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MEMORANDUM FOR PHILIP B. HEYMANN
Assistant Attorney General
Criminal Division

Re: The Power of Congress to Abrogate its Members' Rights under the Speech or Debate Clause

In your memorandum of September 18, 1979, you asked our opinion whether Congress can "waive" its members' rights under the Speech or Debate Clause of the Constitution. 1/ The Solicitor General has taken the position, in the Supreme Court, that Congress has the power to abrogate its members' Speech or Debate Clause protection. See Brief for the United States at 18-21, 76-88, United States v. Helstoski, 442 U.S. 477 (1979); Brief for the United States at 10-32, United States v. Brewster, 408 U.S. 501 (1972). We disagree. We believe that Congress may not "waive" or abrogate its members' rights under the Speech or Debate Clause.

The Speech or Debate Clause protects not just speech on the floor of a house but all of a member's "legislative activities" 2/ from being "questioned" elsewhere. United States v. Johnson, 383 U.S. 169 (1966), was the first case in which the Supreme Court used the clause in connection with the prosecution of an allegedly corrupt member of

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1/ Article I, section 6, clause 1 provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."

2/ The Supreme Court has said that "legislative activities" include those actions which are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." Gravel v. United States, 408 U.S. 606, 625 (1972). See also Hutchinson v. Proxmire, 443 U.S. 111, 123-33 (1979); Note, Evidentiary Implications of the Speech or Debate Clause, 88 Yale L.J. 1280, 1281 n.6 (1979).

Congress. In Johnson the Court held that a Representative's motives for giving a particular speech on the floor of the House could not be the basis of a charge that he had "conspire[d] . . . to defraud the United States" in violation of 18 U.S.C. § 371. But the Court added:

> [W]ithout intimating any view thereon, we expressly leave open for consideration when the case arises a prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.

383 U.S. at 185. In United States v. Brewster, 408 U.S. 501 (1972), the parties discussed whether the federal bribery statute, 18 U.S.C. § 201, was such a "narrowly drawn statute" and whether it could constitutionally empower the other branches to inquire into the legislative activities of a member of Congress. But the Supreme Court again expressly left those issues undecided. 408 U.S. at 529 n.18. Instead, it upheld the Government's power to prosecute a Senator for bribery on the ground that "no inquiry into legislative acts or motivation for legislative acts" was necessary to the Government's case. Id. at 525. Justices Brennan, White, and Douglas dissented. In addition to arguing that legislative activity was indeed involved in the prosecution, the dissenters rejected the view that Congress could abrogate its members' Speech or Debate Clause protection. See id. at 540-50 (Brennan and Douglas, JJ., dissenting); id. at 562-63 (White, Douglas, and Brennan, JJ., dissenting). Then in United States v. Helstoski, 442 U.S. 477 (1979), a bribery prosecution of a former Representative, the Court affirmed a decision that the Speech or Debate Clause required the suppression of evidence referring to the Representative's past legislative acts. In doing so the Court held that 18 U.S.C. § 201 did "not amount to a congressional waiver of the protection of the Clause for individual Members." 442 U.S. at 492. After acknowledging the force of arguments that the Constitution does not permit Congress to "waive" its members' Speech or Debate protection, see id. at 492-93, the Court again left open the question whether "an explicit

and unequivocal expression" could constitutionally abrogate members' rights under the Speech or Debate Clause. Id. at 493. 3/

We have no doubt that Congress may authorize the other branches to prosecute and punish its members if no Speech or Debate Clause issue is involved. See United States v. Brewster, 408 U.S. 501 (1972). Each house has the power to "punish its Members for disorderly Behavior." Art. I, § 5, cl. 2. 4/ See Powell v. McCormack, 395 U.S. 486, 548

3/ Helstoski suggests how Congress can abrogate its members' Speech or Debate protection if it has the power to do so:

> Assuming, arguendo, that the Congress could constitutionally waive the protection of the Clause for individual Members, such waiver could be shown only by an explicit and unequivocal expression. There is no evidence of such a waiver in the language or the legislative history of § 201 or any of its predecessors.

