“Actively” Unconstitutional: Passive Income and Governmental Corruption

Abstract

The Constitution carries within it an invaluable principle of anti-corruption. This is no less central to the document and our structure of government than any piece outlining federalism or the separation of powers. Recently, this tenant of the Constitution may have come to the fore when United States senators sold stocks prior to the COVID-19-induced collapse of the market. Given the framers’ fears of corruption - practices that would benefit others rather than citizens - questions have rightly been raised as to how the country may handle these or other similar practices – namely, using the STOCK act. Yet, the Constitution likely already provides the means. Specifically, the recently litigated case, United States v. Blaszczak, *if appealed and heard by the Supreme Court, can help to better define “property” in securities cases. As a result, this case can provide a foundation on which to further build legal precedents against governmental corruption. While this case may be imperfect, it also highlights the potential to ground these efforts within the text of the Constitution, rather than relying on interpretive efforts exclusively.*

I. Introduction

In February 2020, Senator Richard Burr sold between $628,000 and $1,700,000 worth of stock just one day after he was briefed on the impending effects of the coronavirus pandemic.[1] Throughout the same month, too, Senator Kelly Loeffler sold stock after she too was briefed alongside national infectious disease experts in late January.[2] By March of 2020, the stock market collapsed under the weight of the coronavirus's touchdown in the United States leaving many to deal with the downstream economic effects[3] - save, of course, for Senators Burr and Loeffler. Both senators maintain that these trades were done using only public information.[4] Nonetheless, in light of these events, questions have been raised as to whether or not some measures are necessary to combat these troubling trades.[5] Many have called for investigations under the Stop Trading on Congressional Knowledge (STOCK) Act, a law designed to "prevent members of Congress from engaging in insider trading."[6] Yet, as evidenced by these trades, this appears to be an insufficient piece of legislation in terms of providing a legitimate deterrent for dubiously conducted trades.[7]

More fundamentally, beyond the instances of these pre-market crash trades on possible insider information, government officials who invest in stocks and commodities heighten the risk for corruption. Simply put, while these self-interested acts by sitting United States' senators are indeed disconcerting, members of the government who actively participate in passive income

[1] *See* Paul Truchmann, Insider Trading, the STOCK Act, and Senator Burr's Trades: Material Non-Public Information The National Law Review (2020), https://www.natlawreview.com/article/insider-trading-stock-act-and-senator-burr-s-trades-material-non-public-information.
[2] *See* Annie Lowrey, An Invitation to Corruption The Atlantic (2020), https://www.theatlantic.com/ideas/archive/2020/03/congress-insider-trading-problem/608488/.
[3] *See* Truchmann, supra note 1
[4] *See id*.
[5] *See* Patrick Augustin, Francis Cong & Marti G Subrahmanyam, Insider trading by Congress? It's time to fix the law The Hill (2020), https://thehill.com/opinion/criminal-justice/493497-insider-trading-by-congress-its-time-to-fix-the-law.; *see also* supra note 2
[6] *See* supra note 1
[7] *See* Augustin, supra note 5

markets, investing in individual companies or goods (rather than collections of companies, as in mutual funds, for example), have an open door to place one's own interest ahead of one's constituents.

Thankfully, though, there is an existing roadmap to navigate this dilemma: the United States' Constitution offers a legal framework to combat the dangers of allowing government officials to trade stocks or commodities as it possesses an "anti-corruption" ethos.[8] As Zephyr Teachout writes in her seminal *Cornell Law Review* article, the Constitution "carries within it an anti-corruption principle, much like the separation-of-powers principle, or federalism."[9] What's more, this central component of the United States Constitution is found in "its historical origins, the language of the debates around it, its substance and its structure."[10] This principal, standing alone, may provide enough justification for jurisprudentially combatting the potential corruption embodied in the sale and trade of stocks or commodities by members of Congress. In short, the nature of "anti-corruption" is that it provides a "purposivism"[11] or a lens through which judges may assess various cases (Justice John Paul Stevens, for one, cited Teachout in his dissent in *Citizens United v. FEC*[12]).

However, specific textual components could also provide enough justification in certain instances. For one, the Foreign Emoluments Clause, both exemplifies the framer's anti-corruption intent and provides a textual basis for prosecuting these actions. Specifically, the Foreign Emoluments Clause - which dictates that no individual "holding any office" may accept

[8] *See* Zephyr Teachout, The Anti-Corruption Principle, 94 CORNELL L. REV. 341 (2009)
[9] *Id*. At 342
[10] *Id.*
[11] *See* Zephyr Teachout, *Constitutional Purpose and the Anti-Corruption Principle*, 108 Nw. L. Rev. Colloquy 200 (2014)
[12] *Citizens United v. Federal Election* Comm'n, 558 U.S. 310 (2010) at

a "present Emolument, Office, or Title...from [a] foreign State"[13] - is in direct conflict with the nature of trading stocks and commodities on international markets: in investing in particular companies, potentially on the basis of "insider" information, members of Congress risk aligning themselves not with the interests of the people but the will of foreign actors. Such is, given the framers' conception of the term, patently corrupt behavior in so far as it betrays the foundation of our system of governance, placing the demands of other parties potentially ahead of citizens.

