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A Scandalous Perversion of Trust: Modern Lessons from the Early History of Congressional Insider Trading

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RUTGERS UNIVERSITY
LAW REVIEW

VOLUME 67

SPRING 2015

ISSUE 2

ARTICLES

A SCANDALOUS PERVERSION OF TRUST:
MODERN LESSONS FROM THE EARLY HISTORY OF
CONGRESSIONAL INSIDER TRADING

*Michael A. Perino**

Abstract

The Stop Trading on Congressional Knowledge Act of 2012 (the “STOCK Act”) affirms that members of Congress are not exempt from insider trading prohibitions. Legal scholars, however, continue to debate whether the legislation was necessary. Leveraging recent scholarship on fiduciary political theory, some commentators contend that because members owe fiduciary-like duties to citizens, to their fellow members, and to Congress as an institution, existing insider trading theories already prohibited them from using material nonpublic information for personal gain. These arguments, while plausible, are incomplete. They rely on broad conceptions of legislators as fiduciaries, but provide scant evidence that members violate institutional norms when capitalizing on confidential information, a crucial step for fitting their trading into existing legal doctrines.

This Article fills that gap. Like other scholarship on governmental fiduciaries, it examines the foundational norms in Congress, focusing specifically on an episode not previously discussed in the literature. In 1778, Samuel Chase, a member of the Second Continental Congress, used his knowledge of plans to purchase supplies for the Continental Army to reap a substantial profit by cornering the market for flour in

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his home state. This Article documents the reaction to the Chase scandal and demonstrates that from the earliest days of the institution congressmen expected that members would not attempt to use confidential information for financial gain. Alexander Hamilton and other critics universally concluded that Chase had committed a “scandalous perversion of [his] trust.” This episode and other evidence compiled here strongly suggest that the STOCK Act was unnecessary to hold members of Congress liable for insider trading.

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I. INTRODUCTION

In November 2011, a *60 Minutes* report set off a firestorm of controversy when it accused several members of Congress of reaping enormous profits from insider trading.¹ The report was based, in part, on a tendentious book by Peter Schweizer, a research fellow at the Hoover Institution. Schweizer offered a series of anecdotes about members who allegedly exploited material nonpublic information for their own financial gain.² In each case, he contended, these actions could have

1. *60 Minutes: Congress Trading on Inside Information?* (CBS News Television Broadcast Nov. 13, 2011), available at <http://www.cbsnews.com/video/watch/?id=7388130n>. Earlier press reports contained similar allegations, but did not result in the same level of public outrage. See Brody Mullins, et al., *Congress Staffers Gain from Trading in Stocks*, WALL ST. J., Oct. 11, 2010, at A1; Jane J. Kim, *U.S. Senators' Stock Picks Outperform the Pros'*, WALL ST. J., Oct. 26, 2004, at D2.

2. See generally PETER SCHWEIZER, *THROW THEM ALL OUT: HOW POLITICIANS AND*

been criminal violations of the federal securities laws but for the fact that they were committed by members of Congress.³ These sensational anecdotal accounts were not the only evidence of congressional insider trading. One empirical study suggested that senators reaped statistically significant positive abnormal returns from their stock trading.⁴ In just a few months, bills to close the loophole that theoretically allowed legislators to escape liability for insider trading sailed through the House and Senate virtually unopposed. On April 4, 2012, President Obama signed the Stop Trading on Congressional Knowledge Act (the “STOCK Act”), which affirmed that members of Congress were not exempt from the federal securities laws’ insider trading prohibitions.⁵

As a matter of political expediency, Congress had little choice but to pass the STOCK Act. As a legal matter, however, was it necessary? Were members of Congress really exempt from insider trading proscriptions? Legal scholars split on that question. The debate arose because of the uncertain contours for insider trading liability. There is no explicit ban on insider trading under federal law;⁶ instead, civil and criminal insider trading actions are generally brought under Section 10(b) of the Securities Exchange Act of 1934⁷ and Rule 10b-5,⁸ which together operate as a catch-all antifraud rule. Federal courts first defined insider trading as fraudulent under Rule 10b-5 in the late 1960s,⁹ but in a series of opinions the United States Supreme Court held that not all instances of trading on material nonpublic information constituted fraud.¹⁰ In order to impose civil or criminal liability, the government had to prove that the trader owed a fiduciary or other duty of

THEIR FRIENDS GET RICH OFF INSIDER STOCK TIPS, LAND DEALS, AND CRONYISM THAT WOULD SEND THE REST OF US TO PRISON (2012).

3. *Id.*

4. Alan J. Ziobrowski et al., *Abnormal Returns from the Common Stock Investments of the U.S. Senate*, 39 J. FIN. & QUANTITATIVE ANALYSIS 661, 675-76 (2004) [hereinafter Ziobrowski, *Senate Study*].

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

6. Congress passed the Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264 (1984), and the Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 (1988), but those statutes focused on defining civil remedies for contemporaneous traders in the marketplace or enhancing the penalties that could be imposed in governmental enforcement actions rather than defining the elements of an insider trading action.

7. 15 U.S.C. § 78j(b) (2012).

8. 17 C.F.R. § 240.10b-5 (2013).

9. *Sec. & Exch. Comm’n v. Tex. Gulf Sulphur Co.*, 401 F.2d 833, 848 (2d Cir. 1968) (en banc), *cert denied*, 394 U.S. 976 (1969). In 1961, the Securities and Exchange Commission recognized for the first time that insider trading violated Rule 10b-5. *In re Cady, Roberts & Co.*, 40 S.E.C. 907, 910-11 (1961).

10. *See, e.g., Dirks v. Sec. & Exch. Comm’n*, 463 U.S. 646, 653 (1983); *Chiarella v. United States*, 445 U.S. 222, 227-35 (1980).

trust and confidence either to the person on the other side of the transaction or to the source of the information.¹¹

Some securities law scholars, most prominently Donna Nagy, wrote before passage of the STOCK Act that legislation was unnecessary because members of Congress already “owe[d] fiduciary-like duties of trust and confidence to a host of persons including the citizen-investors whom they serve, as well as the federal government, other members of Congress, and government officials outside of Congress who rely on their loyalty and integrity.”¹² While other scholars thought such arguments were “plausible,”¹³ many were far more skeptical. Stephen Bainbridge led the opposition, arguing that generalized notions that legislators were supposed to act in the public interest were an insufficient basis for imposing potential criminal liability.¹⁴

Despite passage of the STOCK Act, debate continues over whether it was necessary and whether members of Congress prior to passage of that law violated a duty when they traded on material nonpublic information.¹⁵ While proponents of this view have generally made compelling arguments, those arguments have been frustratingly incomplete. They most frequently rely on broad conceptions of legislators as fiduciaries or analogies that compare congressmen to various actors in

11. *United States v. O'Hagan*, 521 U.S. 642, 652-53 (1997); *Dirks*, 463 U.S. at 653; *Chiarella*, 445 U.S. at 227-35. In 2000, the SEC promulgated a rule that, in effect, codified those bases for liability. Rule 10b5-1(a) provides that:

The “manipulative and deceptive devices” prohibited by Section 10(b) of the Act (15 U.S.C. 78j) and § 240.10b-5 thereunder include, among other things, the purchase or sale of a security of any issuer, on the basis of material nonpublic information about that security or issuer, in breach of a duty of trust or confidence that is owed directly, indirectly, or derivatively to the issuer of that security or the shareholders of that issuer, or to any other person who is the source of the material nonpublic information.

17 C.F.R. § 240.10b5-1(a).

12. Donna M. Nagy, *Insider Trading, Congressional Officials, and Duties of Entrustment*, 91 B.U. L. REV. 1105, 1111 (2011); see also Donald C. Langevoort, *Insider Trading and the Fiduciary Principle: A Post-Chiarella Restatement*, 70 CALIF. L. REV. 1, 34-35 (1982) (suggesting that government officials owe “some duty of fair dealing” to United States citizens, although not directly addressing members of Congress).

13. Jonathan R. Macey & Maureen O'Hara, *Regulation and Scholarship: Constant Companions or Occasional Bedfellows?*, 26 YALE J. ON REG. 89, 107 (2009).

14. Stephen M. Bainbridge, *Insider Trading Inside the Beltway*, 36 J. CORP. L. 281, 295-97 (2011). The key provision of the STOCK Act purports to clarify this uncertainty. It provides that “each Member 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 gained from the performance of such person's official responsibilities.” 15 U.S.C. § 78u-1(g)(1) (2012).

15. See generally Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 CORNELL L. REV. 845 (2013).

business organizations who clearly possess fiduciary duties.¹⁶ Unfortunately, they provide scant evidence that members violate institutional norms when capitalizing on confidential information, a crucial step for fitting congressional insider trading into existing legal doctrines. As such, these arguments cannot directly refute the claim that those broad duties do not and have never been conceived to prohibit the use of material nonpublic information learned through legislative activities for personal gain.

This Article seeks to fill the gap in the literature on congressional insider trading by examining the foundational norms in Congress regarding the use of confidential information. It is an example of what Alfred Brophy recently dubbed “applied legal history,” an attempt to use historical analysis to answer legal questions of contemporary significance.¹⁷ The Article focuses on the Second Continental Congress and the story of Samuel Chase. Chase is best known as the first and only Supreme Court Justice ever impeached in the House of Representatives, although the Senate voted to acquit him of the charges in 1805.¹⁸ Chase’s relevance for understanding attitudes about the misuse of nonpublic information involves not that famous episode, but one that occurred more than twenty-five years earlier when Chase served on Maryland’s delegation to the Continental Congress.¹⁹ In the summer of 1778, Chase learned that Congress would authorize the purchase of large amounts of flour in Maryland and other mid-Atlantic states so that it could be shipped to the Continental Army and the newly arrived French fleet then preparing to fight in Rhode Island.²⁰ Chase instructed his business partners to buy up flour in Baltimore, effectively cornering the local market.²¹ The men reaped a substantial profit when they re-sold the provisions to the government later that fall.²²

Chase’s scheme did not involve a securities transaction and therefore it is technically not insider trading within the meaning of Rule

16. *See id.* at 870-77.

17. *See* Alfred L. Brophy, *Introducing Applied Legal History*, 31 *LAW & HIST. REV.* 233, 233 (2013) (defining “applied legal history” as “deeply researched, serious scholarship that is motivated by, engages with, or speaks to contemporary issues”).

18. *See* WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 15-27*, 104-05 (1999).

19. 1 *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800*, 105 (Maeva Marcus, et al. eds., 1985) [hereinafter *DOCUMENTARY HISTORY OF THE SUPREME COURT*].

20. *See id.* at 107; *see also* JANE SHAFFER ELSMERE, *JUSTICE SAMUEL CHASE 19-20* (1980).

21. *See* ELSMERE, *supra* note 20, at 20-21.

22. *See id.*

10b-5,²³ but the reaction to it still tells us a great deal about the earliest institutional norms in Congress concerning the use of nonpublic information for personal profit. Alexander Hamilton, then serving as an aide-de-camp to George Washington,²⁴ was among the most vociferous critics.²⁵ He accused Chase of committing “a scandalous perversion of your trust.”²⁶ Within a month, Maryland revoked Chase’s appointment and warned future delegates that they had a duty “to be watchful each one over the conduct of the other” so as to prevent any repetition of this kind of dishonorable practice.²⁷ Other reactions were similar, and although Chase would eventually return to Congress and secure appointment to the Supreme Court, the scandal dogged him for the rest of his life.²⁸ In the tumultuous politics of the times, Chase was hardly alone in being the target of scathing invective, both from political opponents and opposition newspapers. Blistering rhetoric was the norm rather than the exception in the late eighteenth century. What was notable, however, was the nearly universal conclusion (even from members of his own party) that Chase had behaved dishonorably as a result of “his breach of confidence as a member of Congress.”²⁹

The Chase episode illustrates that, from the earliest days of the institution, congressmen expected that their fellow members would not attempt to profit from the confidential information to which they were privy. The flour scandal demonstrates that a member of Congress using confidential information for personal gain breached a duty of trust and confidence owed to the government in general and to fellow members of Congress in particular. Such trading would thus fit neatly within the pre-existing contours of Rule 10b-5. Passing the STOCK Act was, in other words, unnecessary to hold a member of Congress liable for insider trading.

To be sure, the hostile reactions to and universal condemnation of

23. Traditionally, insider trading proscriptions did not apply to commodities transactions. As a result of the Dodd-Frank Wall Street Reform and Consumer Protection Act, however, it is now unlawful to trade commodities on the basis of material nonpublic information in breach of a pre-existing duty or obtained through fraud or deceit. 7 U.S.C. § 6(c) (2012); 17 C.F.R. §180.1 (2013).

24. RON CHERNOW, *ALEXANDER HAMILTON* 85-125 (2004).

25. See Alexander Hamilton, Publius Letter, II (Oct. 26, 1778), in 1 *THE PAPERS OF ALEXANDER HAMILTON, 1768-1778, 567-70* (Harold C. Syrett & Jacob E. Cooke eds., 1961), all volumes available at <http://founders.archives.gov/content/volumes#Hamilton> [hereinafter 1 *THE PAPERS OF ALEXANDER HAMILTON*].

26. *Id.* at 570.

27. See Letter from Henry Laurens to William Smith (Sept. 12, 1778), in 10 *LETTERS OF DELEGATES TO CONGRESS, 1774-1789, 626 n.1* (Paul H. Smith et al. eds., 1983) [hereinafter LDC].

28. See ELSMERE, *supra* note 20, at 22.

29. JAMES HAW ET AL., *STORMY PATRIOT: THE LIFE OF SAMUEL CHASE* 215 (1980) (internal citation omitted).

Chase's scheme were, at least in part, premised on a somewhat different set of cultural assumptions and expectations than we would have today. Chase's actions were viewed as wrongful because they ran counter to the ethos of republican civic virtue that prevailed in the nascent United States.³⁰ Although civic virtue as a basis for organizing the republic quickly faded from the scene, the reasons offered in the 1770s to explain why Chase's actions were wrongful remain relevant today. Chase's plan imposed a direct economic harm on the government because it was forced to pay higher prices for the commodities it needed for the war effort. More importantly, Chase's actions brought Congress and the United States government into disrepute. His actions made it harder for the average American to believe that the government was made up of disinterested individuals looking to promote the common good rather than to secure their own economic fortunes. Both those harms—the direct economic impact and the reputational harm the source of the information suffers—are at the heart of the modern normative critique of insider trading by governmental actors.

The remainder of the Article proceeds as follows. Section II provides a more detailed analysis of the debate over whether members of Congress could be held liable for insider trading prior to passage of the STOCK Act. Section III discusses Samuel Chase and the flour trading scandal. Section IV describes the general reaction to Chase's conduct, which demonstrates the strong institutional norm against members of Congress profiting from confidential information. To place that reaction in historical and cultural context, the section closely examines Hamilton's denunciation of Chase's behavior—a series of three open letters appearing under the name "Publius."³¹ While a complete history of congressional insider trading is beyond the scope of this Article, Section V briefly analyzes evidence consistent with the idea that these institutional norms against the use of nonpublic information for private gain survived the demise of civic republicanism on which they were premised and continued into modern Congresses. Section VI concludes.

II. CONGRESSIONAL INSIDER TRADING BEFORE THE STOCK ACT

Legal academics are united in their normative conclusion about the propriety of congressional insider trading. Virtually no one suggests that, as a policy matter, legislators should be allowed to trade on

30. See *infra* Section IV.

31. Alexander Hamilton, *Publius Letter, I* (Oct. 16, 1778), in 1 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 25, at 562-63; Alexander Hamilton, *Publius Letter, II* (Oct. 26, 1778), in 1 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 25 at 567-70; Alexander Hamilton, *Publius Letter, III* (Nov. 16, 1778), in 1 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 25, at 580-82.

material nonpublic information.³² Insider trading by such individuals is improper, among other reasons, because it “undermines the public’s trust and confidence in the government,” and because it may lead to decisions (or a common belief that decisions) are made to maximize profits rather than to serve the public interest.³³ Stock market tips could easily function as the payoffs for desired legislative actions.³⁴ Even Henry Manne, the most adamant opponent of insider trading restrictions, argued that there is no legitimate policy rationale for permitting members of Congress to trade on the basis of material nonpublic information they acquire in performing their official functions.³⁵

Nonetheless, those same legal scholars have split regarding whether insider trading law as it existed prior to passage of the STOCK Act actually covered members of Congress. There is no need to reiterate those arguments at length here. The key question they raise is whether a member of Congress owes a fiduciary or other duty of trust and confidence either to the person on the other side of the transaction or to the source of the information. This section highlights the gaps in the current argument with respect to whether members of Congress owed such a duty.

Under what is known as the “classic” theory, insiders in possession of material nonpublic information must either disclose that information to the investing public before trading or abstain from trading entirely if they owe a fiduciary or other duty of trust and confidence to the person on the other side of the transaction.³⁶ For example, a director, executive, or employee of a corporation trading on the basis of material nonpublic information with the shareholders of her company would violate Rule 10b-5 because she owes a fiduciary duty to them.³⁷ Holding members of Congress liable under the classic theory would thus require finding that they owe a fiduciary or other duty of trust and confidence to those contemporaneously trading in the securities markets.

Some securities law scholars take this position. Donna Nagy, for example, has argued that members of Congress occupy a position of

32. For the one brief exception, see M. Todd Henderson & Larry Ribstein, *Let Members of Congress Trade!*, POLITICO (Dec. 1, 2011, 11:19 PM), <http://www.politico.com/news/stories/1211/69601.html>.

33. Nagy, *supra* note 12, at 1133; HENRY G. MANNE, *INSIDER TRADING AND THE STOCK MARKET* (1966), *reprinted in* 2 *THE COLLECTED WORKS OF HENRY G. MANNE* 194 (Fred S. McChesney, 2009).

34. See MANNE, *supra* note 33, at 194.

35. *Id.* at 188-94.

36. *Chiarella v. United States*, 445 U.S. 222, 231-32 (1980).

37. See *Dirks v. Sec. & Exch. Comm’n*, 463 U.S. 646, 659 (1983) (holding that corporate officers are “forbidden by their fiduciary relationship from personally using undisclosed corporate information to their advantage.”); *Sec. & Exch. Comm’n v. Talbot*, 530 F.3d 1085, 1095 (9th Cir. 2008) (corporate directors).

“public trust,” and that their behavior should be governed by the fiduciary standards that govern their relationship with “citizen-investors.”³⁸ Sung Hui Kim takes a similar position, arguing that at its core fiduciary duty articulates an anti-corruption norm that should prevent public officials from exploiting their offices for private gain.³⁹

Nagy and Kim premise their arguments, in part, on an emerging body of scholarship that conceives of government officials as fiduciaries for citizens.⁴⁰ The applicability of that scholarship to insider trading is, however, far from clear. Relying on a variety of eighteenth century sources, proponents of “fiduciary political theory” argue that government officials, including members of Congress, were often thought to have fiduciary duties of loyalty akin to those of agents.⁴¹ Indeed, it was commonplace during that time to use the language of trusts to describe the duties of legislators.⁴² To take just one example, in 1765 John Adams wrote that a country’s rulers were “no more than attorneys, agents and trustees for the people; and if the cause, the interest and trust is insidiously betray’d, or wantonly trifled away, the people have a right to revoke the authority, that they themselves have deputed, and to constitute abler and better agents, attorneys and trustees.”⁴³ There is little doubt that this language is consistent with the

38. Nagy, *supra* note 12, at 1140-47.

39. Kim, *supra* note 15, at 903-08; *see also* Sung Hui Kim, *What Governmental Insider Trading Teaches Us about Corporate Insider Trading*, in RESEARCH HANDBOOK ON INSIDER TRADING 166, 173-76 (Stephen M. Bainbridge ed., 2013).