442 U.S. at 493. The Court added that the debates on the original bribery statute contained "no discussion of the Speech or Debate Privilege" and that the House and Senate Reports accompanying its reenactment did not mention as an objective any abrogation or modification of the Speech or Debate Clause. Id. at 493 n.8. In our view Congress can most clearly express its intention to abrogate its members' Speech or Debate protection by enacting language stating that intention, perhaps as a preamble to the statute that authorizes other branches to "question" members about their legislative activity. Authoritative statements to that effect on the floor of each house, or in the committee reports of each house, should also suffice, under Helstoski, to exercise whatever power Congress has to abrogate the privilege.

4/ Article I, section 5, clause 2 provides: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member." Apparently, Congress even has the power to order that a member be imprisoned. See Kilbourn v. Thompson, 103 U.S. 168, 189-90 (1881) (dictum).

(1969); Kilbourn v. Thompson, 103 U.S. 168, 189-90 (1881). This power appears to extend "to all cases where the offense is such as in the judgment of [the House or] the Senate is inconsistent with the trust and duty of a member." See In re Chapman, 166 U.S. 661, 669-70 (1897); United States v. Brewster, 408 U.S. 501, 541 (1972) (Brennan and Douglas, JJ., dissenting). Very likely, then, the houses of Congress themselves will have the power to discipline their members in any case which implicates the interests of federal criminal law enforcement. And under the Necessary and Proper Clause, Congress may enlist the aid of the executive and judicial branches in punishing its members, see Burton v. United States, 202 U.S. 344, 366-70 (1906), if punishing them in no way involves "questioning" them about their "Speech or Debate." But we believe that Congress may not authorize the executive and judicial branches to act in ways that would otherwise violate the Speech or Debate Clause.

To begin with, the language of the Speech or Debate Clause seems not to permit Congress to abrogate its members' rights. Permitting Congress to "waive" its members' Speech or Debate protection would, in effect, demote the clause to the status of an ordinary statute passed by an earlier Congress; that is not how constitutional provisions are usually interpreted. Moreover, the clause is phrased as a prohibition, not as a grant of legislative power to Congress. 5/ Other constitutional prohibitions similarly

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5/ At the Constitutional Convention the Framers considered William Pinckney's proposal that "[e]ach House shall be the judge of its own privileges, and shall have authority to punish by imprisonment every person violating the same." See Bradley, The Speech or Debate Clause: Bastion of Congressional Independence or Haven for Corruption?, 57 N.C.L. Rev. 197, 199 n.11, 211-12 (1979); Cella, The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present, and Future as a Bar to Criminal Prosecutions in the Courts, 2 Suffolk L. Rev. 1, 14-15 (1968). This proposal, among other things, would evidently have allowed a house to deny Speech or Debate protection to a member. The Framers rejected it. Their reasons for doing so are unclear; their principal fear may have been that Congress would encroach on the other branches' powers. See, e.g., Bradley, supra, at 212 & n.92. But their decision to phrase the clause as a prohibition, not a grant of power, was deliberate.

phrased limit Congress as well as the executive and judicial branches. See, e.g., Art. I, § 6, cl. 2; Amend. 5. Indeed we can think of no provision in the Constitution phrased as a prohibition that can be lawfully overcome by simple legislation, or by the act of one branch.

Those who believe that Congress can "waive" its members' Speech or Debate rights assert that the Speech or Debate Clause, unlike most other constitutional prohibitions, is designed principally to protect Congress. From this they infer that Congress may forgo its protection. See, e.g., Bradley, supra note 5, at 223-24; Brief for the United States at 84 n.35, United States v. Helstoski, 442 U.S. 477 (1979). Their premise is undoubtedly correct; the principal purpose of the Speech or Debate Clause is indeed to protect Congress. See, e.g., United States v. Gillock, 100 S. Ct. 1185, 1191 (1980); United States v. Johnson, 383 U.S. 169, 180-81 (1966). But in our view the clause protects Congress chiefly by protecting the speech and debate of every member -- even if a majority of his colleagues wish to deny him that protection. 6/ If Congress could abrogate its members' rights by a majority vote, the members of that majority would, of course, be giving up not only their own protection -- itself perhaps a problematic act, see United States v. Helstoski, 576 F.2d 511, 523 (3rd Cir. 1978), aff'd 442 U.S. 477 (1979) ("The question of whether an individual senator or representative may waive his Speech or Debate privilege is an open one") -- but that of the minority. In other words, the majority would be subjecting the minority to being "questioned" by the executive