Critically, the judicial justification for this is now partially grounded in a case working through the legal pipes: *United States v. Blaszczak* (*Blaszczak*).[14] I will outline the key components of *Blaszczak* in a later section but the pertinent detail is this: information on a given stock or commodity constitutes "property."[15] It stands to reason then that information given by a foreign entity or individual may be considered no less a gift than, say, the pearls and horses the Iman of Muscat offered President Martin Van Buren.[16] For this reason, the judiciary is an essential piece in solving this tendency towards potential corruption: for one, the questions regarding insider trading are answerable, now especially, in the courts (and, after the relatively recent Second Circuit Court of Appeals decision, only the Supreme Court remains for *Blaszczak,* offering a chance to create a binding precedent); but, second, using *Blaszczak* as the springboard for an eventual case to limit the ability for members of Congress to buy and sell stocks requires the interpretative agency that the courts alone possess. Put more plainly, this is a course of action that requires the judiciary to act so as to provide interpretative clarity around the issue of trading stocks by government officials more generally. Granted, using *Blaszczak* is only one means of

[13] U.S. CONST. art. I, § 9, cl. 8
[14] *United States v. Blaszczak*, No. 18-2811 (2d Cir. 2019)
[15] *See id*.
[16] *See* Zephyr Teachout, Gifts, Offices, and Corruption, 107 NW. U. L. REV. COLLOQUY 30 (2012) at 42

combating corrupt behavior. Given this, this particular case is used here to highlight that there exist textual bases - rather than "interpretive lenses"[17] - which embody this principle.

Therefore, in this article, I argue that the Constitution itself provides a legal framework to curb members of Congress from selling and trading stocks or commodities through its underlying principles and, more basically, through its text: participation in these passive income markets may violate the Foreign Emoluments Clause in particular - and the anti-corruption theme more generally - of our Constitution. Plainly, members of Congress who buy and sell securities in individual companies or goods (in the form of commodities) throughout their tenure in office expose not only themselves but their constituents to the edicts of others, devoid of the requisite "consent" of Congress or of the governed.[18] This is exemplified through Senators Burr and Loeffler's conduct: the impending disaster of a "once-in-a-lifetime pandemic"[19] triggered decisions that were made in the name of protecting oneself, not the people. Using financial information just the same, foreign governments or actors can manipulate the actions of our government officials.[20] These individuals are, in short, corruptible so long as they maintain a presence in these markets. This practice is thus in direct conflict not only with the present conceptions of our Constitution but the demands of the framers nearly two and a half centuries ago.

In order to describe this view, I will first begin by outlining the framers' view of corruption and its influence on the political process along with highlighting where these fears were made manifest in the eventually-authored Constitution (Part II). Following this, I will

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[17] *See* Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 Nw. U. L. Rev. Colloquy 180 (2013) at 201.
[18] *See* U.S. CONST. art. I, § 9, cl. 8, supra note 14
[19] *See* Antonio Guterres, All hands on deck to fight a once-in-a-lifetime pandemic, United Nations, https://www.un.org/en/un-coronavirus-communications-team/all-hands-deck-fight-once-lifetime-pandemic.
[20] *See* Gina-Gail S. Fletcher, Foreign Corruption as Market Manipulation, 2020 *University of Chicago Law Review Online* 15-25 (2020)

outline the case of *Buckley v. Valeo* which offers up a legal precedent for corruption (Part III). Thereafter, to buttress the claim that stock or commodity trading is a form of corruption, I will begin by defining key terms using the Foreign Emoluments Clause as a guide (Part IV). After, we will examine the nature of stock and commodity trading and why it violates the previously outlined principles - yet other similar, but functionally different, practices would not violate them with these understandings in mind (Part V). Lastly, I will discuss the *Blaszczak* case which will ideally, and if eventually appealed, provide the Supreme Court with an opportunity to discuss the issues of not only insider trading but corruption within government - thus laying the intellectual groundwork for future cases (Part VI).