40. In a series of articles in the last decade, Robert G. Natelson developed the idea that the drafters of the Constitution conceived of government actors as standing in a fiduciary relationship to the governed. *See, e.g.*, Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004) [hereinafter Natelson, *Public Trust*]; Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243 (2004) [hereinafter Natelson, *Agency Law Origins*]. Natelson was not the first scholar to make this claim. *See* Kathleen Clark, *Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Theory*, 1996 U. ILL. L. REV. 57 (1996). In the wake of Natelson’s work, however, a flurry of articles have argued that various governmental actors should be subject to fiduciary constraints. *See* Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699 (2013) [hereinafter Leib, Ponet & Serota, *A Fiduciary Theory*]; David L. Ponet & Ethan J. Leib, *Fiduciary Law’s Lessons for Deliberative Democracy*, 91 B.U. L. REV. 1249 (2011) [hereinafter Ponet & Leib, *Fiduciary Law’s Lessons*]; Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441 (2010). Other scholars are using corporate law principles developed to deal with conflicts of interest as a framework for addressing conflicts of interest involving government officials. *See generally* D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671 (2013) (recommending evaluating political gerrymandering claims using the standards of review developed to address corporate conflicts of interest).

41. Natelson, *Public Trust*, *supra* note 40, at 1146-50; *see also* Rave, *supra* note 40, at 709 (arguing that the idea of government acting as trustee for the governed “played a prominent role in . . . constitutional debate[s] surrounding the American Revolution”).

42. Rave, *supra* note 40, at 710.

43. John Adams, *A Dissertation on the Canon and the Feudal Law* (1765), *reprinted*

kinds of breaches of trust that would be amenable to insider trading prosecution.⁴⁴ Legislators, after all, have the same ability to profit from informational asymmetries as other agents on whom we typically impose an abstain-or-disclose duty.⁴⁵

But the historical sources, recent cases articulating similar views, and the existing scholarship tend to speak in broad general terms.⁴⁶ Identifying someone as a fiduciary is only the first step in the analysis.⁴⁷ The more difficult challenge is giving content to any particular fiduciary relationship.⁴⁸ As the Supreme Court noted in *SEC v. Chenery Corp.*, such a determination merely “gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge those obligations?”⁴⁹ The Court’s point is crucial in understanding why simply placing the label “fiduciary” on a member of Congress is inadequate to resolve the insider trading question. Courts and scholars use the term “fiduciary” in a wide array of settings, but the obligations and prohibitions imposed in such a relationship are context specific. Trustees, directors, doctors, and lawyers are all fiduciaries, but the restrictions imposed on their activities vary widely.⁵⁰

It is with respect to the precise contours of a member’s relationship to the trading public that current scholarship is silent. If we return to the eighteenth century sources on which Natelson and other scholars rely, we find some evidence that agents were prohibited from exploiting informational advantages to earn a profit in transactions with the principal. Professor Natelson quotes from the eighteenth century Scottish jurist Lord Kames, whose treatise, *Principles of Equity*, was well-known among lawyers practicing in the United States in the late eighteenth century.⁵¹ Kames wrote that equity “prohibits a trus-

in 1 THE AMERICAN INTELLECTUAL TRADITION 128, 134 (David A. Hollinger & Charles Capper eds., 6th ed. 2011) [hereinafter Adams, *Dissertation on the Canon*]. Conceiving of public officials as trustees can be traced from Plato, Aristotle, and Cicero through John Locke and Edmund Burke. See Leib, Ponet & Serota, *A Fiduciary Theory*, *supra* note 40, at 708; Criddle, *supra* note 40, at 466-67.

44. See *supra* note 33 and accompanying text.

45. See Ponet & Leib, *Fiduciary Law’s Lessons*, *supra* note 40, at 1255-56.

46. See, e.g., Kim, *supra* note 15, at 877-80 (collecting cases in which courts refer to various elected and unelected government officials as fiduciaries of the people and to public office as a “public trust”).

47. See Clark, *supra* note 40, at 69-70.

48. See *id.*

49. 318 U.S. 80, 86 (1943).

50. See Ethan J. Leib, David L. Ponet & Michael Serota, *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. 91, 92 (2013) [hereinafter Leib, Ponet & Serota, *Translating Fiduciary*]; Clark, *supra* note 40, at 69-71.

51. Natelson, *Public Trust*, *supra* note 40, at 1128.

tee from making any profit by his management, directly or indirectly.”⁵² Courts expressed particular concern regarding transactions between the agent and the principal because of fear that the agent might use his superior information about matters within the scope of the agency relationship to the principal’s disadvantage.⁵³ To eliminate this problem, equity courts outlawed almost all transactions between an agent and a principal.⁵⁴

While these cases could be interpreted to cover insider trading, we cannot know with certainty from these sources how such behavior would have been treated or whether those same principles would have been applied outside the context of private agency relationships. There appears to be no evidence that the law extended those prohibitions to legislators or other government officials, and Professor Natelson provides no details specifying what the broad trustee language that was typically employed meant in terms of confidential information in the hands of legislators.⁵⁵ In short, none of these sources address the specific question at hand—whether a legislator’s duty to citizens at large included a duty to refrain from exploiting confidential information.⁵⁶

As a result, those arguing that the classic theory of insider trading encompassed legislators were required to make a logical leap, arguing either by way of analogy or as a normative matter that the same restrictions courts applied to agents in the private context should apply equally to legislative agents.⁵⁷ There is, however, a significant problem in relying on these kinds of facile comparisons when analyzing something as amorphous as the scope of a fiduciary duty. Tamar Frankel, one of the leading authorities on fiduciary law, has noted the limited

52. *Id.* at 1128 (citing LORD KAMES (HENRY HOME), PRINCIPLES OF EQUITY 225 (2d ed., 1767)). Other sources available in the United States in the late eighteenth century were even less helpful. Blackstone’s Commentaries is devoid of any discussion regarding an agent’s use of confidential information. *See generally* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765-1769).

53. *Fox v. Mackreth*, (1788) 29 Eng. Rep. 224 (Ct. Ch.); *Keech v. Sandford*, (1726) 25 Eng. Rep. 223, 223-24 (holding that a trustee who acquires knowledge that his principal’s lease is about to expire cannot renew that lease under his own name).

54. *See* FREDERICK THOMAS WHITE & OWEN DAVIES TUDOR, A SELECTION OF LEADING CASES IN EQUITY 175, 188-89 (1888).

55. *See, e.g.*, Natelson, *Public Trust*, *supra* note 40, at 1114, 1122, 1159-61.

56. *See* RICHARD W. PAINTER, GETTING THE GOVERNMENT AMERICA DESERVES: HOW ETHICS REFORM CAN MAKE A DIFFERENCE 163 (2009) (“Fiduciary principles that bind public officials, however, have not evolved along the same legal trajectory as fiduciary principles in private law.”); Kim, *supra* note 15, at 880 (acknowledging that even if public officials are fiduciaries that does not necessarily mean that they have a duty of disclosure under federal insider trading law).

57. *See* Kim, *supra* note 15, at 875-77; Nagy, *supra* note 12, at 1111. Private agents clearly have such a duty. RESTATEMENT (SECOND) OF AGENCY § 395 (1957). The Supreme Court relied on this provision in fashioning its insider trading rules. *See United States v. O’Hagan*, 521 U.S. 642, 654-55 (1997).

utility of analogies in fiduciary contexts.⁵⁸ Analogies can be particularly unhelpful, she notes, in addressing new situations, like congressional insider trading,⁵⁹ “because the rules that apply to the old prototypes do not necessarily respond to the problems posed by the new ones.”⁶⁰

Other securities law scholars were quick to point out this flaw in the existing arguments. A broad general duty to make decisions in the public interest, Stephen Bainbridge asserted, is irrelevant to the question of whether legislators have a duty to refrain from trading on material nonpublic information.⁶¹ John C. Coffee, Jr. testified in the hearings leading up to passage of the STOCK Act that “[m]embers of Congress do not clearly owe a fiduciary duty (or any similar duty requiring them to be loyal and hold information in confidence) . . . to their trading partners in a securities (or commodities) transaction.”⁶² To help resolve the existing uncertainty, it would be useful to have something more concrete than a generalized notion that members of Congress are fiduciaries for the people. Actual examples of legislators who were found to have violated their duties to the public by using confidential information to their personal financial advantage would strengthen the case substantially. To date, however, those examples have been missing from the debate.

The second and most promising theory for bringing an insider trading case against a member of Congress is the “misappropriation” theory, which premises liability on a breach of fiduciary duty owed to

58. See Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 804-08 (1983).

59. See *id.* at 805.

60. *Id.* Frankel also faults courts for both their inconsistent application of analogies and their failure to explain fully why some similarities between relationships are dispositive while others are not. *Id.*

61. See Bainbridge, *supra* note 14, at 295; Matthew Barbabella et al., *Insider Trading in Congress: The Need for Regulation*, 9 J. BUS. & SEC. L. 199, 216-17 (2009) (recognizing that a “vague sense that congressional representatives ought to place public interests first” might be insufficient to create the kind of duty necessary to impose insider trading liability). As several prominent scholars writing on fiduciary political theory warned in another context, “political relationships and corporate relationships are sufficiently different that one should be wary of seamless application from one context to the other.” Leib, Ponet & Serota, *Translating Fiduciary*, *supra* note 50, at 94.

62. *Insider Trading and Congressional Accountability: Hearing Before the S. Comm. on Homeland Sec. & Gov’t Affairs*, 112th Cong. 143 (2011) (statement of John C. Coffee, Jr., Professor, Colum. Univ. Law Sch.); see also JOHN C. COFFEE, JR. & HILLARY A. SALE, *SECURITIES REGULATION CASES AND MATERIALS 2013 SUPPLEMENT* 43 (12th ed., 2013) (“Until 2012, it was an open question whether members of Congress, or their employees, could violate the insider trading prohibition by trading on the basis of material nonpublic information that they acquired in the performance of their official duties.”); PAINTER, *supra* note 56, at 175 (noting that “Congress has apparently managed to create sufficient ambiguity around fiduciary obligations of members . . . that the rules may not apply to them.”).

the source of the information.⁶³ The primary difficulty here is that case law analyzing which relationships are sufficient to impose such a duty is inconsistent. Traditional fiduciary relationships (such as those between a lawyer and a client,⁶⁴ a psychiatrist and a patient,⁶⁵ or an employer and an employee⁶⁶) clearly suffice, but as previously discussed, it remains uncertain whether legislators possess such a duty and, if so, whether it encompasses a duty not to exploit confidential information for their personal financial benefit.⁶⁷ Relationships of trust and confidence are more nebulous. Some courts took a narrow approach, holding that the relationship had to be the “functional equivalent of a fiduciary relationship”⁶⁸ in order to qualify.⁶⁹ Other courts were seemingly more expansive, finding liability in the context of a diverse number of relationships, even seemingly arm’s length business arrangements.⁷⁰

To help resolve this split, the SEC promulgated Rule 10b5-2, a non-exclusive list of three “circumstances in which a person has a duty of trust or confidence for purposes of the ‘misappropriation’ theory of insider trading.”⁷¹ Two of those circumstances are relevant to congressional insider trading.⁷² The first involves situations in which “a person agrees to maintain information in confidence.”⁷³ The most obvious source for the necessary contractual provision would be government ethics rules.⁷⁴ Critics like Stephen Bainbridge, however, argue that these rules provide an insufficient basis for insider trading liability because members “are bound only by the implied obligations created

63. *O’Hagan v. United States*, 521 U.S. 642, 658 (1997).

64. *See id.* at 658 n.8.

65. *See United States v. Willis*, 778 F. Supp. 205, 208 (S.D.N.Y. 1992).

66. *See Sec. & Exch. Comm’n v. Musella*, 578 F. Supp. 425, 438-39 (S.D.N.Y. 1984).

67. *See supra* text accompanying note 55.

68. *United States v. Chestman*, 947 F.3d 551, 569 (2d Cir. 1991).

69. *See id.* at 568-71 (holding that a husband and wife did not have a relationship of trust and confidence because the government did not show that they repeatedly shared business confidences); *see also Walton v. Morgan Stanley*, 623 F.2d 796, 798 (2d Cir. 1980) (finding that a fiduciary relationship is not created simply by entrusting a third party with confidential information).

70. *See, e.g., Sec. & Exch. Comm’n v. McGee*, 895 F. Supp. 2d 669, 678 (E.D. Pa. 2012) (members of Alcoholics Anonymous); *Sec. & Exch. Comm’n v. Falbo*, 14 F. Supp. 2d 508, 513 (S.D.N.Y. 1998) (electrician working as independent contractor).

71. 17 C.F.R. § 240.10b5-2 (2014).

72. *See id.* §§ 240.10b5-2(b)(1)–240.10b5-2(b)(2). The third circumstance is “[w]hen-ever a person receives or obtains material nonpublic information from his or her spouse, parent, child, or sibling . . .” *Id.* § 240.10b5-2(b)(3).

73. 17 C.F.R. § 240.10b5-2(b)(1).

74. Kim, *supra* note 15, at 882 (citing the Code of Ethics for Government Service, which provides that “[a]ny person in Government Service should . . . [n]ever use any information coming to him confidentially in the performance of governmental duties as a means for making private profit.”).

by congressional ethics rules.”⁷⁵ To be sure, governmental employees (as agents) are subject to fiduciary duties and could be liable under the misappropriation theory. But members of Congress are not employees in the traditional sense. Quoting a former SEC enforcement official, Bainbridge asserted that “[i]f 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.”⁷⁶

Rule 10b5-2(b)(2) provides that a duty of trust and confidence also exists

[w]henver the person communicating the material nonpublic information and the person to whom it is communicated have a history, pattern, or practice of sharing confidences, such that the recipient of the information knows or reasonably should know that the person communicating the material nonpublic information expects that the recipient will maintain its confidentiality.⁷⁷

Based on that rule, Donna Nagy argued that the STOCK Act was unnecessary because members of Congress “owe fiduciary-like duties of trust and confidence to . . . the federal government, other members of Congress, and government officials outside of Congress who rely on their loyalty and integrity.”⁷⁸ Like other fiduciaries, they are required to maintain the confidentiality of information that is entrusted to them and may not use that information for their own personal benefit. Relying largely on public corruption cases, Professor Nagy makes a case that congressional insider trading could fit easily in the misappropriation doctrine.⁷⁹ Other academics were unsure. They accepted the proposition that members of Congress have such a duty of trust and confidence but recognized that a narrower view of the current law might be more likely to prevail.⁸⁰

Indeed, Professor Nagy recognized the limits of her own analysis. She noted, for example, “that there has yet to be a federal prosecution for the undisclosed, self-serving use of congressional knowledge for

75. Bainbridge, *supra* note 14, at 293.

76. *Id.* at 295-96 (quoting Peter Lattman, *Bill Looks to Ban Insider Trading for Lawmakers and Their Aids*, WALL ST. J., Mar. 28, 2006 at A1).

77. 17 C.F.R. § 240.10b5-2(b)(2).

78. Nagy, *supra* note 12, at 1111.

79. *Id.* at 1116-27.

80. See Macey & O’Hara, *supra* note 13, at 107; see also *Insider Trading and Congressional Accountability, Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 112th Cong. 12-13 (2011) (testimony of Donald C. Langevoort) (“[I]t is possible that courts would rule that current insider trading law adequately proscribes all abusive trading in securities on Capitol Hill. But there is sufficient doubt, especially in light of how courts recently have been reading Section 10(b) and SEC Rule 10b-5, [so that explicit legislative clarification is desirable.]”).

personal profit.”⁸¹ The public corruption cases she cites that involve the misuse of some form of inside information involve employees in the executive branch,⁸² personnel at administrative agencies,⁸³ a Chicago alderman,⁸⁴ and a state executive branch official,⁸⁵ not congressmen. And while it is easy to think of trading on confidential information for private gain as an obvious form of political corruption, defining an activity as “corrupt” does not necessarily mean the activity is illegal.⁸⁶ Finally, Professor Nagy highlighted that while the SEC could attempt to show a “history, pattern, or practice of sharing confidences,”⁸⁷ a member of Congress might argue that his or her fellow legislators implicitly condoned the use of nonpublic information. “One certainly would hope,” she wrote, “that this contention would not prove true empirically, and that [the trading activity] would instead draw scorn from other members of Congress who would regard such trading as unethical and outrageous.”⁸⁸

The question of whether legislators are guilty of a breach of duty when they misappropriate confidential information for their own personal benefit thus turns to a large degree on institutional norms. The next section examines that issue by looking at Congress’s earliest history. Naturally, norms and expectations may have changed over time, but as with other scholarship on governmental actors as fiduciaries, it

81. Nagy, *supra* note 12, at 1149; *see also Insider Trading and Congressional Accountability, Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 112th Cong. 169 (2011) (statement of Robert Khuzami, Director, SEC Division of Enforcement) (noting that “[t]he question of duty is more novel for Members of Congress [because] [t]here does not appear to be any case law that addresses the duty of a Member with respect to trading on the basis of information the Member learns in an official capacity.”).

Two precedents are at least partially relevant. In 1976, the House reprimanded Representative Robert Sikes “for purchasing stock in a private bank that he was trying to establish” at a naval air station. Andrew George, *Public (Self)-Service: Illegal Trading on Confidential Congressional Information*, 2 HARV. L. & POL’Y Rev. 161, 167 (2008) (internal citation omitted). That internal disciplinary action, however, was obviously not a judicial proceeding to enforce the federal securities laws. Professor Kim also relies on *United States v. Podell*, 436 F. Supp. 1039 (S.D.N.Y. 1977). In that case, the court held that a congressman stood “in a fiduciary relationship with the United States” and thus was required to disgorge a bribe paid to him. *Id.* at 1042. While the case is useful for recognizing that members are fiduciaries, it does not address the question of whether their fiduciary duty prohibits them from using confidential information for private gain. *See Kim, supra* note 15, at 891 (noting that “the scope of the duty not to use entrusted information for personal gain may vary from one fiduciary context to another.”).

82. *Haas v. Henkel*, 216 U.S. 462, 472 (1910); *Peckham v. Henkel*, 216 U.S. 483, 484 (1910); *Price v. Henkel*, 216 U.S. 488, 488-89 (1910).

83. *United States v. Peltz*, 433 F.2d 48, 49 (2d Cir. 1970).

84. *United States v. Keane*, 522 F.2d 534, 534 (7th Cir. 1975).

85. *United States v. Bryan*, 58 F.3d 933, 936 (4th Cir. 1995).

86. *See Kim, supra* note 15, at 898 n.305.

87. 17 C.F.R. § 240.10b5-2(b)(2).