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6/ In 1808, the Supreme Judicial Court of Massachusetts said that "the privilege . . . is not so much the privilege of the house, as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house." Coffin v. Coffin, 4 Mass. 1, 27 (emphasis added). In its first attempt to interpret the Speech or Debate Clause, the Supreme Court said that Coffin v. Coffin was perhaps "the most authoritative case in this country on the construction of the provision in regard to freedom of debate in legislative bodies." Kilbourn v. Thompson, 103 U.S. 168, 204 (1881). Coffin appears not to have lost its status since then. See, e.g., United States v. Brewster, 408 U.S. 501, 514-15, 516 n.11 (1972); Tenney v. Brandhove, 341 U.S. 367, 373-74 (1951).

and judicial branches against its will. 7/ For several reasons, we believe that the clause was intended to protect members of Congress against the threat of such a hostile alliance between the majority of Congress and the other branches.

First, the historical background of the clause suggests that it serves this purpose. The Speech or Debate Clause of the Constitution is descended from the British doctrine of parliamentary immunity. This immunity was recognized by Parliament and intermittently by the courts, and it was enshrined in the Bill of Rights of 1689:

> That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.

See United States v. Johnson, 383 U.S. 169, 177-78 (1966). The Supreme Court has said that the Speech or Debate Clause was designed, in part, to prevent the sorts of abuses involved in the cases that gave rise to, and continually tested, the British immunity. See, e.g., Gravel v. United States, 408 U.S. 606, 622-24 (1972); United States v. Johnson, 383 U.S. 169, 180-82 (1966). Often in those cases Parliament allied itself with the Crown against dissident members of Parliament. 8/

7/ As we have said, a majority in Congress can itself "punish Its Members for disorderly Behavior." See Art. I, § 5, cl. 2. But for political, practical, and legal reasons, it is likely to be far more efficient for that majority to enlist the aid of the other branches.

8/ See, e.g., Note, The Bribed Congressman's Immunity from Prosecution, 75 Yale L.J. 335, 337 n.10 (1965); Bradley, supra note 5, at 201-03. This article appears to conclude that Congress can "waive" its members' Speech or Debate protection, although its final view is not entirely clear. Compare id. at 223-24 with id. at 224-25. See generally Brief for the United States at 16-17, 20 n.20, United States v. Brewster, 408 U.S. 501 (1972) (Framers of Speech or Debate Clause feared executive domination of legislature).

John Wilkes's struggle against Parliament and the Crown was the most notorious of these cases. In 1763, Wilkes, a member of Parliament, criticized a recent treaty between France and England. He was arrested but ordered released on the ground that his arrest violated parliamentary privilege. At this point, "[i]nfluenced by the King's ministers, the House of Commons voted to expel Wilkes from Parliament." Brief for the United States at 36, United States v. Helstoski, 442 U.S. 477 (1979). Wilkes fled to France to avoid being imprisoned. On his return he was re-elected, then convicted of seditious libel and sentenced to prison. Parliament again obligingly declared him ineligible for membership and expelled him from the Commons, and he was imprisoned. He was reelected several times more, but each time Parliament refused to seat him. In 1770 Wilkes was finally released from prison. In 1774, he was reelected, and in 1782 the House of Commons ordered that its prior resolutions refusing to seat him be expunged. Id. at 36-37. As the Supreme Court has said:

> Wilkes' struggle and his ultimate victory had a significant impact in the American colonies. [He] . . . became a cause celebre for the colonists . . . . It is within this historical context that we must examine the Convention debates in 1787, just five years after Wilkes' final victory.

Powell v. McCormack, 395 U.S. 486, 530-31 (1969). This historical background strongly suggests that a central purpose of the Speech or Debate Clause is to protect individual members of Congress against a legislative majority that would leave them to the mercies of the other branches. 9/ Indeed, the Supreme Court has emphasized

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9/ Some commentators have drawn exactly the opposite conclusion from this English background of the clause, saying that it demonstrates Congress's power to abrogate its members' Speech or Debate rights. These commentators have argued that since Parliament could override its members' rights, so can Congress; and that, moreover, the prominence of Wilkes's case shows that the Framers were aware of Parliament's ability to override its members' rights. See, e.g., Bradley, supra note 5, at 223 & n.154.