II. Constitutional Origins of Corruption

Before putting pen to paper, the framers of our Constitution were acutely aware of, and concerned with, government corruption. Indeed, "there was near unanimous agreement that corruption was to be avoided, that its presence in the political system produced a degenerative effect."[21] James Madison's notes from the Constitutional Convention reflect this: fifteen delegates used the term corruption "no fewer than 54 times, and seven of the most prominent delegates, including Madison, Gouverneur Morris, George Mason, and James Wilson accounted for the vast majority of those usages."[22] Mason most pointedly stated "if we do not provide against corruption, our government will soon be at an end."[23] For the framers, corruption had a specific meaning: political corruption referred to the "self-serving use of public power for private ends, including, without limitation, bribery, public decisions to serve private wealth made

[21] *See* James D. Savage, Corruption and Virtue at the Constitutional Convention, 56 J. POL. 174 (1994) at 181
[22] Brief Amicus Curiae of Professor Lawrence Lessig in Support of Appellee, McCutcheon v. FEC, No. 12-536 (U.S. July 25, 2013).
[23] *See* Notes of Robert Yates (June 23, 1787), in 1 The Records of the Federal Convetion of 1787, at 391, 392 (Max Farrand ed., rev. ed. 1966) (1937)

because of dependent relationships, public decisions to serve executive power made because of dependent relationships, and use by public officials of their positions of power to become wealth."[24] This emphasis on "dependent relationships" and "self-serving" attitudes or "private ends" grounds the following discussion on certain securities or commodities trading: the dynamics of this particular form of investing, today, appear to constitute a violation of principles of corruption the framers sought to eliminate in their proposed system of governance. What's more, the "corruption the framers were concerned about was…'more of a systemic problem.'"[25] This was - and is - not a conversation, then, about individual instances *per se*; rather, the issue of corruption as a matter that the Constitution combats is about a broader system that enables these questionable and corrosive behaviors to take place. In other words, as a matter of design and purpose, the Constitution functions as a bulwark against the corruptive ills that may metastasize in government.

Indeed, the text of the Constitution reflects this. Article I is littered with protections against corruption: the size of the House of Representatives, outlined in Article I, Section 2, is deliberately large in order to "ensure accountability to the people" as "it would take too much time...in a large legislative body to create factions" as well as increasing the likelihood for "jealousies and personality conflicts."[26] Additionally, as another protection against corruption, the Constitution mandates a seven year residency requirement because of a "concern about foreign power, which was often intermingled with fears of corruption."[27]

These anxieties over corruption in the legislature most directly appear perhaps in Article I, Sections 6 and 9 with the Foreign Emoluments Clause and the Ineligibility Clause.[28] George

[24] *See* Teachout, supra note 9 at 373-374
[25] *See* Lessig, supra note 22 (quoting Lisa Hill, *Adam Smith and the Theme of Corruption*, 68 The Review of Politics 636–662 (2006)).
[26] Teachout, supra note 9 at 356
[27] *id*. at 358
[28] U.S. CONST. art. I, § 9, cl. 2, supra note 13; U.S. CONST. art. I, § 9, cl. 2; *see* also Teachout, supra note 9 at 359

Mason noted that the Ineligibility Clause in particular was the "corner-stone"[29] of the republic: the language reads that "[n]o Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."[30] In plain words, this clause "prevents members of Congress from holding civil office while service as a legislator, or from being appointed to offices that had been created - or in which the compensation was increased - during their tenure."[31] The basis for the Ineligibility Clause was rooted in a fear that "members of Congress would use their position to enrich themselves" and, in an effort to combat this, the framers designed a piece of the Constitution that expressly foreshadows a type of potential corruption.

Just the same, the Foreign Emoluments Clause is another example within Article 1 which was written to fight the erosion of government from within. Article 1, Section 9, Clause 8 reads that "[n]o Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."[32] Simply, this clause was put in place so as to fight the aforementioned fear of foreign intervention in a then-nascent republic and "plainly written 'to prevent corruption.'"[33] Moreover, rather than "simply outlawing bribery, these restrictions served as prophylactic measures that also targeted the *appearance of corruption*" (emphasis added).[34] Therefore, the Foreign Emoluments Clause in Article 1 may properly be

[29] *See* Notes of Robert Yates, supra note 23 at 381
[30] *See* U.S. CONST. art. I, § 9, cl. 2, supra note 28
[31] *See* Teachout, supra note 9 at 359
[32] *See* U.S. CONST. art. I, § 9, cl. 8, supra note 13.
[33] *See* Lessig, supra note 22 (quoting David Robertson, Debates and Other Proceedings of the Convention of Virginia 330 (2d ed. 1805) (1788) (recording the statement of Randolph)).
[34] *See* Lessig, supra note 23

read not just as a fight against controversially bestowed titles of notability, for example, but, most basically, a protection against corruption in the form of foreign interference. Critically, this piece plays a central role in the later discussion surrounding stock and commodities trades: as the Foreign Emoluments Clause was drafted in order to stymie the "appearance of corruption" or the compromising of government, instances in which government officials may fall victim to foreign influence, liberally defined, risk violating this tenant of the Constitution.

Similarly, Article II also features protections against corruption. Most notably, Article II, Section 1 outlines the "advice and consent" feature of appointments: the legislature would "check" the executive in a way so as to limit corruption.[35] Curious is what is not presently stated in the Constitution: Zephyr Teachout notes that the original language for what constitutes an impeachable offense were "treason, bribery, or Corruption."[36] In turn, the fears over a usurpation of executive power through outside forces constituted enough justification to remove a president. And, though replaced with the "high crimes and misdemeanors" language that exists now,[37] the deliberate efforts to prevent corruption through the impeachment power persisted in Article II. These two articles are worthy of particular focus as they apply specifically to the actors within the federal government who remain "checked" by the active political machinery of elections. In a later section, I will detail why honing in on these branches is especially crucial; however, if nothing else, the citizenry also acts as a moderator to ensure an ecosystem free of corruption just as the judiciary may too.