88. Nagy, *supra* note 12, at 1158.

is useful to begin with the foundational norms of the institution. In Congress's earliest days, were members expected to keep information confidential? Were those who violated that expectation subject to scorn? Was exploiting confidential information for personal gain regarded as unethical and outrageous conduct? The answer to all of those questions is "yes."

III. SAMUEL CHASE AND THE FLOUR SCANDAL

Samuel Chase was a rough and bumptious lawyer who yearned to live the life of a gentleman. The son of an Anglican priest (who was accused of misappropriating assets and who at one point ended up in debtors' prison), Chase, like his father, habitually lived beyond his means. According to his biographers, Chase inherited his father's "aggressiveness and impulsiveness" as well as his "extravagance and carelessness in financial matters."⁸⁹ As a young man, Chase received a gentlemen's education, but his modest circumstances left him feeling inferior to Maryland's wealthy social elite. Still, he was in the vanguard of a new kind of politician—a rabble-rouser, a patriot, and to some a demagogue, who could hurl political insults with anyone.⁹⁰ Chase appealed to and could mobilize what were commonly known as the "middling sort," small farmers, property owning tradesmen, shopkeepers, and artisans who became his power base.⁹¹ The ruddy-faced lawyer (nicknamed "Old Bacon Face")⁹² was economically one of them, but he desperately sought the kind of wealth that could make him a respectable gentleman. From a young age, Chase kept an eye out for opportunities that would earn him a quick return. While still a neophyte and none too prosperous attorney, he started speculating in land. As often as not his schemes and his desire to acquire all the trappings of the landed gentry left him in a precarious financial position.⁹³

89. HAW, *supra* note 29, at 7. Other biographical information on Chase (most of which focuses on his judicial career and the impeachment proceedings against him) can be found in ELSMERE, *supra* note 20, at 1-35; REHNQUIST, *supra* note 18, at 15-27, 42-113; Robert R. Bair & Robin D. Coblenz, *The Trials of Mr. Justice Samuel Chase*, 27 MD. L. REV. 365 (1967); Charles B. Blackmar, *On the Removal of Judges: The Impeachment Trial of Samuel Chase*, 48 J. AM. JUDICATURE SOC. 183 (1965); Richard B. Lillich, *The Chase Impeachment*, 4 AM. J. LEGAL HIST. 49 (1960); Adam A. Perlin, *The Impeachment of Samuel Chase: Redefining Judicial Independence*, 62 RUTGERS L. REV. 725 (2010).

90. Chase once referred to his critics as "despicable Pimps, and Tools of Power, emerged from Obscurity and Basking in proprietary Sunshine." Bair & Coblenz, *supra* note 89, at 368; *see also* Lillich, *supra* note 89, at 51 n.6.

91. *See* ELSMERE, *supra* note 20, at 2. For discussions of changes in Maryland politics during this time period, *see* RONALD HOFFMAN, *A SPIRIT OF DISSENSION: ECONOMICS, POLITICS, AND THE REVOLUTION IN MARYLAND* (1973).

92. Bair & Coblenz, *supra* note 89, at 386.

93. *See* HAW, *supra* note 29, at 10, 13-14, 16, 22-23, 30; ELSMERE, *supra* note 20, at

Chase was a “huge man with a stentorian voice.”⁹⁴ He was intemperate, had crude manners and little social polish, but he was also an early, vociferous opponent of the Stamp Act while serving his first term in the Maryland House of Delegates and later organized the colony’s opposition to the Boston Port Act.⁹⁵ He led the local chapter of the Sons of Liberty. Their demonstrations were so disruptive that the mayor of Annapolis complained that Chase was a “busy, restless incendiary, a ring-leader of mobs, a foul-mouthed and inflaming son of discord.”⁹⁶ Chase’s prominence and patriotism landed him a spot in Maryland’s delegation in the Continental Congress, where he advocated independence from Great Britain long before many in Maryland were ready for an irrevocable break.⁹⁷ In late June of 1776, he personally scoured Maryland to line up support for independence at a time when the outcome of the vote remained uncertain. On July 1, 1776, an express rider brought John Adams a note—Chase had succeeded; Maryland would vote yes.⁹⁸

After the outbreak of hostilities, Chase was intimately involved with virtually every phase of the war effort, including requisitioning supplies.⁹⁹ Many of the things the army needed were difficult to come by and expensive given the rampant inflation wracking the new nation.¹⁰⁰ Congress also proved to be an inept administrator when it came to equipping and supplying the army. Naturally, most congressional leaders placed the blame elsewhere. It was speculators and dishonorable members of the Commissary Department looking to profit from supplying the army who were causing the problems, or so many in Congress thought.¹⁰¹ Chase’s intimate familiarity with the army’s supply problems, along with his penchant for financial risk-taking,

30.

94. ELSMERE, *supra* note 20, at 74.

95. See HAW, *supra* note 29, at 17-21, 42-43; see also HOFFMAN, *supra* note 91, at 50-59; Bair & Coblenz, *supra* note 89, at 367-68.

96. Lillich, *supra* note 89, at 52 (internal quotations omitted).

97. See HAW, *supra* note 29, at 54-57; Bair & Coblenz, *supra* note 89, at 368. As late as May 21, 1776, Maryland representatives unanimously rejected independence. See HOFFMAN, *supra* note 91, at xiv.

98. CORNEL LENGYEL, *FOUR DAYS IN JULY: THE STORY BEHIND THE DECLARATION OF INDEPENDENCE* 46 (1958); HAW, *supra* note 29, at 66-68.

99. See ELSMERE, *supra* note 20, at 12.

100. See generally ANNE BEZANSON, *PRICES AND INFLATION DURING THE AMERICAN REVOLUTION: PENNSYLVANIA, 1770-1790*, at 10-23 (1951) (providing a detailed study of prices and inflation during the American Revolution).

101. See E. WAYNE CARP, *TO STARVE THE ARMY AT PLEASURE: CONTINENTAL ARMY ADMINISTRATION AND AMERICAN POLITICAL CULTURE, 1775-1783*, at 37-38, 48-49, 55, 101 (1984). Reports to Congress in 1777 detailed that several members of the Commissary Department sought to fraudulently increase prices for their own financial benefit. *Id.* at 37-38.

would soon land him in the middle of what was, before his impeachment from the Supreme Court, the worst scandal of his tumultuous career.

On July 23, 1778, Jeremiah Wadsworth, a Connecticut merchant then serving as Commissary General for the Continental Army, was at George Washington's headquarters in White Plains, New York.¹⁰² In the camp, a detachment of 2,000 soldiers under the command of the Marquis de Lafayette, was preparing to depart on a bold undertaking.¹⁰³ Earlier that month, Comte Charles-Henri d'Estaing's squadron of French ships had arrived in the United States, and Washington and the French leader plotted on where best to engage the British. New York was heavily occupied. The French ships had the British fleet trapped in the harbor, but unfortunately French vessels drew too much water, making it impossible for them to attack. Washington and d'Estaing, therefore, fixed on a different objective—capturing the harbor at Newport, Rhode Island, which was currently under the control of Sir Robert Pigot and several thousand British and Hessian soldiers. By the first week of August, 10,000 Americans (a mixture of Continental soldiers and militia) had massed to the north near Providence while the French ships entered Narragansett Bay from the south.¹⁰⁴ There was a lot riding on the plan. Washington hoped that this first joint operation would be an immediate success, striking a decisive blow against the British, and perhaps even prodding them to engage in serious peace negotiations.¹⁰⁵

Wadsworth's task was to make sure that the troops and their allies were adequately provisioned, but that was proving increasingly difficult. New England was experiencing a severe grain shortage and

102. Letter from Jeremiah Wadsworth to Ephraim Blaine (Jul. 23, 1778), in 23 PAPERS OF THE CONTINENTAL CONGRESS, MISCELLANEOUS LETTERS TO CONGRESS, 1775-1789, 513 [hereinafter PAPERS OF THE CONTINENTAL CONGRESS].

103. Lafayette's Memoir of 1779 and Letter from George Washington to Lafayette (July 22, 1778), in II LAFAYETTE IN THE AGE OF THE AMERICAN REVOLUTION: SELECTED LETTERS AND PAPERS, 1776-1790, 13, 110-11 (Stanley J. Idzerda, ed., 1979) [hereinafter LAFAYETTE].

104. SAMUEL B. GRIFFITH II, THE WAR FOR AMERICAN INDEPENDENCE: FROM 1760 TO THE SURRENDER AT YORKTOWN IN 1781, at 515-17, 519-22 (2002); ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION 1763-1789, at 429-432 (1982).

105. Unfortunately, this first attempt at American and French military cooperation failed. Rather than blockading Newport, d'Estaing chose instead to engage a contingent of British ships, a move that one historian characterized as "brave" but "excessively stupid." GRIFFITH, *supra* note 104, at 519. A strong gale severely damaged both fleets. The French promptly called off joint operations and sailed to Boston for repairs. With French naval support gone, the American militia began to desert in droves, severely reducing the American land forces. The remaining American troops withdrew and were lucky to escape Pigot's counterattack. *Id.* at 515-17, 519-22; JONATHAN R. DULL, THE FRENCH NAVY AND AMERICAN INDEPENDENCE: A STUDY OF ARMS AND DIPLOMACY 1774-1787, at 122-24 (1975).

an existing embargo prevented shipping wheat and flour from the middle or southern colonies.¹⁰⁶ Wadsworth wrote to Ephraim Blaine, Deputy Commissary General of Purchases, in Philadelphia with an urgent request—Blaine should immediately apply to Congress to have it requisition flour in Virginia for shipment to the troops in Rhode Island. “[N]o time should be lost,” Wadsworth warned.¹⁰⁷ A few days later, Congress received Wadsworth’s request and on July 31, 1778, referred it to a committee.¹⁰⁸

Chase was living reasonably well during the Revolutionary War, but his finances were tight. The war closed the courts and Chase’s political activities left his practice in shambles.¹⁰⁹ With most of his time devoted to politics, he had little time for law and just as little income. Chase was hardly alone in this predicament—many delegates sought relief from public office so they could pursue profit making ventures.¹¹⁰ Chase, however, took a different course. In June 1778, he formed a partnership with merchants John and Thomas Dorsey.¹¹¹ Thomas Dorsey was the Continental Army’s purchasing agent for Baltimore County.¹¹² The Dorseys were in charge of the day-to-day management of John Dorsey & Company, but Chase’s knowledge and influence in Maryland were indispensable. Among other activities, the partnership sold rum, cloth, and rope to the state and engaged in privateering raids against British ships.¹¹³

106. Lafayette complained of the shortages in several letters he wrote during the Rhode Island campaign. *See, e.g.*, Letter from Lafayette to George Washington (July 28, 1778), in LAFAYETTE, *supra* note 103, at 121. The Comte d’Estaing “express’d the greatest anxiety” to Lafayette about how poorly provisioned his fleet was. Letter from Lafayette to George Washington (Aug. 6, 1778), in LAFAYETTE, *supra* note 103, at 132-33. Washington had written Congress just a day earlier. He explained the French shortages and requested that Congress procure supplies in Philadelphia. Letter from George Washington to Henry Laurens (July 22, 1778), available at <http://founders.archives.gov/documents/Washington/03-16-02-0144>.

107. Letter from Jeremiah Wadsworth to Ephraim Blaine, in PAPERS OF THE CONTINENTAL CONGRESS, *supra* note 102, at 513. Blaine was a civilian who served as an intermediary between Congress and the Commissary Department to address precisely these kinds of shortages. CARP, *supra* note 101, at 23.

108. LDC, *supra* note 27, at 626 n.1. The committee consisted of Governour Morris, Robert Morris, and Samuel Holten. July 31, 1778, in 11 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1778, at 734.

109. HAW, *supra* note 29, at 103.

110. *See* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 287 (1991) (“But too often America’s political leaders . . . had to retire not to relaxation in the leisure and solitude of a rural retreat but to the making of money in the busyness and bustle of a city law practice.”); JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 234-38 (1979).

111. HAW, *supra* note 29, at 104.

112. *Id.*

113. *Samuel Chase, Censor Letters*, MD. GAZETTE, Sept. 27, 1781 [hereinafter *Chase*, Sept. 27, 1781], at 1; HAW, *supra* note 29, at 104-05.

Now, with Wadsworth's urgent request, a new business opportunity arose. In early August, shortly after Congress received the report from Wadsworth, Chase told John Dorsey and another man, John McClure, to start purchasing large amounts of wheat and flour.¹¹⁴ On August 24, Congress finally replied to Wadsworth.¹¹⁵ It approved his plan, but rather than limiting purchases to Virginia, Congress instructed him to purchase 20,000 barrels of flour in several states (including Maryland) for shipment to New England.¹¹⁶ Shortly thereafter, Chase wrote Dorsey, urging him to increase his purchases.¹¹⁷ Chase instructed Dorsey to "lose no time" and to buy more flour "as soon as possible."¹¹⁸ Dorsey & Company eventually bought 7,000 bushels of wheat and 400 barrels of flour.¹¹⁹ In addition, McClure purchased as much as 1,000 barrels of flour.¹²⁰

These were clearly not securities transactions and so the purchases were not insider trading. Nonetheless, Chase's scheme bears a striking similarity to *United States v. O'Hagan*¹²¹ and other modern misappropriation cases that arise in the context of hostile takeovers. In the modern case, the trader learns, either directly or indirectly from the acquirer, that the acquirer is about to announce its intention to purchase certain items (shares of the target corporation's stock) in the marketplace. The effect of that announcement is easily predictable—the price of those items will rise sharply. Before the announcement is made, the trader purchases the target's shares and benefits from the

114. JOHN CADWALADER, TO THE PUBLIC. IT MAY APPEAR SOMEWHAT EXTRAORDINARY 5-6 (1782) [hereinafter CADWALADER]. Although this appears to be the first recorded case in which Chase attempted to use congressional information for personal profit, he previously dispensed what would today be called political intelligence to help solidify his political position in Maryland. HOFFMAN, *supra* note 91, at 142-43. In 1775, Chase promised to keep Maryland politician and merchant Charles Ridgely apprised of congressional actions so that Ridgely could adjust his business activities accordingly. *Id.* It is not clear if other members of Congress ever learned about these communications or if they considered them improper. There are, however, other examples during the Revolutionary War of this kind of congressional tipping. See Edith B. Gelles, *A Virtuous Affair: The Correspondence between Abigail Adams and James Lovell*, 39 AM. Q. 252, 258 (1987) (describing how Lovell provided Adams with information she used in currency speculation); see also *infra* notes 271-76 and accompanying text. These instances suggest the possibility that contemporary standards tolerated tipping while condemning actual trading. See *infra* notes 271-76 and accompanying text.

115. Aug. 24, 1778, in JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 108, at 831.

116. *Id.* On August 26, Wadsworth was in Philadelphia and had still not received word on his request. He reiterated his desperate need for the supplies. Letter from Jeremiah Wadsworth to Henry Laurens (Aug. 26, 1778), in PAPERS OF THE CONTINENTAL CONGRESS, *supra* note 102, at 537.

117. Letter from Henry Laurens to William Smith, in LDC, *supra* note 27, at 626 n.1.

118. CADWALADER, *supra* note 114, at 6.

119. Letter from Henry Laurens to William Smith, in LDC, *supra* note 27, at 626 n.1.

120. CADWALADER, *supra* note 114, at 5-6.

121. See 521 U.S. at 642.

resulting price increase.¹²² In both cases, a tangible economic harm can flow from the trader's purchases. If the purchases are large enough they can increase the market price, potentially requiring the source of the information to pay more for the goods than they otherwise would if no trading had occurred. Similarly, the increased buying activity might itself tip off other market participants, again leading to increased market prices. The insider trader, having made his purchases, now has an incentive to disclose the confidential information as quickly as possible so that he can reap his profit quickly and avoid any unnecessary market risks. This potentially creates a substantial conflict with the source of the information, which may want to keep its plans confidential for as long as possible.¹²³

Wadsworth and Blaine faced all of these problems when they arrived in Maryland. It had been a bad growing year and flour was already in short supply.¹²⁴ Speculators had recently snapped up what little was available in the market and prices were rising rapidly.¹²⁵ Speculative activity was so high that farmers and millers refused to sell to Wadsworth. "[N]o Contracts can be made with the Farmer for wheat, or the miller for flower [sic], by the purchasing Commissaries," Wadsworth told Congress, "as a higher price is still expected and no publick [sic] officer thinks the States rich enough to keep pace with the Speculators."¹²⁶ Wadsworth was furious because merchants in Baltimore already seemed to know about the congressional resolution even though no public announcement had been made.¹²⁷ If the resolution had remained secret, Wadsworth reasoned, the provisions would have been easier and cheaper to purchase.¹²⁸ By September 22, Washington

122. The same situation could arise in contexts other than hostile takeovers. For example, in the classic case *Brophy v. Cities Services, Inc.*, the confidential secretary for a corporate director bought company shares when he learned that the company was about to announce a stock repurchase plan. 70 A.2d 5, 7 (Del. Ch. 1949).

123. See STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 600-01 (2002).

124. Blaine reported that the crop yields were a one-third of what they had been in recent years. *Memorial of Ephraim Blaine*, in 3 PAPERS OF THE CONTINENTAL CONGRESS, MISC. PAPERS, 1770-1789, 195.

125. Letter from Jeremiah Wadsworth to Henry Laurens, in PAPERS OF THE CONTINENTAL CONGRESS *supra* note 102, at 561-62 ("On my way to this place I found the usual Magazines were almost exhausted and but a non prospect of filling them again as every where there are Speculators purchasing wheat and Flower [sic]"); CADWALADER, *supra* note 114, at 23 (quoting Letter from Jeremiah Wadsworth to John Cadwalader (April 1782)).

126. Letter from Jeremiah Wadsworth to Henry Laurens, in PAPERS OF THE CONTINENTAL CONGRESS, *supra* note 102, at 561-62.

127. See ELSMERE, *supra* note 20, at 20.

128. HAW, *supra* note 29, at 106. These kinds of problems were not isolated to Baltimore. Speculators were quite active in the commodities markets in the period 1777 to 1781. Other government agents also reported that farmers would not sell them grain if they believed the market price was increasing. CARP, *supra* note 101, at 64-65. Like

complained that the provisions for the French fleet had still not arrived.¹²⁹

Less than two weeks later, a congressional committee recommended that Congress authorize the seizure of wheat and flour from anyone who appeared to have engrossed (*i.e.*, monopolized) large amounts of those commodities.¹³⁰ The price of wheat in Baltimore soared in response. On October 24, 1778, after Congress authorized grain seizures, Dorsey & Company sold its commodities to the Continental Army for a substantial profit.¹³¹

IV. DID CHASE VIOLATE CONGRESSIONAL NORMS? CIVIC REPUBLICANISM DURING THE REVOLUTIONARY WAR

It did not take long for members of Congress to suspect Chase's role in the incident. Wadsworth reported that "it was publicly and freely said" in Baltimore that Chase was purchasing flour on speculation and that Wadsworth's mission "was known to everybody before [he] arriv[ed]."¹³² Chase's first reaction was to deny that he had leaked the information, a rather clear indication that doing so would have been considered improper. Chase explained to Henry Laurens, the president of the Continental Congress, that he had written a letter to the governor of Maryland detailing Congress's purchasing plans, but a local merchant and former congressional delegate named William Smith opened the letter and disclosed its contents to speculators.¹³³ When Laurens raised the matter with Smith, Smith vehemently denied the allegation.¹³⁴ His response reveals his understanding of the confidential nature of such congressional information and the breach that theft of the information entailed. Laurens had not revealed

Wadsworth, those agents recognized the importance of secrecy in allowing the government to buy necessary supplies at reasonable prices. *Id.* at 107. Whether Wadsworth would have found similar conditions in Baltimore even if Chase and his partners had not cornered the market is impossible to determine. Chase's activities, however, surely did not make it any easier for Wadsworth to acquire the necessary supplies at a reasonable price.