the importance of Wilkes's case in determining the power of Congress over its members. Id. See also Bradley, supra note 5, at 211. 10/

The Supreme Court has said that "[a]lthough the Speech or Debate Clause's historic roots are in English history, it must be interpreted . . . in the context of the American constitutional scheme of government rather than the English parliamentary system." United States v. Brewster, 408 U.S. 501, 508 (1972). See also Hutchinson v. Proxmire, 443 U.S. 111, 126 (1979). 11/ As we have said, we believe that in

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9/ (Continued from p. 7.)
The difficulty with the first argument is that in the British system Parliament can override any "constitutional" guarantee. Congress, of course, has a different role. The fact that Parliament has the power to abrogate a right cannot possibly demonstrate, or even suggest, that Congress has the same power. The difficulty with the second argument is that the Supreme Court has said that the Wilkes case is an example of the sort of abuse of power by a legislative majority against a dissident legislator that the Framers were concerned to avoid, not ratify. See Powell v. McCormack, 395 U.S. 486, 530-31 (1969). See also Bradley, supra note 5, at 211.

10/ The Supreme Court considered this point in connection with the clauses defining Congress's power to exclude or expel a member, see Art. I, § 5, cl. 1, 2, not in connection with the Speech or Debate Clause. See Powell v. McCormack, 395 U.S. 486, 527-31 (1969). But the underlying abuse, against which the Framers evidently wished to act, was a legislative majority denying a member his immunity for legislative acts.

11/ It is often said that members of Parliament abused their immunity. See, e.g., Brief for the United States at 34-35, United States v. Helstoski, 442 U.S. 477 (1979). But see Reinstein & Silverglate, Legislative Privilege and the Separation of Powers, 86 Harv. L. Rev. 1113, 1139 n.139 (1973). They apparently used it to avoid liability for private wrongs unrelated to their legislative tasks, for example, and since members' privileges extended to their assistants, members in effect sold immunity to wrongdoers who would pay to become bogus assistants. The Supreme Court has suggested that the Framers of the Constitution's Speech or Debate Clause wanted to prevent these abuses from recurring. See, e.g., United States v. Brewster, 408 U.S. 501, 517 (1972). This background

our system the clause serves to protect minorities in Congress. Advocates of the position that Congress can "waive" its members' Speech or Debate Clause rights not only cannot attribute this purpose to the clause; in our view they cannot attribute to it any other significant objective. In other words, interpreting the clause to permit such a "waiver" would effectively deprive the clause of any substantial purpose in the American constitutional scheme. This further suggests that such an interpretation is unsound.

In England, particularly before 1689, legislative immunity was an important weapon in the "long struggle for parliamentary supremacy." United States v. Johnson, 383 U.S. 169, 178 (1966). Parliament invoked it against monarchs (and courts subservient to monarchs, see id. at 181-82) who thought themselves sovereign; the Crown asserted its prerogative to act, without any authority whatever from Parliament, against members of that body. This protection of legislative power against executive prerogative and judicial usurpation -- probably the central purpose of English parliamentary immunity, at least before 1689 -- cannot be a principal function of the American Speech or Debate Clause, however. For the most part, federal courts cannot act against members of Congress at all unless Congress has in some way granted them jurisdiction to do so. For all practical purposes, the executive branch also cannot act against members of Congress unless Congress authorizes it to. In other words, the equivalent of one of the central historic functions of parliamentary privilege -- limiting the prerogative powers of the Crown -- is performed by the structure of the Constitution itself. It therefore cannot be said to be a principal objective of the Speech or Debate Clause.

This function may have survived in a modified form. The Supreme Court has invoked the Speech or Debate Clause to prevent the executive and the judiciary from using general grants of authority to act against members of Congress in

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11/ (Continued from p. 8.)
may perhaps call for narrowing the range of actions that cannot be "questioned" under the clause, to ensure that it is confined to legislative duties. See, e.g., id. at 517-18. It may also be thought to suggest that the protection of the clause should be extended only grudgingly to the assistants of members of Congress. But it has no apparent bearing on Congress's power to abrogate the clause's protection.

ways that Congress may not have foreseen when it made those grants. See, e.g., United States v. Helstoski, 442 U.S. 477 (1979); United States v. Johnson, 383 U.S. 169 (1966). But a "waiver" of the Speech or Debate privilege in connection with some class of offenses is itself a general grant of authority. Therefore, to the extent that the Speech or Debate Clause is intended to prevent the other branches from using a general congressional statute in ways Congress did not intend, or to reduce the danger that Congress will not foresee the uses that the other branches will make of its statutes, a general congressional "waiver" of Speech or Debate rights would also be inconsistent with the objectives of the clause.