What's more, here is where the anti-corruption lens is also especially helpful: these fears, laid bare in Articles I and II, offer a plausible understanding of what the words meant to those who wrote and ratified the Constitution. To take a Textual approach to reading the Constitution,

[35] *See* Teachout, supra note 9 at 356
[36] *See id*. at 367 (quoting Convention Records)
[37] *See* U.S. CONST. art. II, §4

fears over corruption are embedded in the language of the debates and perspectives- if not also in the eventually produced design of our government. To this end, where this article seeks to combat a modern problem, it does so using the historic definitions, understanding, and even anxieties to a degree of those individuals for whom this was a contemporary text. Put another way, the words of the Constitution, taken as they meant, reinforce protections against corruption already. This is to say, this conversation is no call for a rouge judicial tonic to cure a problem that the other branches failed to sort out; rather, the mission of the judiciary here is consistent with the will and design of the framers.

III. *Buckley v. Valeo*: A Precedent for Prosecuting Corruption

Courts have in fact previously taken on similar challenges as, of course, corruption was not a problem that passed with the framers. In the late 1970s, following Watergate, Congress was faced with the task of curbing corruption in government.[38] As a result, the legislature passed amendments to the Federal Election Campaign Act.[39] Notably, the amendments limited financial contributions to candidates, required financial disclosures of contributions, limited expenditures, and provided public financing of elections (among other things too).[40] Additionally, the Federal Elections Commission (FEC) was developed in order to monitor the integrity of the United States' elections.[41]

However, a cadre of political actors filed a suit alleging that the amendments violated the First and Fifth Amendments to the Constitution.[42] In *Buckley v. Valeo* (*Buckley*), the Court reached two divergent but important results in a per curiam opinion: one, the limits on

[38] *See Buckley v. Valeo*, 424 U.S. 1 (1976).
[39] *See id*. at 1
[40] *Id.*
[41] *Id.*
[42] *See id.* at 3

expenditures, in particular, violated the First Amendment;[43] two, though, in the name of enhancing the "integrity of our system of representative government," the individual contribution limits did not violate the First Amendment.[44] While it is not a "particularly coherent opinion," it is nonetheless "perhaps the single most influential case in the modern law governing political processes" as it "sets up the modern framework for analyzing corruption."[45]

To this point, while this case did not expressly deal with self-serving or even self-enriching actions, the language and understanding of the First Amendment violations - or lack thereof as it applies to the individual contribution limitations - is rooted in developing a defensive system against corruption. In upholding the individual limits, the Court reasoned that "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office" warranted enough basis for Congressional action.[46] Conversely, though, the Court found that the "governmental interest in preventing corruption and the appearance of corruption is inadequate to justify [the] ceiling on independent expenditures" because it was unclear that the amendments provide a sufficient answer as to whether or not "large independent expenditures pose the same dangers of actual or apparent quid pro quo arrangements."[47] Importantly, then, *Buckley* "introduces the idea that corruption and quid pro quo might be interchangeable."[48] To these ends, *Buckley* provides ample grounding for the eventual discussion related to corruption in government *vis-à-vis* stock and commodity trading: the Court's opinion expands upon the framers' conception of corruption in a way so as to integrate similar processes

[43] *See id.* at 39-59
[44] *See id.* at 60-84
[45] Teachout, supra note 9 at 383-384
[46] *Buckley*, at 28 .
[47] *Id.* at 59
[48] *See* Teachout, supra note 9 at 385

that equally pose a threat to eroding a "confidence in representative government."[49] What's more, the Court concluded that the contributions limits "serve the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion."[50] In short, the *Buckley* Court understood that corruption went beyond serving oneself: corruption, either active or believed, hamstrings our system of governance in leaving citizens "cynical"[51] that elected officials work on their behalf. Moreover, the *Buckley* decision amplifies the need – if not requirement – for the judiciary to intercede on behalf of a cause against corruption. While instigated by other, political actors, the Court in *Buckley* (and hopefully in later cases as well) recognized the Constitution's role in guarding our democracy from the actions of malicious government officials.

