Act since its passage almost a decade ago.<sup>33</sup> Successfully proving a violation of the STOCK Act requires prosecutors to demonstrate that the nonpublic information acted upon was derived from the member’s position, much of which can be shielded from investigators by the Constitution’s Speech or Debate Clause.<sup>34</sup> Additionally, prosecution of insider trading by members of Congress risks the disclosure of classified information.<sup>35</sup> For example, Senator Burr was the former chair of the Senate Intelligence Committee and participated in various closed-door and private briefings.<sup>36</sup> Moreover, given the availability of information from various public sources and news sites, it is difficult for prosecutors to prove that the information used was nonpublic.<sup>37</sup> In fact, this is exactly what Senator Burr argued; once news broke of his trading activity, Burr was quick to put out a statement noting that he “relied solely on public news reports to guide [his] decision.”<sup>38</sup>

As a result, while § 1348 and the STOCK Act provide some additional tools beyond Rule 10b-5 for prosecutors seeking to bring congressional

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31. Anello & Albert, *supra* note 29. Adding to the uncertainty is the fact that the remand will appear before a different Second Circuit panel, as one member, Judge Christopher Droney, retired from the bench just days after the initial opinion came down. *Id.*

32. *See, e.g.*, Appendix at 1044-45, *United States v. Blaszczak*, 947 F.3d 19 (2d Cir. 2019) (Nos. 18-2811, 18-2825, 18-2867, 18-2878); Charles L. Slamowitz, *Profiteering Off Public Health Crises: The Viable Cure for Congressional Insider Trading*, 77 WASH. & LEE L. REV. ONLINE 31, 36 (2020). *See also* Coffee, *supra* note 18.

33. Joe Nocera, *‘Stop Trading’ Act for Congress Isn’t Stopping Much Trading*, BLOOMBERG NEWS (Dec. 4, 2020), <https://www.bloomberg.com/opinion/articles/2020-12-04/-stop-trading-act-for-congress-isn-t-stopping-much-trading>.

34. Kelner et al., *supra* note 26. In fact, in a 2015 civil STOCK Act investigation regarding whether a congressional staffer provided material nonpublic information to a lobbyist, the Southern District of New York required the U.S. Securities and Exchange Commission to abandon key portions of its subpoena to the staffer and the House Ways and Means Committee on the basis of the speech or debate clause. *Sec. & Exch. Comm’n v. Comm. on Ways & Means of the U.S. House of Representatives*, 161 F. Supp. 3d 199, 246 (S.D.N.Y. 2015).

35. Kelner, et al., *supra* note 26.

36. *Id.*

37. Michael Volkov, *Insider Trading by Members of Congress: An Enforcement Nightmare?*, JDSUPRA (June 23, 2020), <https://www.jdsupra.com/legalnews/insider-trading-by-members-of-congress-43317/>.

38. Dareh Gregorian, *Sen. Burr: I sold off stocks because of TV reports, not inside info about coronavirus*, NBC NEWS, <https://www.nbcnews.com/politics/congress/sen-burr-i-sold-stocks-because-tv-reports-not-inside-n1165036>.

insider trading cases, they do not necessarily resolve the problem of congressional insider trading for the reasons discussed above.

### III. THE CASE FOR A COMPLETE BAN ON CONGRESSIONAL STOCK TRADING

In light of the COVID-19 trading scandals and the demonstrated ineffectiveness of the existing framework in addressing the problem, a strong legislative response banning congressional trading of individual stock is a common-sense next step to address the problem of congressional insider trading.

A ban on congressional stock trading is a bipartisan solution. Legislation barring members of Congress from trading stocks altogether has gained increasing support in recent years from both lawmakers and the general public.<sup>39</sup> In March 2021, a group of bipartisan senators and representatives reintroduced the Ban Conflicted Trading Act, which would ban all sitting members of Congress and senior congressional staff from purchasing or selling individual stocks or other investments while in office.<sup>40</sup> The bill allows for blind trusts that meet certain criteria, and members would still be allowed to hold widely-held investments, including diversified mutual funds and exchange-traded funds.<sup>41</sup> Any individual holdings would have to be liquidated within six months of the bill's enactment.<sup>42</sup> New members of Congress with existing holdings would have six months to sell their stocks or transfer them to a blind trust, or otherwise hold them throughout their entire tenure in office.<sup>43</sup>

Additionally, banning congressional trading of individual stock accords with current practice. More and more members of Congress are voluntarily deciding to divest individual stocks from their portfolios. For example, following allegations against former Senator Kelly Loeffler (R-GA) and a

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39. See, e.g., Slamowitz, *supra* note 32, at 43 (“A more drastic position—that members of Congress be prohibited from trading altogether—is becoming more widely held, a view shared by some members of Congress and a former drafter of the STOCK Act.”); Press Release, *Members of Congress Introduce Bipartisan Legislation to Stop Government Officials* [hereinafter Press Release] (Mar. 3, 2021), <https://krishnamoorthi.house.gov/media/press-releases/members-congress-introduce-bipartisan-legislation-stop-government-officials> (“Recent polling shows that 67% of Americans support banning Members of Congress from holding individual stocks.”); Tyler Gellasch, *I Helped Write the STOCK Act. It Didn't Go Far Enough*, POLITICO (Mar. 25, 2020, 3:50 PM), <https://www.politico.com/news/magazine/2020/03/25/congress-stock-trade-148678> (“If we want members of Congress to focus on their work rather than their personal wealth, we should consider whether allowing them to be active traders of public-company stock, or even active participants in significant outside business activities, reflects the priorities the American people rightly demand of public servants.”); Lowrey, *supra* note 8 (“The fix is simple and obvious, deployed in many of our peer countries: Just don’t let public officials be active investors.”).