129. Letter from George Washington to Nathanael Greene (Sept. 22, 1778), FOUNDERS ONLINE, NATIONAL ARCHIVES, <http://founders.archives.gov/documents/washington/03-17-02-0077>.

130. HAW, *supra* note 29, at 106.

131. LDC, *supra* note 27, at 626 n.1.

132. See CADWALADER, *supra* note 114, at 23 (quoting Letter from Jeremiah Wadsworth to John Cadwalader (April 1782)).

133. Letter from Henry Laurens to William Smith (Sept. 12, 1778), *in* LDC, *supra* note 27, at 626.

134. See *id.* "I am astonished," Smith wrote Laurens, "that any Gentleman . . . should insinuate or assert, That I ever oppened [sic] any letter Addressed to the Governor & Council [sic], on the subject refered [sic] to, or even on any other . . . I do most solemnly declare, that, I never saw or heard of any letter to the Governor or Council [sic] or Any member of Council, giving information, respecting exportation of flour to the eastern states." *Id.*

Chase's name to Smith, who demanded information on his accuser.

If such a declaration, so injurious to my character has been made in a public manner, I must beg, My Dear Sir that you will read . . . this letter in Congress. Otherwise if the declaration has been made in private to your Honor I would only request youll shew [sic] the Gent. My letter & if he will be kind enough to write me on the Subject, I will give him all the satisfaction in my power. For I do declare I do not even yet know with certainty to whom I am indebted for this groundless slander.¹³⁵

Smith's language was a clear prelude to a duel, the culturally appropriate response for a gentlemen accused of dishonorable conduct.¹³⁶ When Smith later wrote directly to Chase, Chase denied that he had ever accused Smith.¹³⁷

The Smith-Laurens exchange shows that theft of confidential information for personal gain was considered wrongful. Was the same true if a member of Congress was the culprit? Around the same time, delegate Henry Marchant confronted the Maryland delegation, accusing one of them of disclosing Congress's secret resolution.¹³⁸ The usually combative Chase reportedly sat silently while the other delegates denied that they had disclosed the information.¹³⁹ When Wadsworth returned to Philadelphia, he found no one willing to defend Chase's conduct. According to Wadsworth, Laurens and several other delegates were "well convinced[] that Mr. Chase had made an ill use of the knowledge he had obtained by his seat in congress, and that he had divulged the resolution, which should have been kept secret."¹⁴⁰ Wadsworth thought Chase's actions were "unworthy and degrading to a man in his station."¹⁴¹

These comments suggest that Chase's conduct was considered wrongful, but why was that so? As always, it is important not to impose twenty-first century conceptions on attitudes that existed 230

135. *Id.*

136. See JOANNE FREEMAN, *AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC* 174-77 (2001); see also KWAME ANTHONY APPIAH, *THE HONOR CODE: HOW MORAL REVOLUTIONS HAPPEN* 3-51 (2010). Laurens claimed later that he never believed Chase's allegation. Laurens wrote Smith: "[F]rom the first moment I heard the intimation alluded to, I treated it not only with discredit, but indignation, and expressed my feelings in the very instant to a particular friend. I know, said I, Mr. Smith's honor and his discretion are never so unguarded, as this imputation seems to imply." LDC, *supra* note 27, at 626 n.1.

137. Samuel Chase, *Censor Letters*, MD. GAZETTE, Aug. 23, 1781, at 1 [hereinafter Chase, Aug. 23, 1781].

138. HAW, *supra* note 29, at 106.

139. *Id.*; Bair & Coblentz, *supra* note 89, at 369.

140. CADWALADER, *supra* note 114, at 23 (quoting Jeremiah Wadsworth to John Cadwalader (April 1782)).

141. *Id.* at 24.

years ago. Was there something in particular about the cultural assumptions and norms in the late eighteenth century that made Chase's conduct improper? Wadsworth's reference to Chase's "station" certainly suggests such a possibility.¹⁴² Were those norms sufficiently at variance with contemporary norms that the any censure of Chase, while interesting, is largely irrelevant in evaluating the propriety of congressional insider trading today?

Chase's scheme was problematic on a number of levels. War profiteering, especially coming, as it did, from a firebrand patriot, was particularly reprehensible. In the conspiratorial mindset of the time,¹⁴³ government officials were hyper-vigilant for any signs that corruption from the newly emerging "monied interest" was infecting the government.¹⁴⁴ Chase's actions came against a backdrop in which members of Congress saw corruption everywhere in the ranks of the Commissary Department—it was, they thought, the only explanation for the army's chronic supply problems.¹⁴⁵ Often it was an illusion, and much of the blame fell on Congress's woeful inefficiencies.¹⁴⁶ Still, the fear in Congress of corruption in supplying the army made profiteering by one of its own members particularly disturbing.

Chase's speculative vehicle—cornering flour—only made matters worse. Engrossing commodities had been illegal or at the very least immoral for centuries in Britain¹⁴⁷ and had been a crime in some of

142. *Id.*

143. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 123 (1992); CARP, *supra* note 101, at 127 (noting that any attempt to profit from the war, even by private individuals, was considered immoral).

144. BAILYN, *supra* note 143, at 123.

145. See CARP, *supra* note 101, at 102.

146. *Id.* at 101-35.

147. In England in the 1500s, Chase's scheme—buying flour in a market and then reselling it to purchasers in the same market would have been classified as "regrating." STUART BANNER, *ANGLO-AMERICAN SECURITIES REGULATION: CULTURAL AND POLITICAL ROOTS, 1690-1860* 15 (1998). Although it appears to have taken on the broader meaning of monopolization, "engrossing" technically referred to buying grain before the harvest for the purpose of reselling it afterward. *Id.* However characterized, Chase's actions were unlawful under the common law and were statutory crimes by the mid-sixteenth century. See *id.*; see generally Wendell Herbruck, *Forestalling, Regrating and Engrossing*, 27 MICH. L. REV. 365 (1929) (discussing statutory enactments against forestalling, regrating, and engrossing). "The unpardonable sin," wrote economic historian R. H. Tawney, "is that of the speculator or the middleman, who snatches private gain by the exploitation of public necessities." R.H. TAWNEY, *RELIGION AND THE RISE OF CAPITALISM* 36 (1962). Engrossers were "no better than common criminals." *Id.* at 55 (internal citation omitted). Indeed, engrossing was not merely a regulatory crime, but was *mala in se*—a crime, like fraud, that was considered intrinsically wrong or evil. Herbert Hovenkamp, *The Law of Vertical Integration and the Business Firm: 1880-1960*, 95 IOWA L. REV. 863, 878 (2010).

Contemporary commentators obviously did not share modern conceptions of forward and future contracts as useful vehicles for shifting risk to those who could bear it more efficiently. Consequently, food speculation was widely criticized as raising prices with

the colonies for more than 100 years.¹⁴⁸ With wartime shortages, the practice flourished, renewing public criticism and increasing enforcement actions to curb it.¹⁴⁹ Indeed, George Washington frequently derided the practice and the overall decline in morality it evinced.¹⁵⁰ “Speculation, Peculation, Engrossing, forestalling with all their concomitants,” he wrote less than a year after Chase’s actions, “afford too many melancholy proofs of the decay of public virtue.”¹⁵¹

Chase’s critics raised both war profiteering and engrossing as explanations for why Chase had behaved dishonorably.¹⁵² Chase was the “prince of speculators and monopolizers” and his use of his “official knowledge as a member of congress” to engage in those activities endangered “obtaining the necessary supplies for the army and navy.”¹⁵³ But, as this and Wadsworth’s comments suggested, it was the fact that a public official was using his privileged access to information that

no offsetting benefits. See BANNER, *supra*, at 17-19. Despite our more capacious notions of risk bearing, the rhetoric used in those times, which focused on the ability of speculators to create artificial shortages and to profit on the misfortunes of others, is remarkably similar to current market critiques. See *id.* Despite wide condemnation of engrossers for their “wicked and unsatiable greediness” and their preference for “private gain above the public good,” food speculation was apparently widely practiced, perhaps because, as Banner speculates, it was performing its modern risk-shifting function even though contemporary observers could not see its utility. *Id.* at 18 (internal citation omitted).

148. BANNER, *supra* note 147, at 123. In 1718, Maryland even passed a law prohibiting short-term speculation in commodities that looks remarkably like section 16(b) of the Securities Exchange Act of 1934, which prohibits “short-swing” profits and which was the first federal law aimed at insider trading by corporate officers and directors. 15 U.S.C. § 78p (2006); Jesse M. Fried, *Reducing the Profitability of Corporate Insider Trading Through Pretrading Disclosure*, 71 S. CAL. L. REV. 303, 308 n.18 (1998). Under section 16(b), directors, officers, and individuals who own ten percent or more of a corporation’s equity securities, are required to disgorge any profit from purchases and sales or sales and purchases made within a six-month period. See *id.* In order to curb commodities speculation, which was “mischievous and prejudicial” to the colony’s residents, the Maryland statute prohibited the purchase of goods or merchandise with the “Intent to sell the same again within the space of six Months.” BANNER, *supra* note 147, at 123 (quoting THE LAWS OF THE PROVINCE OF MARYLAND 36 (John D. Cushing ed., 1718)).

149. See BANNER, *supra* note 147, at 131.

150. See *id.* at 131-32.

151. Letter from George Washington to James Warren (Mar. 31, 1779), in 14 THE WRITINGS OF GEORGE WASHINGTON 312 (John C. Fitzpatrick ed., 1931-41). Washington expressed severe disappointment in that same letter between the rhetoric of public virtue thought necessary for success in a republic and the reality of human behavior during the war. “Cannot our common Country Am[erica] possess virtue enough to disappoint them?” he wrote. *Id.* “Is the paltry consideration of a little dirty pelf to individuals to be placed in competition with the essential rights and liberties of the present generation, and of Millions yet unborn? Shall a few designing men for their own aggrandizement, and to gratify their own avarice, overset the goodly fabric we have been rearing at the expence [sic] of so much time, blood, and treasure? and shall we at last become the victims of our own abominable lust of gain? Forbid it heaven!” *Id.*

152. See *To Samuel Chase, Esquire*, MD. GAZETTE, February 14, 1782, at 333.

153. *Id.*

made Chase's actions particularly unsavory. At least that was the way Alexander Hamilton saw it.

A. Alexander Hamilton and the "Decency and Respect" of the Government

In the summer and fall of 1778, Alexander Hamilton, the future architect of the United States financial system, was serving as one of Washington's aides-de-camp.¹⁵⁴ He was just twenty-three, but Lieutenant Colonel Hamilton had already garnered a reputation for brilliance, and he and Washington were developing what would prove to be a close and enduring bond.¹⁵⁵ Working with the general, Hamilton had unfettered access to confidential military information, helped to organize the Newport campaign and, sometime that fall, learned from Henry Laurens and Jeremiah Wadsworth about Chase's actions.¹⁵⁶ The scheme infuriated Hamilton, who had seen the piteous state of the army in Valley Forge earlier that year and who had written numerous pleas to Congress for additional supplies.¹⁵⁷ Hamilton complained that Congress and the Board of War were maddeningly incompetent when it came to provisioning the army,¹⁵⁸ but Chase's scheme was far more serious. As his later fatal duel with Aaron Burr would demonstrate all too clearly, Hamilton had a particularly acute sense of honor.¹⁵⁹ It was that sense of honor, and his willingness to attack political opponents

154. CHERNOW, *supra* note 24, at 83-125; see ROBERT W. WRIGHT & DAVID J. COWEN, FINANCIAL FOUNDING FATHERS: THE MEN WHO MADE AMERICA RICH 10-37 (2006).

155. CHERNOW, *supra* note 24, at 83-125.

156. See Letter from Alexander Hamilton to Patrick Dennis (July 16, 1778), in 1 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 25, at 524-25; Letter from Alexander Hamilton to George Washington (July 20, 1778), in 1 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 25, at 525-26; Letter from Alexander Hamilton to George Washington (July 23, 1778), in 1 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 25, at 527-28; Letter from George Washington to Continental Congress (July 22, 1778), in PAPERS OF THE CONTINENTAL CONGRESS, *supra* note 102 (Hamilton "was well informed of our situation, and of my sentiments on every point"); see also CHERNOW, *supra* note 24, at 91 (Washington called Hamilton his "principal and most confidential aide") (quoting JAMES THOMAS FLEXNER, THE YOUNG HAMILTON 143 (1978)).

157. In one letter in Hamilton's hand, Washington complained that the army's commissary department was "more deplorable than you can easily imagine." Letter from George Washington to William Livingston (Feb. 16, 1779), in 13 THE PAPERS OF GEORGE WASHINGTON 562 (Philander D. Chase et al. eds., 1985). In another, Washington attributed the supply problems to negligence and mismanagement, not malfeasance. Letter from George Washington to Patrick Henry (Feb. 19, 1778), in 13 THE PAPERS OF GEORGE WASHINGTON 562 (Philander D. Chase et al. eds., 1985).

158. See Letter from Alexander Hamilton to George Clinton (Mar. 12, 1778), in 1 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 25, at 439-42 ("[The] most melancholy truth [about the war was that] . . . the weakness of our councils will, in all probability, ruin us. Arrangements on which, the existence of the army depends, and almost the possibility of another campaign, are delayed in a most astonishing manner; and I doubt whether they will be adopted at all.").

159. CHERNOW, *supra* note 24, at 714.

in the press, that provided Chase's first public denunciation.

In October and November, 1778, Hamilton wrote three slashing letters in the *New-York Journal, and the General Advertiser*.¹⁶⁰ In his cover letter to the publisher, Hamilton explained his purpose. "There are abuses in the State," Hamilton explained, "which demand an immediate remedy. Important political characters must be brought upon the stage, and animadverted upon with freedom."¹⁶¹ For Hamilton, deterring future "corrupt" conduct required exposing and publicly shaming Chase. This kind of public rebuke was devastating to a man in Chase's position. As historian Joanne Freeman noted when she wrote about eighteenth century affairs of honor: "Dishonor in print . . . did more than inflict pain in the present; it damned a man's reputation for all time."¹⁶²

The letters were, however, not just about dishonoring Chase. Hamilton wanted to "preserve the decency and respect" due the government.¹⁶³ In Hamilton's view, Chase's scheme injured the government not only because it was forced to pay higher prices for flour than it otherwise would, but because it brought the government into disrepute. Chase made it much harder for citizens to believe that members of Congress were acting in their best interests, rather than simply trying to line their own pockets. His scheme was a breach of trust because he had wounded the honor and dignity of the fledgling government.¹⁶⁴

Hamilton's claim about the reputational harm to the government is directly linked to modern arguments about the harm that potentially flows from congressional insider trading. Just like Hamilton, modern commentators believe that such trading is improper as a normative matter because it "undermines the public's trust and confidence in the government."¹⁶⁵ Reputational harm to the corporation has also been offered as a justification for the ban on more conventional forms of insider trading.¹⁶⁶ Although it is not necessary to show harm

160. Alexander Hamilton, *Publius Letter I*, in 1 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 25, at 562-63; ALEXANDER HAMILTON, *Publius Letter II*, in 1 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 25, at 567-70; ALEXANDER HAMILTON, *Publius Letter III*, in 1 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 25, at 580-82.

161. Alexander Hamilton, *Publius Letter I*, in 1 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 25, at 562-63.

162. FREEMAN, *supra* note 136, at 158.

163. Alexander Hamilton, *Publius Letter II*, in 1 THE PAPERS OF ALEXANDER HAMILTON *supra* note 25, at 562. Earlier that year, Hamilton had expressed the same concern in negotiating a prisoner exchange with the British. He worried that if he did not negotiate in good faith, it would help to "ruin our national character." CHERNOW, *supra* note 24, at 109.

164. *Cf.* CARP, *supra* note 101, at 101 ("The suspicion of corruption acted as a corrosive on the social order, ate away at the moral legitimacy of the army and Congress, and undermined Americans' faith in their leaders.").

165. Nagy, *supra* note 12, at 1133.

166. *Diamond v. Oreamuno*, 248 N.E.2d 910, 912 (N.Y. 1969).

to the principal in order to obtain an accounting from an agent who has used the principal's confidential information to earn a personal profit,¹⁶⁷ the New York Court of Appeals in *Diamond v. Oreamuno* held that insider trading might result in reputational harm to the corporation.¹⁶⁸ That theory is controversial, with many commentators suggesting that reputational harm to the corporation is far too speculative a basis upon which to impose potential criminal liability for insider trading.¹⁶⁹ But even those critics agree that the reputational harm to the government is far clearer and provides a sufficient normative justification for banning congressional insider trading.¹⁷⁰ Thus, although over two centuries separate Chase's scheme from the modern debate over congressional insider trading, the normative justifications for considering the conduct improper are identical.

In his published letters, Hamilton used the pseudonym "Publius,"¹⁷¹ the same name he would later use—along with James Madison and John Jay—in *The Federalist Papers*.¹⁷² Pen names were intended to have a symbolic resonance with contemporary readers, and Publius was no exception. Hamilton was using the name of Publius Valerius Publicola ("friend of the people"),¹⁷³ one of four Roman aristocrats who overthrew the monarchy and in its place established the Roman Republic. In Plutarch's *Lives* (a book widely read among eighteenth century political leaders and a particular favorite of Hamilton's),¹⁷⁴ Publius was praised for speaking "boldly on the side of justice" and for his efforts in thwarting a plot to destroy the nascent republic.¹⁷⁵ The choice also contained a pointed jab at the grasping

167. See *Brophy v. Cities Serv. Co.*, 70 A.2d 5, 7-8 (Del. Ch. 1949); see also Kahn v. Kohlberg Kravis Roberts & Co., L.P., 23 A.2d 831, 837-38 (Del. 2011); RESTATEMENT (SECOND) OF AGENCY § 388 cmt. c (1958).

168. *Diamond*, 248 N.E.2d at 912 ("Although the corporation may have little concern with the day-to-day transactions in its shares, it has a great interest in maintaining a reputation of integrity, an image of probity, for its management and in insuring the continued public acceptance and marketability of its stock. When officers and directors abuse their position in order to gain personal profits, the effect may be to cast a cloud on the corporation's name, injure stockholder relations and undermine public regard for the corporation's securities.").

169. See, e.g., *Freeman v. Decio*, 584 F.2d 186, 194 (7th Cir. 1978) (noting that damage to the corporation was speculative); BAINBRIDGE, *supra* note 123, at 602 (dismissing this justification for imposing insider trading liability due to concerns over whether any real shareholder injury exists).

