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[ca. Sept. 1976]
Abortion

Early this year I proposed a \$10 billion Health Bock Grant, the Financial Assistance for Health Care Act, to replace the current medicaid program and 15 other Federal health programs. Decisions about the use of these public funds for medical services, including abortions, would be left entirely to the citizens of each state. This is, I believe, completely consistent with my support for a constitutional amendment which would restore the traditional state authority to limit abortion and decide the issue.



[ca. Sept. 1976]

THE WHITE HOUSE
WASHINGTON

① PRESIDENT'S PROPOSED
CONSTITUTIONAL AMENDMENT
AS CONGRESSMAN.

② FORM LETTER
FROM CONG. FORD
TO CONSTITUENTS.

THE WHITE HOUSE

WASHINGTON

January 23, 1975

Memo to: Elishka

From: Marba

Re: Abortion Votes by Congressman Gerald R. Ford

x
Bill Waugh in the Research Division at the Republican Congressional Committee kindly furnished the following information.

On June 21, 1973 Congressman Ford voted "Yea" on a substituted Amendment to an Amendment of the Legal Services Corporation Bill (H. R. 78-24, Roll Call #261). His vote was to prohibit the Legal Services Corporation from providing legal assistance in proceedings or litigation seeking to procure a non-therapeutic abortion or to compel an individual or institution to perform an abortion or to provide facilities for an abortion contrary to religious or moral convictions of such an individual or institution.

This may be interpreted as not being a clear-cut vote for or against abortion. His position is in-between the Bella Absuzs and the Angelo Roncallos (sponsor of anti-abortion Amendment).

In 1974 when additional abortion votes were taken, Vice President Ford was not a Member of the House.



10 FEB 27 1975

[Issues]

"Population"

(VELTHOUSE, Sandy)

VS legalizing abortion

October 11, 1972

Miss Sandy Velthouse
3151 Birchwood, S. W.
Wyoming, Michigan 49508

Dear Sandy,

Many thanks for your letter of October 6 concerning abortion, one of the very important issues in our country today.

We in the Congress have no jurisdiction over the matter of legal abortions in the State of Michigan. This is something which must be decided by the State Legislature and/or by the people of the state. As you indicated, the people of the State of Michigan will have an opportunity in the November election to pass judgment on the liberalization of the abortion law in the State of Michigan.

The federal government has jurisdiction concerning abortions only in the District of Columbia and in certain federal installations such as military posts. President Nixon has ordered these installations to obey the law of the state in which the installation is located as far as abortion policy is concerned. I endorse this position of the President.

Warmest personal regards.

Sincerely,

Gerald R. Ford, M.C.

GRF:rn



THE WHITE HOUSE
WASHINGTON

January 16, 1976

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR:

PHIL BUCHEN
JIM CANNON

FROM:

JIM CONNOR *EE*

SUBJECT:

Abortion

The President reviewed your memorandum of January 15 on the above subject and approved Statement 1 as amended:

"As President I am bound by my oath of office to uphold the law of the land as interpreted by the Supreme Court in its 1973 decisions on abortion. In those decisions the Court ruled 7-2 that States could not interfere with a woman's decision to have an abortion the first three months.

As a matter of personal philosophy, however, my belief is that a remedy should be available in cases of serious illness or rape. Personally I do not favor abortion on demand.

I feel that abortion is a matter better decided at the State level. While House Minority Leader, I co-sponsored a proposed amendment to the Constitution to permit the individual States to enact legislation governing abortion."

Please follow-up with appropriate action.

cc: Dick Cheney



Congress of the United States
Office of the Minority Leader
House of Representatives
Washington, D.C. 20515

AB-2

ABORTION - VS

Revised 3/30/73

Margin 15

Dear :

Your of recent date concerning the Supreme Court decision on abortion has been received.

I agree with you and in the election in Michigan last fall I voted against the referendum calling for legalization of abortion. Several states had asked the U.S. Supreme Court to reconsider its decision, but unfortunately the Court denied the motion to reconsider its earlier ruling.

Therefore, I am cosponsoring a constitutional amendment which would allow each state to determine its own rules regarding the practice of abortion. This resolution, H.J.Res. 468, provides that "Nothing in this Constitution shall bar any State or territory or the District of Columbia, with regard to any area over which it has jurisdiction, from allowing, regulating, or prohibiting the practice of abortion."

I want to thank you for your views and comments, and hope with you that a wise and responsible revision in the current Court ruling will come about.

Kindest regards.

Sincerely,

Gerald R. Ford, M.C.