Evidently, then, those who believe that Congress may "waive" its members' Speech or Debate protection can attribute only one purpose to the clause; it ensures that any such "waiver" must be, as the Supreme Court said in Helstoski, "explicit and unequivocal." See note 3 supra. In other words, if Congress can "waive" its members' Speech or Debate Clause rights, the sole purpose of the clause must be to serve as a rule of statutory construction, not unlike the principle that a waiver of sovereign immunity must be explicit. 12/ See P. Bator et al., Hart and Wechsler's The Federal Courts and the Federal System 1351 (2d ed. 1973). We believe that attributing to the clause only this rather insubstantial purpose is inconsistent with the stature and importance the clause has always been acknowledged to have. As the Supreme Court said in a related context:

> England's experience with monarchs exerting pressure on members of Parliament by using judicial process to make them more responsive to their wishes led the authors of our

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12/ This rule of statutory construction might have been adopted even if there were no Speech or Debate Clause. Courts established the analogous principle for sovereign immunity even though the sovereign immunity of the United States, at least, is not explicitly recognized in the Constitution. Since legislative immunity has comparably deep roots in our legal traditions, courts may similarly have accepted only explicit abrogations of the Speech or Debate protection even without a Speech or Debate Clause. To this extent, the advocates of Congress's ability to "waive" its members' Speech or Debate Clause rights appear unable to assign the clause any purpose at all.

> Constitution to write an explicit legislative privilege into our organic law. In statutes subject to repeal or in judge-made rules . . . readily changed by Congress or the judges who made them, the protection would be far less than the legislative privilege created by the Federal Constitution.

United States v. Gillock, 100 S. Ct. 1185, 1191 (1980). We believe instead that the clause also has the more significant purpose -- suggested by its text and its history -- of protecting individual Senators and Representatives against the danger of a hostile alliance between a majority of Congress and the other branches.

The kinship between the Speech or Debate Clause and the First Amendment is the final support for our view that the clause has this purpose. The First Amendment protects dissident minorities against majorities in the nation as a whole; we believe the Speech or Debate Clause serves the same function in Congress. The Speech or Debate Clause is undoubtedly designed to protect Congress's integrity and proper functioning as an institution. See, e.g., United States v. Brewster, 408 U.S. 501, 517 (1972); United States v. Johnson, 383 U.S. 169, 180-81 (1966). But it focuses on a particular aspect of that functioning. It is not primarily concerned with efforts by other branches to dissolve Congress, for example, to prevent it from meeting, 13/ or to prevent its officers from performing their assigned roles, although all of these abuses figure in the history of the clause. See, e.g., id. at 181. Instead, it addresses itself to "Speech or Debate"; on its face, its objective is to ensure that

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13/ Interdicting such efforts by the executive may be the purpose of another legislative immunity found in Art. I, § 6, cl. 1: "The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same." See United States v. Brewster, 408 U.S. 501, 520-21 (1972); Long v. Ansell, 293 U.S. 76 (1934); Williamson v. United States, 207 U.S. 425 (1908).

members of Congress will be able to speak freely about the issues before them. 14/ The clause protects all legislative activity, not just speech itself, see p. 1 & note 2 supra, but granting members of Congress an unusually uninhibited right to speak -- in a sense, an extraordinary freedom of speech -- is its central function. See Bradley, supra note 5, at 213; see also United States v. Johnson, 383 U.S. 169, 173 (1966). As James Wilson said:

> In order to enable and encourage a representative of the publick to discharge his publick trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offense.

1 The Works of James Wilson 421 (R. McCloskey ed. 1967). The Supreme Court has frequently remarked that this passage illuminates the purpose of the Speech or Debate Clause. See Powell v. McCormack, 395 U.S. 486, 503 (1969); Tenney v. Brandhove, 341 U.S. 367, 373 (1951). In other words, like the First Amendment,

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14/ Indeed, the version of the clause originally introduced at the Constitutional Convention -- patterned after the English version, see p. 6 supra -- referred to "[f]reedom of speech and debate in the legislature." Bradley, supra note 5, at 209 n.79; see United States v. Johnson, 383 U.S. 169, 177 (1966). The Supreme Court apparently attributes no significance to the difference between these formulations. See Powell v. McCormack, 395 U.S. 486, 502 n.20 (1969).

