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Office of the Attorney General
Washington, D. C. 20530

July 17, 1976

MEMORANDUM FOR THE PRESIDENT

While I realize that you have made a decision on the question of the inclusion of all Congressmen in the compulsory referral provision of our revision of S.495, the more I think about it the more I believe this is a serious mistake. As you know, in our version we do include Members of Congress in the discretionary referral section. I believe this is much better for the following reasons:

1. To take out all Congressmen from the normal functioning of the Department of Justice in all criminal cases is really a public statement that the Department of Justice is not to be trusted. I believe this will be very disfiguring to the Department, and it creates a very large second Department of Justice.
2. It will be very alarming to the United States Attorneys, who make the argument that they must be able to prosecute such "hard" cases because it is only if they can do this that they are trusted by the ordinary citizen.
3. I believe the almost certain reaction of the Congress will be to expand the Executive Branch items subject to compulsory referral; in addition to further weakening the authority and harming the image of the Department, this may remove from the Attorney General's prosecutorial discretion some very sensitive matters which have nothing to do with the Watergate-type concern. The only defense to such a tactic which we could make would be resort to some mechanism which selects the additional cases to be referred -- such as the special court device, which we think wholly undesirable.
4. While the argument can be made that there is some kind of conflict of interest which the public believes exists, when members of the cabinet or those employed in the Executive Office of the President who are compensated at level II or higher of the Executive Schedule, this argument is not made or believed as a matter of course when Congressmen are involved.

For the reasons stated above, I do hope you will not insist upon the automatic inclusion of all Congressmen. There is an additional reason. The inclusion, I fear, will be taken as making a political point -- which, while it may be popular with persons other than Congressmen, will make it very difficult to get a constructive alternative passed. It will be viewed solely as a political move, which will be countered not by opposing it but by embracing it and enlarging it. On the other hand it will be very difficult for Congressmen to oppose their inclusion in the discretionary referral section, which will allow referral when the Attorney General believes this to be in the public interest.

- S. J. ... 11-7-21