GRF:DM



93D CONGRESS
1ST SESSION

H. J. RES. 468



IN THE HOUSE OF REPRESENTATIVES

MARCH 28, 1973

Mr. WHITEHURST (for himself, Mr. ARCHER, ~~Mr. BEVELL~~, Mr. BROTHILL of Virginia, Mr. BUTLER, Mr. DERWINSKI, Mr. GERALD R. FORD, Mr. HASTINGS, Mr. HUBER, Mr. HUNT, Mr. KETCHUM, Mr. MAZZOLI, Mr. PARRIS, Mr. SIKES, Mr. STEIGER of Arizona, Mr. WOX PAT, and Mr. ZION) introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States.

1 *Resolved by the Senate and House of Representatives of*
2 *the United States of America in Congress assembled (two-*
3 *thirds of each House concurring therein), That the follow-*
4 *ing article is proposed as an amendment to the Constitution*
5 *of the United States, to be valid only if ratified by the*
6 *legislatures of three-fourths of the several States within*
7 *seven years after the date of final passage of this joint res-*
8 *olution:*



"ARTICLE —

- 1
- 2 "SECTION 1. Nothing in this Constitution shall bar
- 3 any State or territory or the District of Columbia, with
- 4 regard to any area over which it has jurisdiction, from
- 5 allowing, regulating, or prohibiting the practice of abortion."

92ND CONGRESS
1ST SESSION

H. J. RES. 468

JOINT RESOLUTION

Proposing an amendment to the Constitution of
the United States.

By Mr. WHITEHURST, Mr. ARCHER, Mr. BEVILL,
Mr. BROYHILL of Virginia, Mr. BUTLER, Mr.
DERWINSKI, Mr. GERALD R. FORD, Mr. HAST-
INGS, Mr. HUBER, Mr. HUNT, Mr. KETCHUM,
Mr. MAZZOLI, Mr. PARRIS, Mr. SIKES, Mr.
STEIGER of Arizona, Mr. WON PAT, and Mr.
ZION

MARCH 28, 1973

Referred to the Committee on the Judiciary

[ca. Sept. 1976]
File - Abortion

Q. (Any question about abortion, i.e., Hyde Amendment, Constitutional amendment, etc.).

A. My position is clear and consistent.

I am personally opposed to abortion on demand.
I do not agree with the Supreme Court decision of 1973. It went too far.

I think we do have to recognize that there are instances where abortion should be permitted such as in the case of rape or the illness of the mother.

I favor a Constitutional amendment that would permit individual states to enact abortion laws suitable to the citizens of that state. I supported that kind of Constitutional amendment as a member of the House of Representatives, and I still do.



[Ca. Sept. 1976]

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I favor a Constitutional amendment that would permit individual states to enact abortion laws suitable to the citizens of that state. I supported that kind of Constitutional amendment as a member of the House of Representatives, and I still do.



[ca. Sept. 1976]

Preliminary Findings: Our initial analysis indicates that four agencies have legislative authority for medical services which they have interpreted to include authority to permit them to fund or provide abortions: HEW, DOD, VA, and Civil Service Commission.

It is worth noting that the Congress has not acted consistently to prohibit abortion as a means of family planning. For example AID, which has family planning authority, is prohibited by Act of Congress from funding abortion. Similarly, in HEW the Congress has prohibited abortion under Title X of the Public Health Service Act (Family Planning) but have not addressed themselves to family planning under Title XIX (Medicaid) or Title XX (Social Services).

It is also worth noting that the Executive Branch over the years has not been consistent. As an administrative matter, HEW has decided that abortion can be a reimbursable service under Titles XIX and XX. Further, CSA which has legislative authority for family planning has acted administratively to prohibit the use of CSA funds for any surgical procedures intended to cause abortion.



The conference report is not as restrictive as the language of the amendment and in some respects is contradictory, for example, it indicates that abortion would be permitted in cases of rape or incest.



THE WHITE HOUSE

WASHINGTON

September 4, 1976

f.

MEMORANDUM FOR:

JIM CAVANAUGH

FROM:

BOBBIE GREENE KILBERG

BK

SUBJECT:

Solicitor General's Amicus
Brief in Beal v. Doe

In his amicus brief, Solicitor General Bork argues that the Pennsylvania Medicaid plan satisfied the rational basis test for equal protection under the Fourteenth Amendment. The respondents have argued that the bar on payments for non-therapeutic abortions invidiously discriminates between "those who continue their pregnancies to birth and those who seek to terminate their pregnancies by abortion" and thus that the limitation can be justified, if at all, only if it promotes a "compelling state interest". Bork has responded to this assertion as follows:

"Moreover, the fact that a woman has a qualified right to an abortion does not imply a correlative constitutional right to free treatment. Individuals presumably have a "right" to undergo many recognized medical procedures by a licensed physician but the Equal Protection Clause does not affirmatively require a state to cover the costs incurred by indigents in undergoing such procedures."