170. See *supra* Section II.

171. ALBERT FURTWANGLER, *THE AUTHORITY OF PUBLIUS: A READING OF THE FEDERALIST PAPERS* 51 (1984).

172. ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, *THE FEDERALIST PAPERS* (Lawrence Goldman ed., Oxford Univ. Press 2008) (1787).

173. See FURTWANGLER, *supra* note 171, at 51.

174. See BAILYN, *supra* note 143, at 23-25; CHERNOW, *supra* note 24, at 111-12.

175. PLUTARCH, *1 LIVES OF THE NOBLE GRECIANS AND ROMANS* (Arthur Hugh Clough

Chase. The wealthy Publius lived in a splendid house overlooking the Forum.¹⁷⁶ Learning that Romans were envious and resentful of his home, he hired workmen to tear it down to its foundations.¹⁷⁷ The Romans admired his magnanimity and built him a new house of “more moderate proportions.”¹⁷⁸ Here was a man, Hamilton implied, who would, unlike Chase, abjure luxury for the good of the country.

To fully appreciate Hamilton’s critique and the general reaction to Chase’s “corrupt” actions, it is crucial to understand that Roman history was at once an inspiration, a model, and a cautionary tale for the leaders who were at the heart of the struggle with Great Britain. Americans at the time placed an enormous importance on “disinterested virtue,” a concept they derived from an idealized version of the Roman Republic as well as from the writings of Machiavelli, Montesquieu, and England’s seventeenth century “commonwealth men” and radical Whigs.¹⁷⁹ American writings demonstrated a nostalgic and naïve belief in an earlier age “full of virtue: simplicity, patriotism, integrity, a love of justice and of liberty.”¹⁸⁰ The obsession with virtue, the widely shared belief that Great Britain had fallen into a state of pervasive corruption, and the expectation that the new republic needed to avoid the same corruption if it were to endure were “neither manipulated propaganda nor borrowed empty abstractions, but ideas with real personal and social significance for those who used them.”¹⁸¹ Indeed, historian Gordon Wood has argued that “[n]o generation in American history has ever been so self-conscious about the moral and social values necessary for public leadership.”¹⁸² For Wood, “[t]he republican revolution was the greatest utopian movement in American

ed., John Dryden trans., 1992), available at <http://www.gutenberg.org/files/14033/14033-h/14033-h.htm>. The name, perhaps, also contained a hint of Hamilton’s ambition because in an ensuing election, Publius “received the due reward of his patriotism and was gloriously made consul.” *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. GERALD STOURZH, ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT 63-70 (1970).

180. BAILYN, *supra* note 143, at 25; see also J.G.A. Pocock, *Virtue and Commerce in the Eighteenth Century*, 3 J. INTERDISC. HIST. 119, 127 (1972) (the “intellectual scene [was] dominated to the point of obsessiveness by concepts of virtue, patriotism, and corruption . . .”); Robert E. Shalhope, *Republicanism and Early American Historiography*, 39 WILLIAM & MARY Q. 334, 335 (1982) (“Public virtue, as the essential prerequisite for good government, was all-important.”).

181. See GORDON S. WOOD, THE IDEA OF AMERICA 52 (2011) [hereinafter WOOD, THE IDEA OF AMERICA].

182. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION, *supra* note 110, at 197. At the time, public virtue (the actions of a governmental official in office) was considered more important than private virtue, although those attitudes would soon begin to change. See Jacob Katz Cogan, *The Reynolds Affair and the Politics of Character*, 16 J. EARLY REPUBLIC 389, 394-95 (1996) (“For these men, public service depended on public

history . . . [Its leaders] sought to construct a society and government based on virtue and disinterested public leadership and to set in motion a moral movement that would eventually be felt around the globe.”¹⁸³

Talk of virtue and its critical importance in republican governments was everywhere in the writings of the revolutionary generation. Thomas Paine warned in *Common Sense* that “when republican virtues fail, slavery ensues.”¹⁸⁴ For John Adams, virtue was absolutely foundational for erecting a government designed to produce the greatest possible happiness among the greatest portion of the population. For a republic to succeed, “[t]here must be a possitive [sic] Passion for the public good” that is “Superiour to all private Passions. Men must be ready, they must pride themselves, and be happy to sacrifice their private Pleasures, Passions, and Interests, nay their private Friendships and dearest Connections, when they Stand in Competition with the Rights of society.”¹⁸⁵ What could be a clearer breach of this obligation to prefer the public over the private than Chase’s misuse of confidential information?

America, after all, was supposed to be different from corrupt Britain. It was easy for Americans, at least in the years before Chase and other instances of war profiteering, to believe in their own exceptionalism. In 1765, John Adams wrote that “America was designed by Providence for the Theatre on which Man was to make his true figure, on which science, Virtue, Liberty, Happiness and Glory were to exist in Peace.”¹⁸⁶ Charles Carroll, writing in the same year, thought that corruption might one day infect America, but predicted that it was still far off into the future. And so he advised a friend to sell his estate in England and to:

virtue—the ability to resist the common passion of self-interest and the corrupt influences of others.”).

183. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION*, *supra* note 110, at 229. Indeed, it was not just members of Congress, but ordinary staff officers in the ranks of the commissary who frequently invoked preserving their honor as the motivating force behind their actions. *See* CARP, *supra* note 101, at 155-67.

184. THOMAS PAINE, *COMMON SENSE* (1776), *reprinted in* 1 *THE FOUNDERS’ CONSTITUTION* 103, 107 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter 1 *THE FOUNDERS’ CONSTITUTION*].

185. Letter from John Adams to Mercy Otis Warren (Apr. 16, 1776), *available at* www.masshist.org/publications/apde2/view?id=PJA04d058. Elsewhere, Adams also decried the decline of British virtue, noting that: “Liberty can no more exist without virtue and independence, than the body can live and move without a soul.” John Adams, *Novanglus No. III*, *BOS. GAZETTE* (1774), *reprinted in* 4 *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES* 29, 31 (Charles C. Little & James Brown eds., 1851).

186. Diary Entry of John Adams (Dec. 30, 1765), *available at* www.masshist.org/digitaladams/archive/doc?id=D12.

purchase lands in this province where liberty will maintain her empire till a dissoluteness of morals, luxury, and venality shall have prepared the degenerate sons of some future age to prefer their own mean lucre, the bribes, and the smiles of corruption and arbitrary ministers to patriotism, to glory, and to the public weal. No doubt the same causes will produce the same effects, and a period is already set to the reign of American freedom; but that fatal time seems to be at a great distance. The present generation at least, and I hope many succeeding ones, in spite of a corrupt Parliament, will enjoy the blessings and the sweets of liberty.¹⁸⁷

Ten years later, Benjamin Franklin, then in Great Britain, compared “the extreme corruption prevalent among all orders of men in this old rotten state” with “the glorious public virtue so predominant in our rising country”¹⁸⁸

They would, the revolutionary leaders thought, need all of that virtue if they were to survive. Governmental corruption was an existential threat to republican societies, which by their nature were incredibly fragile polities.¹⁸⁹ From Montesquieu, the revolutionaries learned that successful republics tended to be small in size and largely homogenous, creating even more danger for the far-flung and diverse United States.¹⁹⁰ Given the fragility of republics and the widespread view that no republic on the scale of the United States had ever succeeded, it was not surprising that citizens would be hyper-vigilant for signs of governmental wrongdoing.

The ideal public servant embodied all the attributes of disinterested civic republicanism. Indeed, virtuous civil servants were supposed to serve as a model for all citizens, who in time would conform their behavior to those ideals.¹⁹¹ The key to public virtue was the willingness to forego private desires for the public interest.¹⁹² Unlike the

187. BAILYN, *supra* note 143, at 91 (quoting a 1765 letter by Charles Carroll of Carrollton for which no citation is given). Before the flour scandal, Chase and Carroll were political allies. HOFFMAN, *supra* note 91, at 212. For more on Carroll’s reaction to the flour scandal, *see infra* notes 219-231 and accompanying text.

188. BAILYN, *supra* note 143, at 136 (quoting Letter from Benjamin Franklin to Joseph Galloway (Feb. 25, 1775)).

189. *See* WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION, *supra* note 110, at 105 (“Without virtue and self-sacrifice, republics would fall apart.”).

190. *See* BAILYN, *supra* note 143, at 281-82, 343-45.

191. *See* WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION, *supra* note 110, at 190.

192. *See* PAULINE MAIER, THE OLD REVOLUTIONARIES: POLITICAL LIVES IN THE AGE OF SAMUEL ADAMS 32-37 (1990); Shalhope, *supra* note 180, at 335 (the “exclusive purpose of republican government” was to “further[] the public good” which “required the constant sacrifice of individual interests to the greater needs of the whole . . .”).

courtiers of Europe, who were driven by avarice, gentlemen were supposed to serve in government without any compensation.¹⁹³ Such service was thought to be a personal sacrifice and an obligation that the elite owed due to their privileged positions and education.¹⁹⁴ For Washington, public service was supposed to entail “[e]xpense and trouble without the least prospect of gain.”¹⁹⁵ The ideal republican legislator was a man of leisure—someone who did not work and could therefore engage in government service with complete disinterest. Virtue required that government officials be free “from the petty interests of the marketplace.”¹⁹⁶

It was from this vantage—of a dominant and thoroughgoing civic republicanism as an essential attribute and necessary condition for the successful American experiment—from which Hamilton characterized Chase’s conduct as the kind of “prostitution” which should be “immortalised in infamy.”¹⁹⁷ Hamilton began his first letter with a critique of the evils of war profiteering in general, and he did not limit his condemnation to those in public positions. The individuals who “carried the spirit of monopoly and extortion to an excess” were principally responsible for the exorbitant prices gripping the country, and their activities reflected poorly on the potential longevity of the United States. Mirroring the prevailing ethos of civic republicanism, Hamilton wrote that “[w]hen avarice takes the lead in a State, it is commonly the forerunner of its fall. How shocking [it is] to discover among ourselves, even at this early period, the strongest symptoms of this fatal disease.”¹⁹⁸

War profiteers were worthy of “contempt,” Hamilton wrote, but when Chase used confidential information garnered through his position as a member of Congress for his own personal gain, it constituted a far worse betrayal of trust.¹⁹⁹

But when a man, appointed to be the guardian of the State, and the depository of the happiness and morals of the people—*forgetful of the*

193. See WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION, *supra* note 110, at 83.

194. *Id.* Chase at least seemed to share the view of governmental service as a strictly elite endeavor, even if he also saw it as a profitable one. When Maryland drafted its state constitution after independence, Chase was part of a group of delegates who advocated high property qualifications for holding office. HOFFMAN, *supra* note 91, at 176.

195. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION, *supra* note 110, at 83 (internal quotation marks omitted).

196. WOOD, THE IDEA OF AMERICA, *supra* note 181, at 68.

197. ALEXANDER HAMILTON, *Publius Letter II*, in 1 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 25, at 567-70; see Shalhope, *supra* note 180, at 335 (“[Many] historians now commonly recognize that republicanism represented a secular faith for Americans.”).

198. ALEXANDER HAMILTON, *Publius Letter I*, in 1 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 31, at 562-63.

199. *See id.*

*solemn relation, in which he stands—descends to the dishonest artifices of a mercantile projector, and sacrifices his conscience and his trust to pecuniary motives; there is no strain of abhorrence, of which the human mind is capable, nor punishment, the vengeance of the people can inflict, which may not be applied to him, with justice. If it should have happened that a Member of C[ongre]ss has been this degenerate character, and has been known to turn the knowledge of secrets to which his office gave him access, to the purposes of private profit . . . he ought to feel the utmost rigor of public resentment, and be detested as a traitor of the worst and most dangerous kind.*²⁰⁰

Government officials, in other words, were held to a higher standard than members of the general public. They had a duty not to use confidential information for private gain, a duty that was essential to preserving the fledgling nation. In a world in which all citizens, but especially public officials, were supposed to act with honor and virtue, Chase's conduct was treasonous. Chase's lot for "engaging in a traffic infamous in itself, repugnant to your station, and ruinous to your country" was "to have the peculiar privilege of being universally despised."²⁰¹ In short, in what seemed to be the first case of a member of Congress taking information for personal gain, contemporaries deemed the action as a violation of a duty owed both to the American people and to the United States government, precisely the same duty the STOCK Act purported for the first time to enshrine into law 234 years later.

Despite his behavior, even Chase professed to adhere to the tenets of civic republicanism that Hamilton now accused him of violating. In a letter to James Duane in 1775, Chase had even expressed the kind of jaundiced critique of Parliament that Hamilton now leveled at Chase.

[W]hen I reflect on the enormous Influence of the Crown, [and] the System of Corruption introduced as the Art of Government . . . I have not the least Dawn of Hope in the Justice, Humanity, Wisdom or Virtue of the British Nation. I consider them as one of the most abandon[ed] [and] wicked People under the Sun.²⁰²

Chase condemned members of Parliament "who as openly traffic their Integrity & Honor" and who "no longer regard even the Appearance of Virtue."²⁰³ To underscore that point, Chase helped to re-draft Maryland's constitution, which provided, among other things: "That all persons invested with the legislative or executive powers of government *are the trustees of the public*, and, as such, accountable for their

200. *Id.* (emphasis added).

201. ALEXANDER HAMILTON, *Publius Letter II*, in 1 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 25, at 569.

202. Letter from Samuel Chase to James Duane (Feb. 5, 1775), in LDC, *supra* note 27, at 305.

203. *Id.*

conduct”²⁰⁴

Perhaps it was that hypocrisy that led Hamilton in his second Publius letter to level what was mostly an *ad hominem* attack on Chase, although he also provided a bit more factual detail about Chase’s scheme.²⁰⁵ For example, according to Hamilton, Chase had, through “intrigues and studied delays” protracted congressional decision-making on Wadsworth’s request in order to give his business partners time to corner the market.²⁰⁶ Hamilton also charged that Chase’s purchases had doubled the price the government was forced to pay for flour²⁰⁷—a tangible economic injury that only made Chase’s breach of trust worse.

In his third letter, however, Hamilton expanded on the notion that members of Congress owed a duty to the citizens of the country, a duty which precluded them from using their office for financial gain. “The station of a member of C[ongres]s,” Hamilton wrote, “is the most illustrious and important of any I am able to conceive.”²⁰⁸

A man of virtue and ability, dignified with so precious a trust, would rejoice that fortune had given him birth at a time, and placed him in circumstances so favourable for promoting human happiness. He would esteem it not more the duty, than the privilege and ornament of his office, to do good to mankind; from this commanding eminence, he would look down with contempt upon every mean or interested pursuit.²⁰⁹

Invoking the then prevalent hostility toward any kind of financial speculation, Hamilton observed that an honorable member of Congress

would not allow his attention to be diverted . . . to intrigue for personal connections, to confirm his own influence; nor would [he] be able to reconcile it, either to the delicacy of his honour, or to the dignity of his pride, to confound in the same person the representative of the Commonwealth, and the little member of the trading company.²¹⁰

Hamilton’s third letter closed with a prediction that Chase’s “avarice” would be fatal to his “ambition.” “I have too good an opinion of the sense and spirit, to say nothing of the virtue of your countrymen, to believe they will permit you any longer to abuse their confidence, or

204. MD. CONST., art. IV (1776) (emphasis added); HAW, *supra* note 29, at 73-74.

205. ALEXANDER HAMILTON, *Publius Letter II*, in 1 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 25, at 567-70.

206. *Id.* at 570.

207. *Id.*

208. ALEXANDER HAMILTON, *Publius Letter III*, in 1 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 25, at 580-82.

209. *Id.*

210. *Id.* at 581.

trample upon their honour.”²¹¹ Hamilton advised Chase to resign from Congress rather than face “the ignominy of a formal dismissal.”²¹² To Hamilton, Chase’s political career had been one long charade. “It is time,” Hamilton advised, to “lay aside the mask of patriotism, and assert your station among the honorable tribe of speculators and projectors.”²¹³

B. The Fallout from the Flour Scandal

When Chase returned to Maryland, it was clear that members of the state government viewed his actions as both wrongful and a substantial breach of trust. In the wake of the scandal, the Maryland legislature revoked Chase’s appointment to Congress “on the current report of his being a speculator.”²¹⁴ The Maryland General Assembly also passed an act restricting delegates from engaging in any foreign or domestic trade.²¹⁵ Most observers viewed it as being designed to prevent Chase from representing Maryland in the future.²¹⁶ In the instructions the state issued to its delegates that December, it told them not to combine with “monopolizers and engrossers of the necessaries of life.”²¹⁷ The delegates had a duty “to be watchful each one over the conduct of the other” so as to expose any dishonorable practices.²¹⁸ Like Hamilton, Maryland’s instructions to its new delegates emphasized how their misbehavior could harm the reputation of the new government.

You must be fully sensible, gentlemen, that it is of the utmost importance, the people at large should entertain the highest opinion of the integrity and wisdom of congress; if either should be questioned, the respect due to that assembly, and hitherto paid to it, will diminish; and in proportion to that diminution it will lose of its dignity and influence. Delegates to congress, therefore, ought not only to be honest, but free from the imputation of dishonesty.²¹⁹

Impliedly, Chase’s misappropriation of confidential congressional information for personal profit had already led to that kind of reputational harm. The state also passed an act authorizing the seizures of grain from engrossers and ordering engrossers of grain bound over for trial.²²⁰

211. *Id.* at 582.

212. *Id.*

213. *Id.*

214. HAW, *supra* note 29, at 108.

215. *See* ELSMERE, *supra* note 20, at 21.

216. *See id.*

217. HAW, *supra* note 29, at 109.

218. LDC, *supra* note 27, at 627 n.1.

219. CADWALADER, *supra* note 114, at 17.

220. HAW, *supra* note 29, at 107 (quoting and citing VOTES AND PROCEEDINGS OF THE

Chase's conduct put an end to his increasingly strained relationship with another prominent Maryland politician, Charles Carroll of Carrollton.²²¹ Both men were lawyers, Maryland delegates to the Continental Congress, and staunch revolutionaries, but that is where the similarities ended.²²² Carroll was every bit the aristocrat, a prominent member of Maryland's landed gentry who prided himself on his self-discipline, integrity, and strict code of honor.²²³ Carroll, like other revolutionary leaders, feared corruption and praised virtue, and he disdained those who sought to profit from government positions at the expense of the people they represented.²²⁴

Though they had been allies in pushing Maryland to assent to independence from Britain, Carroll thought Chase's conduct warranted a stronger rebuke. Carroll proposed the following language:

Reports have circulated, much to the disadvantage of some of the delegates; they have been accused of combining with the monopolizers and engrossers of the necessities of life, and sharing in iniquitous gain. The resolves of Congress . . . to check those pernicious practices, will lose much of their efficacy and force, while members of their own body, under the suspicion of the same guilt, are suffered to retain their seats in that assembly.²²⁵

The House of Delegates, "where Chase still had many friends," excised the language, which had deeply offended Chase.²²⁶ "The malice of enemies," Chase wrote, "may be forgiven, but it requires some time to forget the ungenerous perfidious conduct of false friends."²²⁷

Chase, however, was hardly chastened in his desire to use his public position for private profit. A little over a year later, Chase was reportedly involved in a scheme to purchase depreciated state loan certificates.²²⁸ Still a member of the House of Delegates, he then added a provision to a bill that would require the state to redeem the certificates at full value, creating a windfall for himself.²²⁹ Carroll told his

HOUSE OF DELEGATES OF THE STATE OF MARYLAND (Nov. 6, 12, 18, 24, 1778); VOTES AND PROCEEDINGS OF THE SENATE OF THE STATE OF MARYLAND (Nov. 28, 1778); LAWS OF MARYLAND, Oct. Sess. 1778, chap. VIII).