IV. Defining Terms

Yet, though the Supreme Court and the framers provide something of an outline, it is first essential to define and understand key terms for the purposes of furthering a conversation around securities or commodities trading. While, as discussed, the Constitution carries with it an anti-corruption ethos, I believe honing in on a particular piece of text is most helpful - specifically, the Foreign Emoluments Clause. The text reads, in full, that "[N]o Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."[52] Of course, one may first ask, who is a "person holding any

[49] *See Buckley*, supra note 39 at 30.
[50] *Id*. at 75
[51] *See* Teachout, supra note 9 at 386
[52] *See* U.S. CONST. art. I, § 9, cl. 8, supra note 13.

office" (hereafter synonymous with a "government official")? For the purposes of this argument, this official is any individual, either appointed or elected, who serves in the federal government. The reasons for this are three-fold: one, this is likely what the framers (or at least near-contemporaries) had in mind when drafting the language of the Constitution's Foreign Emoluments Clause; two, both policy-makers and policy advisors are subject to corruptive forces (thus meaning that this doctrine cannot just apply to elected officials);[53] and, third, the Constitution, while it governs the states through the incorporation doctrine,[54] outlines the structure of the federal (rather than the states') government.

There are, however, some caveats to this surprisingly both liberal and, yet, stringent definition. For one, Zephyr Teachout suggests that the language of the Foreign Emoluments Clause applies to state officials given the "under them" language of this section because, for example in Article III, Section 3, Clause 3, "the United States is referred to as 'them' instead of 'it' when defining treason"[55] thus showing that the language of the Constitution refers to the entire body - both federal and state governments - rather than simply the former.[56] This appears inconsistent with some historical facts: as but one example, the framers, in drafting the Constitution's predecessor, the Articles of Confederation, used "United States" to refer to the "federal entity" (and "when they meant both, they used express language accommodating both").[57] This is not to diminish the fact that "even if states were intentionally excluded, the shift does not constitute an intentional grant of greater power to state officials to accept foreign gifts

[53] *See* Teachout, supra note 9
[54] *See* Incorporation Doctrine, Legal Information Institute, https://www.law.cornell.edu/wex/incorporation_doctrine#:~:text=The incorporation doctrine is a,clause of the Fourteenth Amendment.
[55] *See* Teachout, supra note 16
[56] *See id.*
[57] *See* Tillman, supra note 17 https://scholarlycommons.law.northwestern.edu/nulr_online/68

when representing the country."[58] Nevertheless, the text of the Constitution - not a normative position - does not seem to substantiate this view.

Just the same, though, Seth Barrett Tillman has argued that "government official" does not apply even to elected office-holders.[59] As a basis for outlining the original public meaning of the text, Tillman cites gifts George Washington received from France and a list that Alexander Hamilton produced.[60] For the latter, Congress directed Hamilton to compile a list of "every person holding any civil office or employment under the United States, (except judges)."[61] The resulting product featured "all those holding federal appointed or statutory office in every branch but no elected officials."[62] Critically, again, "under the United States" did not mean state officials.[63] But more importantly, as Tillman mentions, Hamilton deliberately focused on individuals who were not elected officials serving at the federal level either.[64] This is not reason to dismiss the potential for the language of the Foreign Emoluments Clause to not apply to these individuals though: this incident is, in fact, in direct conflict with Edmund Randolph's view that "the President was an officer of and under the United States and subject to the Impeachment Clause and the Foreign Emoluments Clause."[65] Randolph was not alone as, in point of fact, a "majority" of the framers took this position.[66] Therefore, the ambiguity of "government official" is not clarified by Tillman's suggestion - indeed, it may have meant both an elected and unelected member of the government to the framers. For this reason, the definition for the

[58] *See* Teachout, supra note 16
[59] *See* Tillman supra note 17
[60] *See* supra note 17 at 186
[61] *See id*.
[62] *See id.* 187
[63] *See id*.
[64] *See id*.
[65] *See* 3 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution 202 (Jonathan Elliot ed., Washington, 2d ed. 1836)
[66] *See* Tillman, supra note 17 at194

purposes of this article will use both as erring towards one or the other fails to appropriately capture the possible intents of the framers.

Additionally, Tillman cites Washington's gifts. Despite the fact that these gifts were "widely reported"[67] on, Washington never asked for the requisite Congressional blessing.[68] Perhaps, as Professor Tillman suggests, it was not necessary; however, it may have also been a lapse in judgement as a young country worked out the knots in its young system of self-governance.[69] For one, Presidents Martin Van Buren, John Tyler, and Andrew Jackson would all seek Congressional approval for various foreign-derived gifts during their tenures in office.[70] These were not political actors following Washington in the later centuries but contemporaries of the first president. Such a fact should not be overlooked: while I cannot speak to Washington's motivations, they appear inconsistent with the views of his peers. Once again, then, it is unclear - and, in reality, quite possible - that "officials" are those both elected or who serve in the federal government.

It is necessary to appropriately define this term here as the ensuing conversation around stock and commodities trading applies to a particular party, one that is consistent with both the letter and spirit of the Constitution. Simply put, while the focus of this article remains elected officials in light of recent events, this is not an exclusive proposition - in fact, as in *Blaszczak*, a government official (one who holds an "office") does not necessarily apply strictly to those who

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[67] *See* Tillman, supra note 17 at 188 (citing, Fed. Gazette & Phila. Daily Advertiser, Aug. 12, 1790, at 2 ("Last week the key of the Bastille, accompanied with a fine drawing of that famous building, was presented to the President of the United States, by John Rutledge, jun. Esq. to whose care they were committed by the illustrious patriot the Marquis de la Fayette . . . .")).