Attachment

cc: Philip Buchen
Sarah Massengale ✓



THE WHITE HOUSE

WASHINGTON

September 4, 1976

MEMORANDUM FOR:

JIM CAVANAUGH

FROM:

BOBBIE GREENE KILBERG

SUBJECT:

Cases on Federal Funding
and Abortion

BK

Sarah Massengale called last evening with the request that I provide you this morning with information on the amicus curiae brief filed in March, 1976 by Solicitor General Bork in the case of Beal v. Doe. The brief was filed in support of the petitioners request that the U.S. Supreme Court grant certiorari to review a 1975 decision by the Third Circuit Court of Appeals that held that the State of Pennsylvania was required under the Medicaid program of Title XIX of the Social Security Act to pay for non-therapeutic abortions. Under Pennsylvania's Medicaid plan, payments for abortions had been limited to those abortions which were medically indicated, i.e. abortions certified by physicians as necessary for the health of the woman or necessary to prevent the birth of an infant with an incapacitating deformity or mental deficiency. Medicaid payments for abortions that were not required for medical reasons had been barred. This limitation had meant, in effect, that women covered by Medicaid in Pennsylvania who had voluntary, non-therapeutic abortions had to use their own money to pay for the abortions.

In contrast to the Third Circuit decision, the Second and Sixth Circuits had ruled that Title XIX permitted state Medicaid plans to deny coverage of abortions that were not medically necessary. In the 1975 Second Circuit decision in Roe v. Norton, the Justice Department filed an amicus brief in which it argued that the Medicaid statute required only that necessary medical services be covered. Justice



argued that since non-therapeutic abortions were not "necessary medical services", states should have the option to determine for themselves whether to include those abortions in their Medicaid programs.

In his amicus brief, the Solicitor General stated that the United States Government believed the Supreme Court should review the Beal v. Doe case because of the conflicting decisions of the lower courts and the substantial importance of the questions presented in the case to the federal government's oversight responsibilities under Title XIX. The Solicitor General further stated that the Government was of the view that neither Title XIX of the Social Security Act nor the Fourteenth Amendment to the U.S. Constitution required a federally-funded state Medicaid program to pay for abortions that were not medically indicated.

The plaintiffs in the Beal v. Doe case had raised the issue of both Title XIX and the equal protection clause of the Fourteenth Amendment. The U.S. District Court for the Western District of Pennsylvania ruled that the Pennsylvania limitation of coverage to abortions that are medically necessary did not contravene Title XIX but that the state restriction as applied during the first trimester of pregnancy did deny equal protection since it created "an unlawful distinction between indigent women who choose to carry their pregnancies to birth, and indigent women who choose to terminate their pregnancies by abortion." The defendants appealed to the Third Circuit Court of Appeals which held that Title XIX prohibits a participating state from requiring a physician's certification of medical necessity as a condition for funding during both the first and second trimesters of pregnancy. In light of this disposition, the court found it unnecessary to address the constitutional question. Though the Second and Sixth Circuits had ruled upon the statutory question, the Solicitor General's amicus brief addressed itself to both the statutory and constitutional questions since they were both raised by the respondents in opposing the granting of certiorari.

The Solicitor General's Office has informed me that the U.S. Supreme Court has accepted certiorari in Beal v. Doe but has not yet heard oral arguments on the merits. It is also my understanding that the Solicitor General's Office has decided not to file a separate brief on the merits but I am attempting to double-check this.

The only other federal funding cases which I am aware of involve hospitals and raise the general question of whether a hospital that provides obstetric services is required as a result of the 1973 Supreme Court abortion decisions to also permit abortions to be performed on their premises. Generally, the lower courts have found that public hospitals do have a duty to permit abortions to be performed on their premises but that private hospitals do not. On December 1, 1975, the Supreme Court refused to hear a challenge to a 1973 statute that permitted federally aided private hospitals to decline, on either religious or moral grounds, to permit abortions or sterilizations. The specific case involved a hospital in Montana run by a Roman Catholic Order.

Most of the litigation in regard to private hospitals has turned on the question of government funding and "state action." The prevailing, though not unanimous, view of the lower courts has been that the 1973 Supreme Court abortion decisions prohibit only state-imposed bars to abortion and do not cover bars imposed by private groups. Most courts have held that even when the private hospitals have sizable government funding, this funding is not sufficient "state action" to bring the hospitals within the law.