221. See HOFFMAN, *supra* note 91, at 248-49.

222. See generally MAIER, *supra* note 192.

223. See *id.* at 201-02.

224. See *id.* at 209-10, 216-17.

225. HAW, *supra* note 29, at 109. Carroll's political ally, General John Cadwalader, was even blunter, writing that Chase sought "to amass a fortune, from the robbery of private persons as well as the public." Letter from General John Cadwalader to Charles Carroll of Carrollton (Jul. 23, 1780), *quoted in* HAW, *supra* note 29, at 115.

226. HAW, *supra* note 29, at 109.

227. See Samuel Chase, *Censor Letters*, MD. GAZETTE, June 21, 1781, at 1, *quoted in* HAW, *supra* note 29, at 109.

228. HAW, *supra* note 29, at 112.

229. *Id.*

father that Chase was “the most prostitute scoundrel, who ever existed.”²³⁰ In the rhetoric of late eighteenth century America, it is hard to imagine a sharper rebuke of a gentleman.²³¹

C. The Flour Scandal Revived

Chase maintained his silence on the flour scandal for three years. In 1781, the Maryland law prohibiting delegates from engaging in commerce expired and Chase wanted both to resume his seat in Congress and to clear his name.²³² Using the pseudonym “Censor,” he began publishing letters in the *Maryland Gazette*, which although ostensibly focused on state political issues, implicitly called into question the charges in the flour scandal.²³³ It was, Chase argued, “the constant practice of our open enemies, and our internal secret foes, to raise distrust and suspicion of those entrusted with the conduct of our affairs.”²³⁴ Chase quickly began a direct refutation of the charges against him, which he blamed on “new patriots” trying to further their own political careers.²³⁵ Chase had given many years of honorable and patriotic service, “without receiving (or wishing to receive) any reward.”²³⁶ The charges lodged against him “were false and infamous, and the author was a calumniator and a villain.”²³⁷

What is noteworthy about Chase’s defense, at least from the perspective of determining the institutional norms that prevailed in Congress at the time, is his admission that the charged conduct constituted a significant breach of trust.²³⁸ While he would later argue that the information concerning Congress’s plan to purchase flour for the army was not secret,²³⁹ he never tried to argue that it was permissible for a member of Congress to use confidential information for personal profit.²⁴⁰ Such conduct was, he admitted, “infamous.”²⁴¹ He readily conceded that if he had “betrayed the secrets of congress, and made use of

230. *Id.* (citing Letter from Carroll of Carrollton to Carroll of Annapolis (May 6, 11, 1780)).

231. See FREEMAN, *supra* note 136, at xvi. When a political rival called Carroll’s father a scoundrel, Carroll challenged him to a duel. HOFFMAN, *supra* note 91, at 108-09.

232. ELSMERE, *supra* note 20, at 21; see generally Chase, Sept. 27, 1781, *supra* note 113, at 1.

233. See generally Chase, Sept. 27, 1781, *supra* note 113, at 1-2.

234. *Id.* at 1.

235. Samuel Chase, Censor Letters, M.D. GAZETTE, June 21, 1781, at 1, *quoted in* HAW, *supra* note 29, at 109.

236. *Id.*

237. *Id.*

238. See *id.*

239. See *id.* at 2.

240. See *id.* at 1.

241. *Id.* at 2.

the knowledge he acquired as a member of that body, to his own private emolument” it would constitute serious “misconduct.”²⁴² The charges, however, were simply untrue, and he had never been given an opportunity to refute them.²⁴³

Chase’s erstwhile ally Charles Carroll was not convinced. Should “a man talk of virtue, liberty and patriotism,” he wrote his father, “who betrayed the secrets of Congress?”²⁴⁴ Carroll offered a more extensive response in the pages of the *Maryland Gazette*. Little had changed in his view of Chase’s conduct. For Carroll, it remained a “breach of public trust.”²⁴⁵ A newspaper battle between the two ensued, but Chase’s responses never denied the impropriety of the alleged conduct. Instead, after launching an *ad hominem* attack on Carroll,²⁴⁶ Chase admitted for the first time that he had instructed his partners to buy flour in the summer of 1778.²⁴⁷ Those instructions, however, did not flow from “any knowledge acquired as a member of congress, but from facts publicly known to every merchant in America.”²⁴⁸ Chase, in other words, argued that the information was already public, a defense common to almost all modern insider trading cases.²⁴⁹

242. *See id.* at 1.

243. *Id.* at 1-2.

244. HOFFMAN, *supra* note 91, at 249 (quoting Letter from Charles Carroll of Carrollton to Charles Carroll of Annapolis (June 14, 1781)).

245. Chase, Aug. 23, 1781, *supra* note 137.

246. Chase, Sept. 27, 1781, *supra* note 113, at 2.

247. *Id.*

248. *Id.*

249. This Article focuses on the impropriety of the conduct, not the truth of the allegations made against Chase. Nonetheless, it is worth addressing, at least in passing, the other defenses Chase proffered. Chase’s defense was radically different from the original one he offered to Henry Laurens. *See supra* notes 133-34 and accompanying text. Rather than blaming disclosure on William Smith, who had allegedly opened a confidential letter intended for Maryland’s governor, Chase now admitted that he told his business partners about the congressional resolution. Chase, Sept. 27, 1781, *supra* note 113, at 2. Chase claimed, however, that his disclosure was not improper because Congress had never authorized that the resolution be kept confidential. *Id.* This argument was particularly ironic because five years earlier Chase argued that Congress was ill-equipped to run the war in part because “their Resolutions can never be kept secret.” RAKOVE, *supra* note 110, at 196 (internal quotations omitted).

In addition to claiming that information about grain shortages and the arrival of the French fleet was widely known in the market, Chase claimed that he had no intention to drive up commodities prices. Chase, Sept. 27, 1781, *supra* note 113, at 2. None of those defenses actually met the charges against Chase. Disclosure of the resolution was not the issue—it was capitalizing on his knowledge that Congress was likely to engage in substantial purchases. Knowledge of grain shortages in New England and the arrival of the French fleet is one thing—knowledge that the government is likely to enter another market (the middle Atlantic states), make significant purchases that were likely to raise demand and prices there, and ship those purchases to New England, a practice that would violate existing trade embargoes, was another thing entirely. Chase’s last defense conflates market manipulation and insider trading. Profiting from confidential

The public back and forth between Chase and Carroll eventually led to a hearing in the Maryland House of Delegates to determine whether Chase had betrayed a secret resolve of Congress.²⁵⁰ John Cadwalader, a former brigadier general in the Pennsylvania militia and a close confidant of George Washington, led the effort.²⁵¹ Cadwalader charged that Chase's "breach of trust . . . in high office" was "shameful and infamous" and that such a great crime "deserved the most exemplary punishment," banishment from the state.²⁵² Although the rhetoric was clearly overwrought, Cadwalader, like Hamilton, focused on the reputational harm that would occur to Congress if such practices were permitted to flourish.

What would the world think of congress (as the first representative body of America) if every member of that assembly was known to be, in point of character, what they only suspect Mr. Chase to be? Would the world entertain the *highest opinion of the integrity of congress*? Would not congress, by being composed of *such men*, lose that *dignity and influence* which it has hitherto supported? Could it be said with truth, that such delegates were not only *honest*, but *free, even from the IMPUTATION of dishonesty*? . . . An assembly composed of *such men* could, in my opinion, possess neither DIGNITY or INFLUENCE [sic].²⁵³

Just as Hamilton had,²⁵⁴ Cadwalader emphasized the loss of dignity for the institution, a position that links directly to the modern conceptions of the harm arising from congressional insider trading.²⁵⁵

Cadwalader added, however, a new twist on the reputational harm that could arise from such trading. For Cadwalader, allowing members to exploit this kind of information would create enormous inequalities in the marketplace. "His *official knowledge*," Cadwalader wrote, "will give him an advantage over *petty adventurers*."²⁵⁶ This was an unerodible advantage because the information "can only be *known*

information did not require that Chase's purchases drive up prices. It was enough to anticipate the significant price increases that would arise once the government began its buying program. Nor did Chase's defense address the reputational harm to Congress and to the United States from the scheme.

250. MARYLAND HOUSE OF DELEGATES, FRIDAY JANUARY 11, 1781, GENERAL CADWALADER HAVING MADE THE FOLLOWING MOTION 1 (1782). [hereinafter MARYLAND HOUSE OF DELEGATES].

251. *Id.*; HISTORICAL SOCIETY OF PENNSYLVANIA, CADWALADER FAMILY PAPERS 1-3 (2007), available at http://hsp.org/sites/default/files/legacy_files/migrated/findingaid1454cadwaladerpart1.pdf.

252. John Cadwalader, *To the Printers of the Maryland Gazette*, MD. GAZETTE, Jan. 3, 1782, at 322.

253. CADWALADER, *supra* note 114, at 20-21 (alteration in original) (internal quotation marks omitted).

254. See *supra* text accompanying notes 154-213.

255. See CADWALADER, *supra* note 114, at 20-21.

256. *Id.* at 19.

by members of congress.”²⁵⁷ Cadwalader foresaw a somewhat different form of corruption than Hamilton articulated, but one that would harm the dignity and integrity of the government just as severely—members of Congress could sell information to the highest bidder.²⁵⁸ Anticipating the modern political intelligence industry, Cadwalader wrote that those “who have not the *means* of obtaining that information . . . will not be at a loss to *whom* to apply.”²⁵⁹

The strong circumstantial evidence and Chase’s lack of credibility from his ever-shifting explanations should have led to a finding that Chase had acted improperly. By a 36-2 vote, however, the House of Delegates found that “Chase was not guilty of a breach of his duty, as a member of Congress, by revealing a secret resolve of that assembly.”²⁶⁰ It was hardly a resounding vindication. The legislature found only that Chase did not improperly disclose the resolution—it said nothing about whether he had used his early knowledge of that resolution to personally profit from it. Nor was the ruling much of a surprise. During that time period, Chase continued to wield enormous influence in the House of Delegates. A finding in Chase’s favor was very much a foregone conclusion.²⁶¹ More fundamentally, even if Chase were innocent of the charges, the legislature was clear that disclosing confidential congressional information was a breach of duty.

Privately, it seemed, even Chase knew that he had abused his position. In 1786 he warned his sons that they should “[n]ever seek to acquire power or property from a public station.” In fact, it would be better if they avoided public service altogether, “unless you are fully convinced that your services are really necessary to promote the good of your country.”²⁶²

V. HAS THE CONGRESSIONAL NORM PROHIBITING MISAPPROPRIATION SURVIVED?

A. *Public Virtue, Public Debt, and Peace Talks*

Civic virtue quickly proved to be a rather shaky foundation on which to construct a new republic, as some political leaders had warned. Chase’s colleague in Congress, Carter Braxton, was skeptical from the start that the patriotic fervor of the years leading up to the Declaration of Independence was sustainable. Public virtue, he wrote

257. *Id.*

258. *Id.*

259. *Id.*

260. MARYLAND HOUSE OF DELEGATES, *supra* note 250, at 1.

261. Years later John Quincy Adams wrote that Chase “had for some years almost uncontrolled dominion over the politics of the State of Maryland.” *John Quincy Adams* (Dec. 18, 1820), in *THE DIARY OF JOHN QUINCY ADAMS, 1794-1824* 247 (Allan Nevins ed., Charles Scribner’s Sons 1951) (1928).

262. HAW, *supra* note 29, at 127.

in 1776, “a disinterested attachment to the public good, exclusive and independent of all private and selfish interest . . . though sometimes possessed by a few individuals, never characterised the mass of people in any state.”²⁶³ Even John Adams had his doubts. Just a few months before he wrote *Thoughts on Government*, in which he argued that virtue was indispensable in a true republic, Adams despaired over whether a long-lasting republic in America was possible: “[T]here is so much Rascallity [sic], so much Venality and Corruption, so much Avarice and Ambition such a Rage for Profit and Commerce among all Ranks and Degrees of Men even in America,” he wrote, “that I sometimes doubt whether there is public Virtue enough to Support a Republic.”²⁶⁴ Just a few years after his Publius letters, even Hamilton abandoned the idea that widespread virtue among the populace was possible.²⁶⁵

Braxton thought that abnegation of prosperity and rejection of ambition and interest were antithetical to the burgeoning commercialism and mercantilism in the colonies, and the early years of the war proved him correct.²⁶⁶ In the social, political, and economic upheaval of the Revolutionary War, as farmers, merchants, and artisans sought to profit from the increasing demand for their products, civic virtue among the populace often seemed in short supply. According to Gordon Wood:

Instead of becoming a new and grand incarnation of ancient Rome, a land of virtuous and contented farmers, America within decades of the Declaration of Independence had become a sprawling, materialistic, and licentious popular democracy unlike any state that had ever existed. Buying and selling were celebrated as never before, and

263. Carter Braxton, *An Address to the Convention of the Colony and Ancient Dominion of Virginia: On the Subject of Government in General, and Recommending a Particular Form to Their Consideration* (1776), in 1 THE FOUNDERS' CONSTITUTION, *supra* note 184, at 670, 671; see also WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION, *supra* note 110, at 229 (“But the ink on the Declaration of Independence was scarcely dry before many of the revolutionary leaders began expressing doubts about the possibility of realizing these high hopes [for a republic of virtue]. The American people seemed incapable of the degree of virtue needed for republicanism.”).

264. Letter from John Adams to Mercy Warren (Jan. 8, 1776), in 1 THE FOUNDERS' CONSTITUTION, *supra* note 184, at 669, 669.

265. See Alexander Hamilton, *Continentalist*, No. 6 (July 4, 1782) in 1 THE FOUNDERS' CONSTITUTION, *supra* note 184, at 670, 671, 673 (“We may preach till we are tired of the theme, the necessity of disinterestedness in republics, without making a single proselyte. The virtuous declaimer will neither persuade himself nor any other person to be content with a double mess of porridge, instead of a reasonable stipend for his services. We might as soon reconcile ourselves to the Spartan community of goods and wives, to their iron coin, their long beards, or their black broth. There is a total dissimulation in the circumstances, as well as the manners, of society among us; and it is as ridiculous to seek for models in the simple ages of Greece and Rome, as it would be to go in quest of them among the Hottentots and Laplanders.”).

266. See Braxton, *supra* note 263, at 672.

the antique meaning of virtue was transformed. Ordinary people who knew no Latin and had few qualms about disinterestedness began asserting themselves with a new vigor in the economy and in politics. Far from sacrificing their private desires for the good of the whole, Americans of the early Republic came to see that the individual pursuit of wealth and happiness (the two were now interchangeable) was not only inevitable but justifiable as the only proper basis for a free state.²⁶⁷

The republic of virtue was dead before it ever really began.

The rapidly waning belief in the foundational role of virtue in the United States raises an important question about whether the institutional norms prohibiting members of Congress from exploiting confidential information for personal gain survived the Revolutionary War. Many of the complaints about the absence of virtue were, to be sure, directed at the populace at large, rather than members of Congress.²⁶⁸ But when Americans abandoned civic republicanism in the decades following the war,²⁶⁹ did Congress similarly abandon any restraint on its members' use of inside information?

To answer that question fully, one would ideally want to trace other episodes throughout the history of Congress to determine whether there was any apparent change in institutional norms over time. Unfortunately, that kind of extensive analysis, which would undoubtedly reveal some instances of questionable behavior, is beyond the scope of this Article. Instead, this section offers sketches of two episodes, one close in time to the Chase flour scandal and the other more than a century later, which together suggest something about the continuity of those early institutional norms.

On January 14, 1790, the first Treasury Secretary, Alexander Hamilton, submitted a lengthy Report on Public Credit to Congress, in which he proposed that the federal government assume all of the debt the national and state governments had incurred during the revolution.²⁷⁰ The various notes and certificates were trading at steep discounts from face value, but Hamilton, in order to establish the creditworthiness of the new nation, proposed to pay it off in full to the current holders through notes issued by the new federal government.²⁷¹ While many in Congress agreed that the country should fund the debt, some objected that the plan would create a windfall for speculators (a suspect class in 1790).²⁷² The price of debt certificates rose steadily in

267. WOOD, *THE IDEA OF AMERICA*, *supra* note 181, at 75.

268. *See id.*

269. *See id.*

270. *See* GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815*, at 95-98 (2009); WRIGHT & COWEN, *supra* note 154, at 21-22.

271. *See* WRIGHT & COWEN, *supra* note 154, at 22-23.

272. *See* Whitney K. Bates, *Northern Speculators and Southern State Debts: 1790*, 19 WM. & MARY Q. 30, 30 (1962) ("In Congress and in the press, Hamilton's opponents

the months before Hamilton released his report based, in part, on a widespread belief that the federal government would fund the debt.²⁷³ But there were also leaks. The primary culprit seems to have been Hamilton's First Assistant Treasury Secretary, William Duer, who not only disclosed information about the funding plan but also joined with other New York traders to purchase state securities in the weeks before and after Hamilton released his report.²⁷⁴

loudly complained that such securities as had not already passed from the hands of their original owners were now being bought up at bargain rates by a band of speculators taking advantage of inside information and the ignorance of the owners.”). Analysis of transfer records shows that the vast majority of the debt issued by several southern states was concentrated in the hands of a relatively small number of northern speculators. *See generally id.* But not all of this concentration represented recent speculative activity. *See* E. James Ferguson, *Public Finance and the Origins of Southern Sectionalism*, 28 J. S. HIST. 450, 454 (1962) (noting that most of the southern states' debt was originally issued to northern purchasers).

As a result, James Madison and other congressmen supported what was known as discrimination. *See* WRIGHT & COWEN, *supra* note 154, at 23. Current holders would be paid only the depreciated market value of the certificates. *See* CHERNOW, *supra* note 24, at 305. In other words, they would be made whole but would not profit from their purchases. The remainder of the face value of the certificates, it was argued, should go to the original holders of the debt, generally soldiers, widows, and small farmers, who were deemed far more deserving of repayment than “stock-jobbers.” *See* WRIGHT & COWEN, *supra* note 154, at 23; CHERNOW, *supra* note 24, at 304-05. In the end Hamilton's argument that the notes were negotiable instruments that constantly fluctuated in value won the day, and only the current holders were permitted to exchange them for the new notes the federal government offered. WRIGHT & COWEN, *supra* note 154, at 23.

273. *See* Bates, *supra* note 272, at 39; E. JAMES FERGUSON, *THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776-1790* 270 (1961) (showing that some of the most active speculators predicted that the federal government would assume state debts as early as 1788). Much of the trading in late 1789 was already among secondary purchasers, and a good deal of the price rise was attributable to a large influx of foreign purchasers into the United States market. *See id.*

274. *See* ROBERT F. JONES, “THE KING OF THE ALLEY,” WILLIAM DUER POLITICIAN, ENTREPRENEUR, AND SPECULATOR 1768-1799 126-34 (1992) [hereinafter JONES, “THE KING OF THE ALLEY”]; Robert F. Jones, *William Duer and the Business of Government in the Era of the American Revolution*, 1975 WM. & MARY Q. 393, 409. Duer had actually been speculating in national and state debt for several years, including during his time at the predecessor Board of Treasury. *See* JONES, “THE KING OF THE ALLEY,” *supra*, at 118-19, 123-26; JOHN S. DAVIS, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS* 158-65, 183-84 (1917).