15/ To say that the underlying principles of the Speech or Debate Clause resemble those of the First Amendment is not to suggest, of course, that they protect the same speech; many statments unprotected by the First Amendment are immunized by the Speech or Debate Clause. See generally Hutchinson v. Proxmire, 443 U.S. 111 (1979). For this reason any possible First Amendment limits on the power of Congress to discipline its own members, see generally Bond v. Floyd, 385 U.S. 116 (1966), do not protect legislative speech as fully as the Speech or Debate Clause does.

the Speech or Debate Clause is designed to promote a diversity of expression, no matter what the wishes of the majority.

We see two plausible arguments that can be made in support of Congress's power to "waive" its members' Speech or Debate privilege. The first relies on Congress's expertise. Interpreting the Speech or Debate Clause requires judgments about the nuances of the legislative process and a legislator's role in it. A congressional effort to "waive" the rights established by United States v. Helstoski, for example, would reflect a judgment that allowing evidence referring to past legislative acts to be introduced at a federal bribery trial would not intimidate members of Congress or otherwise impair the legislative process, see, e.g., Powell v. McCormack, 395 U.S. 486, 505 (1969), or Congress's institutional integrity. It might be argued that Congress is far better qualified than the courts to make this sort of judgment, and that the courts should defer to such a judgment when Congress makes it. See, e.g., Brief for the United States at 83-84 & n.35, United States v. Helstoski, 442 U.S. 477 (1979). See generally Katzenbach v. Morgan, 384 U.S. 641, 653 (1966); Oregon v. Mitchell, 400 U.S. 112, 238, 246-49 (1970) (opinion of Brennan, White, and Marshall, JJ.); Cox, The Role of Congress in Constitutional Determinations, 40 U. Cin. L. Rev. 199 (1971). As a general matter, the Framers' specific rejection of William Pinckney's proposal that Congress and not the courts interpret the guarantee of legislative immunity, see note 5 supra, undermines this argument. Moreover, as we have said, we believe that an important purpose of the Speech or Debate Clause is to protect minority or dissident members of Congress against a legislative majority; the Supreme Court does not defer to congressional "interpretations" that restrict rights guaranteed to minorities against Congress itself. See, e.g., Buckley v. Valeo, 424 U.S. 1, 45-48 (1976).

The second argument, more frequently advanced, is that judicial trials are superior as a matter of policy. If Congress cannot enlist the aid of the other branches in disciplining its members, it will be forced to use its Article I, section 5, clause 4 powers, see pp. 3-4 & note 4 supra, and hold some sort of legislative "trial" of allegedly corrupt Senators and Representatives. But, according to this argument, Congress is not organized to conduct criminal trials. Its efforts to punish its own members waste scarce legislative resources; they will also, according to this argument, be ridden with politics and will offend against the principles underlying the proscription of bills of attainder and other constitutional

guarantees. See generally United States v. Brewster, 408 U.S. 501, 519-20 (1972); Brief for the United States at 26-28, United States v. Brewster, 408 U.S. 501 (1972); Brief for United States at 83-84, United States v. Helstoski, 442 U.S. 477 (1979). In addition, it is not clear that a Congress can impose punishments that extend beyond its term, or can punish a member for conduct that was not discovered until he left office. See United States v. Brewster, 408 U.S. at 520.

In our view this argument begs the question. Judicial trials are preferred over comparable legislative proceedings not because they are intrinsically superior but, in large measure, because the Constitution mandates judicial trials in most cases. To this extent, the normal preference for judicial trials does not help decide what the Constitution mandates. The policy considerations are, in any event, likely to vary from case to case, see generally United States v. Brewster, 408 U.S. 501, 543-44 (1972) (Brennan, J., dissenting); they provide no clear argument in support of Congress's power to abrogate its members' rights.

For these reasons we cannot agree that the Constitution permits Congress to "waive" its members' rights under the Speech or Debate Clause.

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