40. Press Release, *supra* note 39; Ban Conflicted Trading Act, S. 564, 117th Cong. § 4 (2021).

41. Press Release, *supra* note 39; S. 564.

42. Press Release, *supra* note 39; S. 564.

43. Press Release, *supra* note 39; S. 564.

subsequent investigation into whether she had traded on insider information to avert thousands of dollars in losses to her portfolio, Loeffler ultimately decided to divest her portfolio from all individual stocks and step down from a subcommittee that oversaw her husband's company.<sup>44</sup> Former Senator David Perdue (R-GA), who faced similar accusations for his trading activity, sold all but three of his individual stocks in May 2020.<sup>45</sup> Former Senate Majority Leader Mitch McConnell (R-KY) has also stated that he decided many years ago that he was "more comfortable not owning individual stock."<sup>46</sup>

This growing trend reflects members' realization that insider trading accusations carry steep political costs. Loeffler, for example, had to spend almost three months of her re-election campaign fighting back against accusations and regaining the trust of her voters.<sup>47</sup> Perdue's "unusually active" stock trading during the pandemic also drew much criticism and ultimately served as a political liability in an election year.<sup>48</sup> Both Loeffler and Perdue ultimately lost what arguably were the most important senate elections of 2020, both losing seats (and ultimately, the Senate majority) to their Democratic opponents.<sup>49</sup> Senator Burr was forced to give up chairmanship of the Senate Intelligence Committee and has said that he will not seek re-election in 2022.<sup>50</sup> Given the damage that even the mere perception of insider trading can cause,<sup>51</sup> a complete ban on congressional trading of individual stock would further protect innocent lawmakers from political fallout that might result from unproven insider trading accusations.

Finally, a trading ban is a solution that has been successful outside of the congressional context. For example, FDA employees and certain family members are prohibited from holding financial interests, including stock, in certain business regulated by the FDA, such as companies working in the

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

45. David Allison, *Senator David Perdue restructures his retirement savings, advisors to stop trading individual stocks*, ATLANTA BUS. CHRON. (May 8, 2020, 6:57 PM EDT), <https://www.bizjournals.com/atlanta/news/2020/05/08/senator-david-perdue-restructures-his-retirement.html>.

46. Fandos, *supra* note at 44. Though he claims to not own individual stock himself, Senator McConnell believes that each member should be allowed to invest "as they saw fit." *Id.*

47. Fandos, *supra* note at 44.

48. Stephanie Saul, Kate Kelly & Michael LaForgia, *2,596 Trades in One Term: Inside Senator Perdue's Stock Portfolio*, N.Y. TIMES (Dec. 2, 2020), <https://www.nytimes.com/2020/12/02/us/politics/david-perdue-stock-trades.html>.

49. *Georgia Senate Runoff Results*, PBS NEWSHOUR, <https://www.pbs.org/newshour/elections-2020/georgia-senate-runoff>.

50. Fandos & Benner, *supra* note 6.

51. *See, e.g.,* Lowrey, *supra* note 8 ("The simple perception that officials might have prioritized their own financial well-being over the well-being of American households is damaging enough, even if the trades were innocuous.").

drug, food, and tobacco industries.<sup>52</sup> Even journalists and members of their immediate families are not allowed to buy or sell stocks of entities about which they have written, commented, or reported recently about.<sup>53</sup> If FDA employees and journalists—persons with arguably less power and access to confidential information—have accepted restraints on their trading activity, it begs the question why no such limits exist for our Nation’s lawmakers.

## CONCLUSION

During times of global and national emergencies, Americans should not have to worry about lawmakers abusing their positions of power for their own financial and personal gain. Yet, this is exactly what appears to be happening—between early February and early April of 2020, during the height of the COVID-19 pandemic, twelve senators made 227 stock purchase worth as much as \$98 million, and the thirty-seven members of the House made 1,358 trades worth as much as \$60 million.<sup>54</sup> The story of Senator Burr demonstrates that the existing insider trading enforcement framework as applied to members of Congress is ineffective. Banning members of Congress from trading individual stocks is a bipartisan solution that would address this problem and rebuild Americans’ trust in their elected officials.

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52. *Prohibited Financial Interests for FDA Employees*, U.S. FOOD & DRUG ADMIN. (last visited May 7, 2021), <https://www.fda.gov/about-fda/ethics/prohibited-financial-interests-fda-employees>.

53. Steven Perlberg, *The Insane Difference In The Rules For Journalists And SEC Employees When It Comes To Trading Stocks*, BUS. INSIDER (Mar. 4, 2014, 6:43 PM), <https://www.businessinsider.com/journalists-and-sec-employees-stock-trading-2014-3>.

54. Fandos, *supra* note at 44.