When Duer continued his purchases in his new post, however, he violated the provisions of the recently passed Act to establish the Treasury Department, which provided that “no person appointed to any office instituted by this act, shall directly or indirectly be concerned . . . in the purchase or disposal of any public securities of any State, or of the United States . . .” Ch. 12, 1st Cong., 1 Stat. 65 (1789). Anyone violating what was arguably the country's first statutory ban on insider trading was subject to a \$3,000 fine, removal from office, and a permanent bar from holding any future federal office. While not applicable to congressional trading, the act does suggest the contemporary view regarding the seriousness and nature of the offense. The crime was defined as a “high misdemeanor,” meaning that the victim was the government itself, rather than the individuals with whom the Treasury official traded. *See* RAOUL BERGER, *IMPEACHMENT:*

Hints that members of Congress were speculating in state securities were circulating even before Hamilton's nomination. Andrew Craigie, an apothecary, financier, and land speculator who made a fortune trading revolutionary-era debt, charged in September 1789 that Congress would delay consideration of the debt because members' "private arrangements are not in readiness for speculation."²⁷⁵ Craigie liked to boast about how his strong political connections informed his trading,²⁷⁶ and his correspondence reveals intimate knowledge of nonpublic Senate debates.²⁷⁷ Because he lived in the same lodging house with several members of Congress, it seems reasonable to conclude that they disclosed information to him, although it is unclear whether they also shared in his profits.²⁷⁸ William Constable, one of the largest New York speculators, seemed to have equally good sources in the Senate.²⁷⁹

Most of the accusations of actual congressional insider trading, as opposed to tipping, come from an ardent republican senator from western Pennsylvania, the irascible diarist William Maclay.²⁸⁰ Maclay ex-

THE CONSTITUTIONAL PROBLEMS 61 (1973). This definition suggests that the act's drafters shared Hamilton's view that trading by governmental officials possessing material nonpublic information was wrongful because it imposed a reputational harm on the government. Respect for the new federal government would arguably diminish if Treasury officials used their offices for personal gain. *See supra* notes 198-211 and accompanying text. As a result, the act was the first federal statute to explicitly include removal and disqualification as punishments for official misbehavior. *See* Paul Taylor, *Congress's Power to Regulate the Federal Judiciary: What the First Congress and the First Federal Courts Can Teach Today's Congress and Courts*, 37 PEPP. L. REV. 847, 905-06 (2010).

Duer resigned from his position in April 1790, but he was never prosecuted for his trading. *See* JONES, "THE KING OF THE ALLEY," *supra* note 274, at 133.

275. 17 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, MARCH 4, 1789-MARCH 3, 1791 1446 (Charlene Bangs Bickford and Helen E. Veit eds., 1986) (Letter from Andrew Craigie to Daniel Parker, September 1, 1789).

276. *See* JONES, "THE KING OF THE ALLEY," *supra* note 274, at 126 (Craigie wrote that government debt was "the best field in the world for Speculation" and that he knew "of no way of making safe speculations but by being associated with people who from their official situation know all the present & can aid future arrangements either for or against the funds").

277. *See* Bates, *supra* note 272, at 41.

278. *See id.*

279. FERGUSON, *supra* note 273, at 328 (quoting Letter from William Constable to Gouverneur Morris, February 3, 1790) (stating that Senator Robert Morris "promises that when the Bill comes up in the Senate He will apprise me when to strike.")).

280. *See* 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789-1781: THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 182-85 (Kenneth R. Bowling & Helen E. Veit eds., 1988) [hereinafter THE DIARY OF WILLIAM MACLAY].

licitly accused several members of speculating in depreciated certificates.²⁸¹ They included fellow Pennsylvanians Senator Robert Morris²⁸² and Representatives Thomas Fitzsimons and Daniel Hiester as well as Connecticut Representative Jeremiah Wadsworth (the Commissary General during the Revolutionary War).²⁸³ “I really fear,” Maclay wrote, “the [m]embers of Congress are deeper in this business than any others.”²⁸⁴ Six months later Maclay remained horrified at the level of influence peddling and congressional speculation he thought had occurred.²⁸⁵

The literature regarding speculation in government securities during this time period is extensive, making a thorough analysis here impracticable.²⁸⁶ Much of it is also only marginally relevant because it focuses on the motivations behind the framing of the Constitution as

281. *Id.* at 183.

282. *See id.* at 183-85. From 1781 to 1784, Morris served as the United States Superintendent of Finance and proposed a funding plan that was similar to, and the basis for, Hamilton’s plan. Morris was also accused of improperly profiting from the use inside information while he held this government post. *See* ELLIS P. OBERHOLTZER, ROBERT MORRIS: PATRIOT AND FINANCIER 190-213 (1903). For information on Wadsworth, see *supra* text accompanying notes 102-128.

283. Among the specific allegations, Maclay charged that Morris and his business partner William Constable (who was also apparently working with Duer and Wadsworth) had bought tens of thousands of dollars of depreciated state certificates. *See* THE DIARY OF WILLIAM MACLAY, *supra* note 280, at 183. Three days later, Maclay wrote: “[Benjamin] Hawkins, of North Carolina, said as he came up [to New York] he passed two expresses with very large sums of money on their way to North Carolina for purposes of speculation in certificates. [Jeremiah] Wadsworth has sent off Two small Vessels for the Southern States, on the Errand of buying up certificates.” *Id.* at 184-85 (January 18, 1790).

Massachusetts Representative Theodore Sedgwick lodged similar complaints about Wadsworth, charging that the Connecticut Representative “has thought it more for his interests to speculate than to attend his duty in Congress” *See* Jack N. Rakove, *The Structure of Politics at the Accession of George Washington*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 283 (Richard Beeman, Stephen Botein & Edward C. Carter II eds., 1987) (quoting Letter from Theodore Sedgwick to Pamela Sedgwick, March 23, 1790).

284. *See* THE DIARY OF WILLIAM MACLAY, *supra* note 280, at 185 (January 18, 1790).

285. *See id.* at 324 (July 17, 1790) (“The Whole Town almost has been busy at [speculating] & of Course all engaged in influencing the Measures of Congress. Nor have the Members themselves kept their hands clean from this dirty work. From Wadsworth with his boatload of Money down to the daily Six dollars have they generally been at it. The Unexampled Success has obliterated every mark of reproach and from henceforth we may consider Speculation As a congressional Employment. Nay all the abominations of the South Sea Bubble are Outdone in this Vile Business. In Wrath I wish the Same fate May attend the Projectors of both.”) (internal punctuation omitted).

286. *See* Jessica Lowe, *Ideas that Matter: Parting Thoughts on Charles Beard on the 100th Anniversary of An Economic Interpretation*, 29 CONST. COMMENT. 525, 526 (2014) (observing that “a full generation of historians” has “sifted through the framers’ yellowed account books”). For an overview, see FERGUSON, *supra* note 273, at 251-343.

opposed to the institutional norms addressed here.²⁸⁷ It is certainly possible, however, that Maclay, given his antipathy to the funding plan,²⁸⁸ his overwhelming belief in his own rectitude, and his absolute certainty regarding his fellow legislators' shortcomings,²⁸⁹ exaggerated the level of congressional speculation or thought it more widespread than it actually was.²⁹⁰ Most of Maclay's information seems to have been based on rumor and hearsay.²⁹¹ Maclay's objections were also broader than just congressional insider trading. He also believed that members of Congress had an inherent conflict of interest whenever proposed legislation affected their investments.²⁹² He strongly adhered to the republican ideal that government officials could only legislate properly if they were completely disinterested. Maclay, therefore, found any ownership of debt securities objectionable, even if the purchase was not based on material nonpublic information. More broadly, Maclay was wary of securities speculation in any form, including speculation by those who were not members of the government.²⁹³

A fuller examination of the historical record also raises questions about the accuracy of some of Maclay's allegations. New York speculators had already predicted the outlines of Hamilton's plan months before he actually began to write it.²⁹⁴ Some of the congressional trading

287. Arguments about the extent to which financial interests such as these influenced the actual framing of the Constitution go back 100 years to Charles Beard's Progressive Era critique. See CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 73-151 (1913). Most historians now reject Beard's view that those economic interests, rather than the founders' professed political ideologies, were the primary motivators for those who voted in favor of the Constitution. See G. Edward White, *Charles Beard & Progressive Legal Historiography*, 29 CONST. COMMENT. 349, 349 (2014) ("Beard's reputation stands like an imposing ruin in the landscape of American historiography." (quoting RICHARD HOFSTADTER, THE PROGRESSIVE HISTORIANS 212 (1968))).

288. See THE DIARY OF WILLIAM MACLAY, *supra* note 280, at 183 (January 14, 1790) (criticizing Hamilton's plan because "a Committee of Speculators in certificates could not have formed it more for their advantage."); *id.* at 205 (February 19, 1790) (noting that a funding system was "the political Gout of Every Government which has adopted it" and that it was "Villany to Cast the debt on Posterity.").

289. See *id.* at xv. J. Franklin Jameson, a scholar who spent most of career trying to assemble manuscripts of the early United States, lamented that Maclay's diary was the most complete record of the first Congress. For Jameson, Maclay was a "contemptible creature" whose diary was "poisoned and distorted by his mean malignancy." *Id.* at xi-xii.

290. See *id.* at 183 (January 15, 1790) ("I call not at a single house . . . or go into any company but traces of [s]peculation in certificates appear."); *Id.* at 184 (January 16, 1790) ("[T]he [s]peculations in certificates in the [m]outh of every one.").

291. See *id.* at 183-84 (January 15 & 17, 1790).

292. See *supra* note 285.

293. See *supra* note 274; THE DIARY OF WILLIAM MACLAY, *supra* note 280, at 287 (June 9, 1790) ("For these humble speculators infinitely too much was done. They had no claims in justice.").

294. See JONES, "THE KING OF THE ALLEY," *supra* note 274, at 127.

Maclay reported may never have occurred or may not have been based on inside information. For example, Robert Morris, in the throes of severe financial problems in early 1789, began plans to purchase state debt securities before Congress met for its first session.²⁹⁵ While some of his more elaborate plans never came to fruition,²⁹⁶ he and his brother did buy securities later that spring.²⁹⁷ Morris certainly was speculating and he had a conflict of interest when he voted on the funding bill, but his purchases were apparently not premised on inside information about it.

Still, Maclay's own scorn for this kind of speculative activity suggests that the norm against trading on material nonpublic information remained in place. Maclay himself reported that those receiving information from members of Congress were "abashed" when confronted with their behavior.²⁹⁸ Members speculating in certificates even stayed away from the congressional session so that they would remain "unsuspected."²⁹⁹ These reactions suggest that, whatever the actual level of trading, using confidential information acquired through a governmental position was still viewed as improper and that it remained inconsistent with institutional norms.

Even Hamilton, who lamented the lack of virtue among the populace as a whole, continued to cling to the belief that government officials should be subject to a different standard. In November 1789, Henry Lee wrote Hamilton seeking information on the future prospects for the public debt.³⁰⁰ Hamilton did not divulge any information:

I am sure you are sincere when you say, you would not subject me to an impropriety. Nor do I know that there would be any in my answering your queries. But you remember the saying with regard to Caesar's Wife. I think the spirit of it applicable to every man concerned in the administration of the finances of a Country. With respect to the Conduct of such men—*Suspicion* is ever eagle eyed, And the most innocent things are apt to be misinterpreted.³⁰¹

295. See Bates, *supra* note 272, at 39 n.18; CHARLES RAPPLEYE, ROBERT MORRIS: FINANCIER OF THE AMERICAN REVOLUTION 438-57 (2010).

296. See RAPPLEYE, *supra* note 295, at 474-75; DAVIS, *supra* note 274, at 167-73.

297. FERGUSON, *supra* note 273, at 270.

298. Ebenezer Hazard, the former postmaster general, had been in the business of buying state debt certificates for some time. After Hamilton's Report on Public Credit was released, Maclay confronted him, stating: "You are then among the happy few, who have been let into the [s]ecret." Maclay reported that Hazard "seemed abashed, and I checked by my forwardness much more information which he seemed disposed to give." THE DIARY OF WILLIAM MACLAY, *supra* note 280, at 184 (January 15, 1790).

299. *Id.* (referring to Morris and Fitzsimons).

300. Letter to Alexander Hamilton from Henry Lee (Nov. 16, 1789), in 5 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 25, at 517.

301. Letter from Alexander Hamilton to Henry Lee (Dec. 1, 1789), in 6 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 25, at 1.

Several years later, when friends urged that he use his inside information to secure his own fortune, Hamilton, his eye firmly fixed on his reputation, said that he would not. “[T]here must be some public fools,” he wrote, “who sacrifice private to public interest at the certainty of ingratitude and obloquy—because my vanity whispers I ought to be one of those fools and ought to keep myself in a situation the best calculated to render service.”³⁰² As with any standard of behavior, evidence that some members of the community violate a norm is not necessarily evidence that the norm no longer persists.

Over one hundred years later another incident of alleged insider trading suggests the persistence of the institutional norm in congress against exploiting material nonpublic information. In late 1916, President Woodrow Wilson offered to mediate a peace agreement between the European powers fighting in World War I.³⁰³ News of that offer led to a substantial decline in stock prices because American companies had made substantial profits supplying the warring factions.³⁰⁴ Almost immediately, charges surfaced that the president’s offer had been prematurely leaked to Wall Street, allegedly allowing several traders, including Bernard M. Baruch and Otto H. Kahn, to make substantial profits from short selling before the news broke.³⁰⁵ Thomas W. Lawson, a well-known Boston stock trader and the author of a popular tell-all book about stock manipulation called *Frenzied Finance*, then alleged that several members of Congress had also profited from advance knowledge of the president’s announcement, and that “[t]he good old Capitol has been wallowing in Wall Street leak graft for forty years.”³⁰⁶ Lawson had developed a reputation for wild accusations, but he still caused a sensation when he charged that “advance information from Washington about [g]overnment affairs” was “one of the commonest things in Wall Street.”³⁰⁷

The House Rules Committee investigation eventually found no evidence of congressional insider trading.³⁰⁸ While it is unclear how thorough that investigation was, there is evidence that members of that Congress (just like William Maclay and the members of the Second

302. Letter from Alexander Hamilton to Robert Troup (Apr. 13, 1795), in 18 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 25, at 328-29 (emphasis omitted).

303. See CEDRIC B. COWING, POPULISTS, PLUNGERS, AND PROGRESSIVES: A SOCIAL HISTORY OF STOCK AND COMMODITY SPECULATION 1890-1936 76 (1965).

304. See JAMES GRANT, BERNARD M. BARUCH: THE ADVENTURES OF A WALL STREET LEGEND 145-46 (1983).

305. See *id.* at 145-55.

306. *Id.* at 76.

307. See Lawson Faces Contempt Charge in “Leak” Inquiry, N.Y. TIMES, Jan. 9, 1917, at 2.

308. See H.R. REP. NO. 1580 OF H. RULES COMM., 54 CONG. REC. 4439, 4439-42 (1917); COWING, *supra* note 303, at 77.

Continental Congress) considered such behavior a violation of institutional norms. The House authorized the investigation because the charges “affect the dignity of this House and the integrity of its proceedings and the honesty of its Members.”³⁰⁹ Indiana Representative William R. Wood similarly argued for an investigation because those allegations “constitute an attack upon the integrity of the House and its proceedings. They should not be ignored.”³¹⁰ Illinois Representative James R. Mann observed that: “If these charges do not affect the dignity of the House and its proceedings . . . I do not know of charges that could be so construed.”³¹¹ These statements suggest that a congressional norm against using confidential information for personal gain continued into the twentieth century.

B. Chase’s Reputation after the Flour Scandal

While civic virtue as the basis for the new republic did not survive for long, the sense that Chase had abused the public trust did. Indeed, the flour scandal “haunted Chase for the rest of his life.”³¹² Despite exoneration in the Maryland House of Delegates and his later appointment to the Supreme Court, Chase’s reputation never fully recovered from the flour scandal. From a modern perspective, it would seem that Chase’s nomination to the Supreme Court is proof enough that the flour scandal did not permanently besmirch his reputation. Such a conclusion, however, would be inaccurate because the role of Supreme Court Justice in the late eighteenth century was nothing like the pinnacle of professional achievement that it is today. Alexander Hamilton, who thought that the judiciary was by far “the weakest of the three departments of power,” turned down an appointment to the Court so that he could practice law in New York.³¹³ John Rutledge left his seat on the Court to become a South Carolina state court judge.³¹⁴ The Court’s low prestige was coupled with the arduous task of riding circuit, a chore so onerous that several Justices resigned their positions to avoid it.³¹⁵

309. H.R. RES. NO. 429, 64th Cong., 54 CONG. REC. 4442 (1917).

310. *Hears Baruch Sold on Peace Note Tip*, N.Y. TIMES, Jan. 4, 1917, at 1.

311. *Id.*; see also *Lawson Faces Contempt Charge*, *supra* note 307, at 2 (noting that members of Congress expressed the view that insider trading charges were “of the gravest sort”).

312. HAW, *supra* note 29, at 216.

313. THE FEDERALIST NO. 78 (Alexander Hamilton); BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 16 (1993).

314. See SCHWARTZ, *supra* note 313, at 16.

315. See *id.* at 18-19. When Chase was on the Court, he nearly drowned crossing the Susquehanna River in February 1800. See Letter from Samuel Chase to Hannah Chase (Feb. 4, 1800), in DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 888-89.

Washington wrote that he only wanted to nominate to the Supreme Court “such men as I conceive would give dignity and lustre to our national character,” but the simple fact was that he found it exceedingly difficult to find prominent and respectable individuals willing to accept the position.³¹⁶ Washington was also trying both to appoint Federalists to the bench and to maintain geographic diversity on the Court, further constraining his choices.³¹⁷ Although Chase had originally opposed ratification of the Constitution,³¹⁸ he was now an ardent Federalist, and as a citizen of Maryland he was a viable candidate to fill the seat of Virginian John Blair.³¹⁹ Given his relatively narrow options, Washington had little practical choice but to lower his standards. In fact, before nominating him to the Supreme Court in January 1796, Washington observed that Chase was “unquestionably, a man of abilities; . . . [b]ut he is violently opposed in his own State by a party, and is besides, or to speak more correctly has been, accused of some impurity in his conduct.”³²⁰

Others shared Washington’s assessment of Chase’s character. John Adams, who had worked closely with Chase in the Continental Congress, was equally wary. He confided to Abigail after the nomination that: “Mr. Chase is a new Judge, but although a good 1774 Man his Character has a Mist about it of suspicion and Impurity which gives occasion to the Enemy to censure.”³²¹ Abigail agreed, and she wondered, in verse:

How can a judge enforce that Law gainst some poor Elf
Which conscience tells him, he hath broke himself[?]