[68] *See id*.

[69] *See* Teachout, supra note 17 at 41-42

[70] *See id*.; *see also* Message from the President of the United States To the Two Houses of Congress at the Commencement of the First Session of the Twenty-Third Congress 258–59 (Washington, Gales & Seaton 1833) (reproducing Jan. 22, 1834 letter from the Secretary of State to the President explaining, in summary fashion, the history of the Jackson medal and how it came into the possession of the State Department)

are subject to electoral checks through the traditional political process.[71] On the contrary, assuming a role within the government subjects individuals to the will of the Constitution.

V. Stock Trading as a Matter of Corruption

With all these understandings and definitions in mind, let us now turn to the issue of government officials trading stocks or commodities. First, stock trading is the process of investing capital in an individual company[72] while commodities trading is investing in various goods, like oil.[73] By contrast, a mutual fund or an exchange-traded funds (ETFs), though ostensibly similar, diversifies capital into different kinds of "baskets" of collections of stocks- thus spreading risk and areas of investment.[74] Though this is a simplified binary, functionally, the investment in individual companies is where government officials risks corruptibility.

As an analogy, take two scenarios, one hypothetical, the other actively litigated. In one, Gina-Gail Fletcher proposes an example in which a foreign official uses "bribes or other corrupt conduct to secure derivatives - or commodities-related business."[75] Here, a "hedge fund bribes a foreign official with authority over a sovereign wealth fund to secure it as an investor in a derivative transaction...[which] could potentially constitute a violation of the [Commodities Exchange Act]."[76] While it may violate a statute, it may also violate the Constitution's protections against corruption: as noted, the underlying current of the Constitution was designed and written to prevent corruption in the form of foreign involvement in the United States. The

[71] *See Blaszczak* supra note 14 at 4
[72] *See* Adam Hayes, Stock Investopedia (2020), https://www.investopedia.com/terms/s/stock.asp.
[73] *See* James Chen, Commodity Investopedia (2020), https://www.investopedia.com/terms/c/commodity.asp
[74] *See* Adam Hayes, Mutual Fund Definition Investopedia (2020), https://www.investopedia.com/terms/m/mutualfund.asp.
[75] *See* Fletcher, supra note 20
[76] *See id*.

bribery scheme that Fletcher suggests is a clear measure that a foreign entity takes to influence or drive policy in a particular direction.

Or, let us examine the case of President Donald Trump. When sworn in to the presidency, Trump did not divest from his expansive real estate and hotel businesses.[77] In turn, though, cases were introduced in which the central question was whether or not for "each rent payment from a foreign government...or [for] each hotel [that] books another member of a foreign sovereign delegation, or [for] each golf resort [that] sets a tee time for a member of a governor's entourage" these instances constituted a violation of the Emoluments Clauses (foreign and domestic).[78] As these sections of the Constitution bar the president "from getting gifts or other valuables from foreign governments unless [one] has the consent of Congress,"[79] President Trump's conduct may also be a violation of the Constitution. As these cases are actively in litigation, we may soon have an answer.[80] But this said, the appearance of corruption may provide enough grounds to spur legislative action irrespective of the outcome.

Thematically speaking, these were the trends that the Constitution was to combat as it is necessary to limit even the "appearance of corruption."[81] Though these instances do not expressly outline the issues of stock and commodity trading, similarities exist: simply, when government officials expose themselves - and by extension their country - to international markets, they risk foreign intervention in domestic affairs. One may rightly conclude that involvement in these markets would cloud the judgement of political figures if their individual fortunes were on the line with each decision they made. If nothing else, it leaves would-be skeptics disillusioned with the actions of politicians – to the detriment, possibly, of all as they are

[77] *See* Karl Racine & Elizabeth Wilkins, *Enforcing the Anti-Corruption Provisions of the Constitution*, 13 Harvard Law & Policy Review , https://harvardlpr.com/wp-content/uploads/sites/20/2019/07/Racine-Wilkins.pdf. At 451
[78] Ciara Torres-Spelliscy, *From a Mint on a Hotel Pillow to an Emolument*, 70 Mercer L. Rev. 705 (2019) at 7
[79] *Id*. at 8
[80] *See eg. District of Columbia v. Donald Trump*, No. 18-2488 (4th Cir. 2020)
[81] *See* Lessig, supra note 34; *see Buckley*, supra note 46

bettered by added voices in the political process. Consequently, not only do potentially corrupt politicians fail to uphold constitutional standards that their various offices are to follow but they also simultaneously chip away at the structural supports of our government by creating cynics of citizens.