“[T]he fountain of Justice should be pure as virgin innocence,” she continued. “[T]he Laws can neither be administerd [sic] or respected if the minister of them is not unspotted.”³²²

Other government officials expressed similar sentiments. James Madison was incredulous. “Chase in the place of Blair!!!!” was all that

316. See SCHWARTZ, *supra* note 313, at 17.

317. *Id.*

318. Letter from George Washington to Alexander Hamilton (Oct. 29, 1795), in 34 WRITINGS OF WASHINGTON 347, 347 (John C. Fitzpatrick ed., 1940).

319. *Id.* at 17, 27.

320. Letter from George Washington to Alexander Hamilton (Oct. 29, 1795), in DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 805; see ELSMERE, *supra* note 20, at 55 (noting that “Washington liked Chase . . . [but] was hesitant to appoint him to office because . . . of the old flour scandal.”).

321. Letter from John Adams to Abigail Adams (Feb. 6, 1796), *quoted in* STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE 195, n.16 (1991).

322. Letter from Abigail Adams to John Adams (Feb. 21, 1796), in DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 839-40.

he could manage to write to Thomas Jefferson.³²³ But this was not just the usual political rancor so typical in the early republic. Fellow members of the Federalist Party, who might be expected to minimize Chase's past transgressions for the sake of party unity, continued to view Chase as a poor choice for the Supreme Court because of his previous abuse of trust while in a national office. Samuel Johnston wrote his brother-in-law Associate Justice James Iredell: "I have no personal acquaintance with Mr. Chase, but am not impressed with a very favorable opinion of his moral Character whatever his professional Abilities may be."³²⁴ According to future New Hampshire Senator William Plumer, Chase's bad character had even been immortalized in poetry. "I know nothing," Plumer wrote, "of judge Chase, but from your letter. Is he the man mentioned by the satirical writer of *The Times*. He gives him a bad character:

Flit not around me thus pernicious elf,
Whose love of country terminates in self__
Back to the gloomy shades detested sprite,
Mangler of rhetoric, enemy of right__
Curst of thy father, scum of all that's base,
Thy sight is odious, & thy name is Chase."³²⁵

That bit of doggerel is particularly notable for the way it characterized Chase's wrongdoing. Chase was "an enemy of right" because he had placed his own self-interest ahead of his duty to further the public good. He was odious because of the way he had abused his public trust. Plumer thought that Chase's nomination did "not increase the respectability or dignity of the judiciary."³²⁶

Even after he was appointed to the Supreme Court, Chase was never able to shake the flour scandal. Leading the effort to discredit

323. Letter from James Madison to Thomas Jefferson (Feb. 7, 1796), in DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 835-36.

324. Letter from Samuel Johnston to James Iredell (Feb. 27, 1796), in DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 840; *see also* Letter from Thomas Jefferson to James Monroe (Mar. 2, 1796), in DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 841 ("I may consign the appointment of Chace to the bench to your own knowlege [sic] of him & reflections."); Letter from Oliver Wolcott, Sr. to Oliver Wolcott, Jr. (Feb. 15, 1796) in DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 837 ("I know Sam Chase and to you I will say, that I have but an unworthy Opinion of him").

325. Letter from William Plumer to Jeremiah Smith (Feb. 19, 1796) in DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 838. The poem in question was written by Peter Markoe and was called *The Times. A Poem*. Although the original poem (published in 1788) does not mention Chase, Markoe could have added these lines sometime later. *See id.* at 839 n.1. For a brief profile of Plumer, who valued reputation and character "above all else," *see* FREEMAN, *supra* note 136, at 262-65.

326. Letter from William Plumer to Jeremiah Smith (Feb. 19, 1796) in DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 839.

Chase were, naturally, the Federalist's political opponents, the Republicans. Many of those criticisms homed in on Chase's breach of trust and his misappropriation of confidential, nonpublic information. For example, in the bitter presidential campaign of 1800, the Republican newspaper *The Aurora* complained vehemently about Chase's active campaigning for John Adam's re-election. What Chase was "to receive as his reward," for those efforts, the paper noted, "[was] no more public, than was the *flour speculation* at the moment of its conception."³²⁷ When in that same year Chase heard the sedition trial of John Callender, *The Aurora* wondered how such a dishonorable man could even be a judge. "The effect of appointment to the bench of justice," wrote the editor, William Duane, "of men who have been impeached, and notoriously known to have speculated upon the public fortune, *by being entrusted with, and abusing the public secrets* in the hour of danger—can be plainly pointed out by Judge Chace [sic]."³²⁸ Three years later, in the lead-up to his impeachment the newspaper, with the scathing invective typical of the time period, labeled Chase a "monster in politics" and reminded its readers of "his breach of confidence as a member of Congress."³²⁹ At one Republican dinner in 1804, someone raised a toast to Chase, "[w]hose morality and patriotism were exemplified in breach of congressional trust."³³⁰

What conclusions can we draw from the Chase flour scandal and the general reactions to it? The incident certainly provides strong evidence that members of the Continental Congress were expected to keep information confidential. Twenty-six years after his scheme was disclosed, Chase was still scolded for his "breach of confidence as a member of Congress."³³¹ There is no doubt that he was subject to scorn for his behavior. Until his death in 1811, Chase was variously referred

327. THE AURORA (Aug. 11, 1800), in DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 896.

328. ELSMERE, *supra* note 20, at 123 (quoting THE AURORA, June 8, 1800) (emphasis added); *see also id.* at 112-13 (citing THE AURORA, May 22, 27, 1800) (noting with sarcasm that "whether the question be of treason[,] . . . of sedition law; or flour contracts, his . . . abilities still shine with superior lustre."). For the Baltimore *American*, Chase was "subtle—sharp—scheming—subtle—sly—simpering—smiling—slippery Sam of speculative memory." *Id.* at 136 (quoting AMERICAN, Nov. 6, 1800).

329. HAW, *supra* note 29, at 215 (citing THE AURORA, May 27, 1803).

330. ELSMERE, *supra* note 20, at 178-79. After Chase was impeached, he asked Alexander Hamilton to serve on his defense team for the Senate trial. Hamilton was an ardent Federalist who might naturally want to do everything in his power to prevent Republicans from removing his party's judicial appointments. Hamilton might also have been motivated to represent Chase because his personal and political enemy, Aaron Burr, would, as vice president, serve as the presiding judge. Hamilton refused to participate, which one Chase biographer attributed to his continued personal antipathy to Chase. *See id.* at 201. Whatever the cause, Hamilton would not have participated in the trial—he was killed in the duel with Burr in July 1804, five months before the trial began. *See id.* at 215.

331. HAW, *supra* note 29, at 215 (quoting THE AURORA, May 27, 1803).

to as odious, a “monster of politics,”³³² and “the most prostitute scoundrel, who ever existed.”³³³ Exploiting confidential information for personal gain was regarded as so unethical and outrageous that Chase was immediately removed from his position as a delegate to the Continental Congress.³³⁴ Although he was eventually exonerated in the Maryland House of Delegates, it was on narrow, factual grounds in a forum where he retained enormous power.³³⁵ Nothing in that determination suggests that the delegates viewed capitalizing on confidential congressional information as anything but a dishonorable breach of trust.³³⁶ As a result, it is fair to say that in the early republic there was a confidentiality norm in Congress that would, if it continued today, be more than sufficient to support a claim of insider trading under the misappropriation theory.

While those views are tightly linked to the notions of civic republicanism that prevailed in the revolutionary years, the demise of that worldview is, on some level, irrelevant to the question of whether the norm against exploiting nonpublic information continued in Congress. The rationale offered for that confidentiality norm in the eighteenth century is precisely the same one used today to support a ban on congressional insider trading. Alexander Hamilton viewed Chase’s conduct as wrongful because it imposed a direct economic harm on the national government in the form of higher commodity prices. Much more importantly, Chase’s action was considered wrongful because it imposed a substantial reputational harm on the government. If knowledge of Chase’s actions became known among the populace, it would be harder for citizens to believe that members of Congress were acting in the public interest rather than for personal financial gain. While modern scholars dispute whether congressional insider trading fits within current Supreme Court doctrine, they overwhelmingly agree that avoiding those reputational harms supports a ban on this kind of behavior.³³⁷

C. A Closer Look at the Contemporary Data on Congressional Insider Trading

As an institutional matter, it would make sense for Congress, in order to maintain its credibility, to have a norm against exploiting nonpublic information. The legislative history of the STOCK Act reflects that institutional desire. The committee report explained that

332. *Id.*

333. HAW, *supra* note 29, at 112 (citing Letter from Carroll of Carrollton to Carroll of Annapolis (May 6, 11, 1780)).

334. *See* HAW, *supra* note 29, at 108.

335. *See supra* notes 249-60 and accompanying text.

336. *See* HAW, *supra* note 29, at 112-113.

337. *See supra* notes 34-35 and accompanying text.

Congress was seeking to resolve the uncertainties that the media had raised because “it is of the utmost importance for the American people to have full confidence that all Members of Congress act to serve the American people rather than their own financial interests.”³³⁸ Individual members expressed similar sentiments during consideration and debate of the STOCK Act.³³⁹ Other statements seemed consistent, with varying degrees of specificity, to the existence of just such an institutional norm.³⁴⁰ Speaker after speaker noted that they occupied positions of trust that prohibited them from profiting personally from the confidential information to which they were privy.³⁴¹ To be sure, it is easy to discount these statements, which were made after the current scandal over congressional insider trading began. Nonetheless, viewed in light of the response to the Chase scandal, they suggest the possibility that the norm against using confidential information for private gain that existed in 1778 continued throughout congressional history.

The contemporary existence of such a norm is also consistent with

338. S. Rep. No. 112-244, at 2 (2012).

339. See *Insider Trading and Congressional Accountability, Hearing Before the Comm. on Homeland Sec. and Governmental Affairs*, 112th Cong. 1 (2011) (Statement of Sen. Joseph I. Lieberman) (“Perceptions are very important in public service. That means that if the law seems to allow Members of Congress to take advantage of their public position for personal gain, the trust that needs to exist between the American people and our government will be further eroded than it already is.”); *id.* at 3 (Statement of Sen. Susan Collins) (“[W]ith so many critical challenges facing our country, if the American public does not believe that the decisions that we are making are in their interests rather than our interests, it will be next to impossible to tackle the truly significant problems that we face.”).

340. For example, Senator Claire McCaskill noted:

I think, Mr. Chairman, the more quickly we can pass this legislation and demonstrate to the public that none of us has gone into this line of work because he thought he was going to receive a great deal of money for it. I am not arguing that there may have been some people who have used their positions inappropriately . . . [B]ut I think all of us want to make sure that the public knows that we are not using this position in any way to gain personally from it.

Id. at 32. In the floor debate, Senator Lieberman added that it was self-evident to him that “public office is a public trust and that Members of Congress have a duty to the institution of Congress, of course to the government as a whole, and ultimately, most importantly, to the American people not to use information gained during their time in Congress—and unavailable to the public—to make investments for personal benefit.” 158 CONG. REC., S14, 142 (daily ed. Jan. 30, 2012). In the House, Representative John Dingell (who had recently become the longest serving member of Congress) noted, “throughout my career, it has always been my understanding that the House Ethics Rules specifically prohibit this sort of behavior.” 158 CONG. REC. S22, 655 (daily ed. Feb. 9, 2012).

341. See, e.g., 158 CONG. REC. H657 (daily ed. Feb. 9, 2012) (Statement of Rep. Blumenauer) (“Public officials are entrusted by the public to conduct their duties with integrity. Those who abuse this trust should be held accountable and prosecuted to the fullest extent of the law.”).

the existing empirical data on congressional insider trading. The original, and still the most prominent, study is by Alan Ziobrowski and his co-authors. Examining data from 1993 to 1998, the authors found that in the year prior to their purchase the common stocks senators bought had a modest cumulative return of 3.4 percent, but in the twelve months after they were acquired the cumulative return on those same stocks jumped to 28.6 percent.³⁴² Just the opposite occurred with common stock sales. In the year before the sale, the stocks senators held returned 25.1 percent; in the year after the sale, the return was nearly zero. The combined purchases and sales beat the market by 85 basis points per month, meaning that senators outperformed corporate insiders trading their own company's stock.³⁴³ The authors concluded from these results that senators were trading at a substantial informational advantage, an outcome they attributed to the senators' privileged access to nonpublic information and a willingness to use it for personal profit.³⁴⁴

A closer look at the data, however, undermines the popular perception that insider trading was rampant in Congress. An interesting and somewhat overlooked aspect of the study is the distribution of trading activity among senators. In each year of the Senate study, a minority of senators (ranging from a low of 25 percent to a high of 38 percent) bought individual stocks. How did that compare to averages for United States citizens in general? Direct stock ownership is highly correlated with household net worth and income, and Senators are, on average, significantly wealthier than the average American. The figures Ziobrowski and his co-authors report closely track direct stock ownership percentages in the 1990s for those in the 75 to 89.9 percentiles of net worth.³⁴⁵ These data suggest that the informational advantages Senators possess did not lead them to engage in more stock market activity than their demographic peers, a somewhat surprising result if they could violate insider trading laws with impunity and if institutional norms allowed them to freely exploit the confidential information that came their way.

342. Ziobrowski, *Senate Study*, *supra* note 4, at 667.

343. *Id.* at 663, 669, 675.

344. For a follow-up study that shows similar, but less dramatic, results for members of the House of Representatives, see Alan Ziobrowski, et al., *Abnormal Returns from the Common Stock Investments of Members of the U.S. House of Representatives*, 13 *BUS. & POL.* 1, 5 (2011) (www.bepress.com/bap/vol113/iss1/art4) [hereinafter Ziobrowski, *House Study*]. Like their Senate counterparts, representatives earn statistically significant positive abnormal returns from stock trading. A trade-weighted portfolio mimicking their common stock purchases outperforms the market by 55 basis points per month, or 6.6 percent per year. *See id.*

345. Vicki Bogan, *Stock Market Participation and the Internet*, 43 *J. FIN. & QUANTITATIVE ANALYSIS* 191, 192 (2008); THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, 2010 SCF CHARTBOOK, *available at* http://www.federalreserve.gov/econresdata/scf/files/2010_SCF_Chartbook.pdf.

Even within this minority of stock traders, there were substantial differences in trading behavior. Most senators engaged in just a few transactions per year, but a small group of senators were much more active. Indeed just four senators accounted for nearly half of the transactions in the sample.³⁴⁶ This skewed distribution is crucial to understanding the reported results because the authors of the empirical study could not observe senators' actual returns. Instead, they had to construct a synthetic portfolio that attempted to mimic senators' purchases as a group.³⁴⁷

Recently, economist Andrew Eggers and political scientist Jens Hainmueller re-evaluated the data collected by Ziobrowski and applied the same methodology to congressional trading during the period spanning 2004-2008.³⁴⁸ They found that Ziobrowski's findings are highly dependent on the weighting and modeling choices the authors used to construct the synthetic portfolios.³⁴⁹ In fact, Eggers and Hainmueller found that the reported abnormal returns were only statistically significant for three out of the eight specifications of the synthetic portfolio.³⁵⁰ In other words, in the majority of model iterations the senators' superior performance might simply have been the product of random noise.

Eggers and Hainmueller found similar results for the period 2004-2008.³⁵¹ Although some specifications yielded significant results, the overall results did not demonstrate pervasive excess returns.³⁵² Eggers and Hainmueller also looked at actual congressional portfolio performance rather than the synthetic portfolios constructed in the earlier studies and found, consistent with most studies of individual trading, that members generally underperform the market as a whole.³⁵³ Indeed, even some of the members Schweizer specifically accused of insider trading did not earn unusually high returns.³⁵⁴

Based on this analysis, Eggers and Hainmueller conclude that there is "very little evidence that more than a handful of members of

346. Ziobrowski, *Senate Study*, *supra* note 4, at 666.

347. *Id.* at 663-64.

348. Andrew Eggers & Jen Hainmueller, *Capitol Losses: The Mediocre Performance of Congressional Stock Portfolios*, 75 J. POL. 535 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762019.

349. *Id.* at 7-8.

350. *See id.* The House study is even more problematic. There, the 6 percent excess return is from the buy side of the congressional portfolio. When sales are added in, however, the picture that emerges is much different because the sales over-performed rather than under-performed the market, a result inconsistent with both the Senate study and with expectations about trading on material nonpublic information. *See id.*

351. *See id.*

352. *See id.* at 8.

353. *See id.* at 2.

354. *See id.* at 15-16.

Congress trade stocks at an informational advantage,” a result consistent with the existence of a congressional norm prohibiting members from capitalizing on their privileged access to information for personal profit.³⁵⁵ Ziobrowski’s earlier findings to the contrary are based on the unusually good trading performance of just a few members, who were perhaps willing to violate those norms.³⁵⁶ As a result, Eggers and Hainmueller conclude “that, while isolated members of Congress may unethically or even illegally trade based on political information, there is no evidence in any period of widespread ‘insider trading.’”³⁵⁷

To be sure, neither the statements made in the debate over the STOCK Act nor the empirical data on congressional insider trading definitively shows that the norm against exploiting confidential information for personal gain that so clearly existed in 1778 remained in place in 2012. Nonetheless, the Chase episode puts the case that the STOCK Act was superfluous on firmer footing. At the very least, it would seem to shift the burden of persuasion. Rather than being premised on amorphous obligations to act in the public interest, proponents of this view can now point to a specific historical precedent supporting the existence of an institutional norm prohibiting the use of nonpublic information. For that reason, it seems reasonable to posit that those arguing that no such norm existed prior to passage of the STOCK Act have the burden of demonstrating when and how that foundational norm vanished.

VI. CONCLUSION

When congressional insider trading hit the headlines in 2011, legal scholars and other commentators debated whether members of Congress were subject to the same prohibitions against the improper use of material nonpublic information as corporate actors. The debate turned on the nuances of insider trading law as it has developed over the last four decades. Did members of Congress owe a fiduciary duty or other duty of trust and confidence to members of the trading public or to the source of their information? Given public outrage during the controversy and the historically low levels of public approval of the job Congress was doing, it is hardly surprising that the reaction was to resolve any uncertainties over the issue by passing the STOCK Act. There perhaps was, in addition, enough ambiguity in the insider trading case law to warrant this legislative fix. In this regard the statute was like chicken soup—it was unlikely to hurt, and might actually be beneficial.

Still, debate continues to linger over whether passage of the STOCK Act was necessary. This Article offers evidence that it was not.

355. *See id.* at 2.

356. *See id.* at 15.

357. *Id.* at 2.

The Chase flour scandal shows that from the earliest days of the Continental Congress, there was a norm in Congress against exploiting material nonpublic information for personal financial advantage. Chase's scheme was considered a scandalous perversion of trust because he breached the confidences of Congress. If such a breach involved securities transactions, it would fit squarely within the modern misappropriation doctrine. While the ideas of civic republicanism on which this breach of trust were originally premised quickly faded, the underlying rationale for viewing the misuse of confidential information as wrongful remains precisely the same in 2014 as it did in 1778. The behavior was improper because it would cause serious reputational harm to Congress as an institution. The consistency of those views, the importance to members of Congress of maintaining institutional respect, and the empirical data on the apparent infrequency of congressional insider trading suggest that the norm against using confidential information for personal profit continues to exist.