Most basically, then, stock and commodity trading is a violation of the Constitution for failing to pass the corruption test.[82] As mentioned, this does not preclude members of the government from participating in other passive income markets, like investing in mutual funds. Rather, much like an individual investor, mutual fund or ETF investments spread the risk - not just of taking a loss in the market but also in terms of corrupting government officials through coercive practices. In short, the difference underlying these two kinds of investments comes down to whether or not an individual government official invests in an individual company which can therefore tether the official's interests with the desires of actors within the market and not of one's own constituents. Yet, as exemplified by Senators Loeffler and Burr, past events have sounded alarms with respect to the nature and health of our representative government.[83] These cries should not fall on deaf ears - particularly those of the judiciary: in line with the original vision of the framers, behaviors like those of the most recent spring do not comport with our Constitutional visions. To the extent the courts can contribute to limiting these trades - as I believe they can - this branch of government should remain active and vigilant in maintaining the original intent of the framers.

VII. *Blaszczak*, The Foreign Emoluments Clause, and An Opportunity for Change

[82] *See* Teachout, supra note 24
[83] *See* Augustin, supra note 5; *see also*, Charles L. Slamowitz, *Profiteering Off Public Health Crises: The Viable Cure for Congressional Insider Trading*, 77 Wash. & Lee L. Rev. Online 31 (2020)

Recent developments, in the form of the *Blaszczak* case, further complicate and advance the claim that stock and commodities trading violates the Constitution generally and the Foreign Emoluments Clause in particular. Moreover, and most importantly, this case also allows for the appropriate judicial intervention to curb corruption within government.

In May of 2017, the U.S. Attorney's for the Southern District of New York charged David Blaszczak, Theodore Huber, Robert Olan, and Christopher Worrall for counts of "conspiracy, conversion of U.S. property, Title 15 securities fraud, wire fraud, and Title 18 securities fraud"[84] in a scheme to acquire confidential information from the federal agency known as the Centers for Medicare and Medicaid Services (CMS).[85] Olan and Huber (along with another employee at the healthcare-focused hedge fund Deerfield Management Company, L.P.[86]), contacted Blaszczak in order to acquire "predecisional" information regarding various "rules and regulations."[87] Between 2009 and 2014, the Department of Justice alleged, CMS employees disclosed confidential information to Blaszczak who, in turn, provided it to Deerfield employees who "shorted" stocks on healthcare companies who would be hurt by certain measures.[88] The jury at the district court level "acquitted all defendants on the Title 15 counts, but found the defendants guilty on other counts, including conversion, wire fraud, and (except for the CMS employee) Title 18 securities fraud."[89]

On appeal, the Second Circuit sought to determine whether the "federal wire fraud, securities fraud, and conversion statutes, codified at 18 U.S.C. §§ 1343, 1348, and 641,

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[84] *Blaszczak,* supra note 14 at 3
[85] *See id*. at 4
[86] *See id*. (describing the "Deerfield Scheme")
[87] *See id*. at 5
[88] *See id*. at 6
[89] Barry Goldsmith et al., United States v. Blaszczak: Second Circuit Ruling Heightens Risks of Insider Trading Investigations and Prosecutions, Gibson Dunn, https://www.gibsondunn.com/us-v-blaszczak-second-circuit-ruling-heightens-risks-of-insider-trading-investigation-and-prosecutions/.

respectively, reach misappropriation of a government agency's confidential nonpublic information relating to its contemplated rules."[90] Among the defendants' arguments were that the "convictions for fraud under Title 18 must be reversed because there was insufficient evidence to prove that they engaged in a scheme to defraud CMS of 'property.'"[91] The Second Circuit rejected these claims. Writing for the majority, Judge Ronald Sullivan stated that "the word 'property' is construed in accordance with its ordinary meaning: 'something of value' in the possession of the property holder."[92] What's more, the circuit court wrote that "CMS's right to exclude the public from accessing its confidential predecisional information squarely implicates the government's role as property holder, not as sovereign."[93]

Now, the implications for this are many. For one, the *Blaszczak* decision may induce more cases against insider trading.[94] But, as it relates specifically to the issue of stock and commodities trading by government officials, the Second Circuit's decision inadvertently lays the groundwork for challenges to these practices in line with the Constitution. (As a small aside, the CMS employees involved were, obviously, not elected officials. This said, under our definition from the Emoluments Clause, these individuals are no less subject to the Constitution's principles than an elected member of the House of Representatives, for example.) The language of the Foreign Emoluments Clause is, once again, especially relevant in this example: this piece expressly bars government officials from receiving "any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State"[95] In essence - and as previously discussed - this was written to prevent foreign governments from

[90] *See Blaszczak*, supra note 14 at 3
[91] *Id.* at 16.
[92] *Id.* at 19
[93] *Id*. at 22
[94] *See* supra note 89
[95] *See* U.S. CONST. art. I, § 9, cl. 8, supra note 13.

giving gifts to government officials in the name of currying favor or improperly influencing policy.

But given the *Blaszczak* decision, stock or commodity information may just the same be a "gift" in the sense the framers could have had in mind, like a key, painting, or other object of some material value.[96] Put another way, information that a government official may receive from a foreign party would constitute, under this legal framework, a "gift" and a violation of the Emoluments Clause as a result.

Of course, to seemingly be a violation of the Foreign Emoluments Clause, the information shared - the property, or gift - must come from a foreign entity. While this is the case for tangible goods, in the realm of information, it is less clear. Would information on an international company - which need not necessarily originate from the company's home country - constitute a "foreign gift"? I believe the answer could be yes: in *Blaszczak*, defendants cited *Dirks v. Securities and Exchange Commission* which ruled that tippers of information are only liable when they "personally . . . benefit, directly or indirectly, from [their] disclosure."[97] Let us see this through to our present hypothetical: if an individual in the United States tipped non-public information on a foreign company to a government official in exchange for payment, that is a "gift" of "property" given without the consent of Congress. While this would be a rather unique scenario, it illustrates, in my view, the potential for textual (rather than purposive[98]) violations of the Constitution. Thus, there are instances in which the practice of stock and commodities trading conducted by government officials violates the core spirit and, simultaneously, a section of the Constitution. Regardless, then, the "foreign" elements of this scenario help to describe the claim that the trading tribulations of today are unconstitutional,

[96] *See* Teachout supra note 17
[97] *See Dirks v. Securities Exchange Commission*, 463 US 646 (1983)
[98] *See* Teachout, supra note 11

rooted in the letter of the document. Put plainly, while the framers' views on corruption may sway some, the text is dispositive. In other words, the undergirding current - that corruption poisons government endogenously - may only further a small piece of the problem; however, *Blaszczak*, in tandem with future cases, would be a textually-rooted fight against corrupt practices.

To these ends, the Supreme Court can offer a reprieve: *Blaszczak* may very well be appealed to the high court. Interestingly, it would come at a critical time: in *Kelly v. United States*, the Court appeared to undermine the Second Circuit's view of property.[99] In particular, the Court ruled that "an exercise of regulatory power" does not mean there was a property fraud. As a result, the Solicitor General's office has sought to push *Blaszczak* before the Court - or to at least remand the decision in light of *Kelly*.[100] This is inconsistent with the ruling, though, in *Kelly*: Justice Elena Kagan, writing for a unanimous court, stated because the scheme in question did not "aim to obtain money or property"[101] *this* was the reason that it was not "fraud." All the more, then, that the Court should hear the *Blaszczak* case: if following the judgement of the lower court, the Supreme Court may ultimately better define "property" in the realm of securities or commodities. In turn, this judgement would allow for a greater push towards remediating some of the existing corruption that exists in government in the form of trading. Simply, a high court judgement in *Blaszczak* would be the cornerstone of future challenges to corruption related to stock trading.

But this alone should not influence the Court entirely: indeed, the *Kelly* ruling may fail to offer enough justification to counter the Second Circuit's decision in seeing information as

[99] *See Kelly v. United States*, 590 US _ (2020)
[100] Robert J Anello & Richard F Albert , Days Seem Numbered for Circuit's Controversial Insider Trading Decision Law.com (2020), https://www.law.com/newyorklawjournal/2020/12/09/days-seem-numbered-for-circuits-controversial-insider-trading-decision/.
[101] *See Kelly*, supra note 98

property for there was an exchange of dollars involved. On a larger scale, though, *Blaszczak* is one tool to use to advance the claims of corruption through the use of textual, rather than legislative, levers. To this point, *Blaszczak*'s advantages are that it will catalyze interpretive change sooner – but it is surely not the only means of providing arms to combat corruption through the text of the Constitution. Teachout's view of anti-corruption, which the Court has once adopted (at least in dissent[102]) before, largely comport with the will of the framers - just as maintaining a close allegiance with the text would not undermine the framers either.

VIII. Conclusion

In sum, the practice of allowing government officials – elected or unelected members of the federal government – to buy or sell securities or commodities allows for corrupt behavior. This view is not inconsistent with the views of the framers of the Constitution who embedded anti-corruption measures within various sections of the documents, not least of which being those that describe the elected branches of government. In brief, corruption – the fear of it specifically – initiated many of the existing and original provisions of our Constitution.

To this point, the judiciary must remain active in aligning it's interpretations with what the words meant to those who designed our system of governance. Of late, there is an opportunity for at least the Supreme Court to contribute in all likelihood: *United States v. Blaszczak* offers the Court a chance to better define "property" in securities cases. Accordingly, if the Supreme Court upholds the decision of the Second Circuit Court of Appeals, this view of "property" would provide a textual basis and framework to ground the unconstitutionality of stock trading. As one example, exchanging insider information – property, as the Second Circuit saw it – on a foreign company would violate the Foreign Emoluments Clause of the Constitution.

[102] *See Citizens United*, supra note 12