You may be interested to know that when Supreme Court Justice Stevens was on the Seventh Circuit Court of Appeals he wrote the majority opinion in the 1973 case of Doe v. Bellin Memorial Hospital. In that case the Seventh Circuit held as follows:

- (1) that a private hospital, by accepting funds under the Hill-Burton Act, did not surrender its right to determine whether it would accept abortion patients; and



(2) that notwithstanding the acceptance by private hospital officials of financial support from both Federal and state governments and the detailed regulation of the hospital by the state, implementation of private hospital rules relating to abortions did not constitute action "under color" of state law within the meaning of civil rights statutes, in the absence of a showing that the state sought to influence hospitals' policy respecting abortions either by direct regulation or by discriminatory application of its powers or benefits.

cc: Philip Buchen
Sarah Massengale ✓



abortion

THE WHITE HOUSE
WASHINGTON

September 7, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: JIM CANNON *J Cannon*

SUBJECT: Letter from John D. Rockefeller, III

Attached is a letter from John D. Rockefeller, III,
to you about your position on abortion.

attachment



30 Rockefeller Plaza
New York, N.Y. 10020

Room 5600

Circle 7-3700

PERSONAL

August 31, 1976

Dear Mr. President:

For many years now the world population problem has been a major interest and concern of mine. As you may remember in the early 1970's I was Chairman of the Commission on Population Growth and the American Future established by the Congress. Because of this long-time exposure, I am fully informed about abortion and its relationship to society today.

I would also mention that all my life I have been a Republican although sometimes independent as a voter. Like so many Americans, I felt a satisfaction and a lift when you were sworn in as President.

With this background, as you can imagine I am distressed to find that our party appears to be rapidly becoming the party opposed to a woman's right to choose abortion. I say this because of the Republican platform, Senator Dole's record, the Hyde Amendment to the HEW/Labor appropriations bill and, if I may say so, your own position on the subject.

I realize that legalized abortion raises difficult questions for those in political life. However I have come to realize that most public officials voting for a woman's right to choose an abortion are voting from conviction, from concern for the welfare of our society, particularly of women; that most public officials who oppose legalized abortion are voting primarily from fear, fear engendered by the pressure of small, well organized, well financed groups which threaten to prevent their re-election.

It must be remembered that until recently abortion was illegal in most of the world but widely practiced under unsafe conditions in spite of the risk of such an operation.



090703

The situation is very much the same today in many South American countries where abortion continues to be illegal. When I visited Colombia, I was told that there is one abortion for every two live births. In Mexico I was told that there are more than half a million illegal abortions performed every year, and in Chile I was told hospital admissions caused by illegal abortions gone wrong exceed 50,000 a year.

What I am saying is that the issue we are facing today in this country as elsewhere is not whether abortion will be eliminated but rather whether it will be safe. If we make the mistake of reverting back to illegal status for abortions, we will be forcing poor people to seek unsafe abortions while the wealthy have the means to obtain expert medical attention.

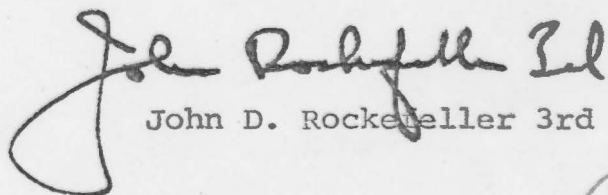
I hope you will be understanding of my writing so frankly. To me the question of legal abortion is one of the most important questions facing our society today. Your leadership in relation to it is badly needed. The majority of American women, including Catholics, want the freedom to choose. This is the way it should be, it must be, in a democracy such as ours.

May I suggest, Mr. President, that you assign one of your most trusted advisors the responsibility of preparing an indepth report for you on the basic facts relating to abortion. When this issue is approached objectively and unemotionally it becomes clear that much more than the life of the fetus is involved.

I am enclosing a brief statement I wrote on abortion which appeared in the June 21st issue of NEWSWEEK. Also I should say that I am taking the liberty of sending a copy of this letter to Mrs. Ford.

With warm best wishes, I am

Sincerely,


John D. Rockefeller 3rd

The President
The White House
Washington, D. C. 20500



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My Turn

John D. Rockefeller 3d

No Retreat on Abortion

It is ironic that in this Bicentennial year there is a strong effort across the nation to turn the clock back on an important social issue. Ever since the Supreme Court legalized abortion in January 1973, anti-abortion forces have been organizing to overturn the decision. They have injected the issue into the campaigns of 1976, including the appearance of a Presidential candidate who ran on the single issue of opposition to abortion.

There have been efforts within the

principles—and this is where the opposing views clash head-on. Abortion is against the moral principles defended by the Roman Catholic Church, and some non-Catholics share this viewpoint. But abortion is *not* against the principles of most other religious groups. Those opposed to abortion seek to ban it for everyone in society. Their position is thus coercive in that it would restrict the religious freedom of others and their right to make a free moral choice. In contrast, the legalized abortion view-

is one abortion for every two live births in Colombia, and that more than half a million illegal abortions are performed every year in Mexico. In Chile, hospital admissions caused by illegal abortions gone wrong exceed 50,000 per year.

In contrast, the access to safe procedures in the United States has resulted in a drastic decline in deaths associated with abortion. In the period 1969-74,



THE WHITE HOUSE

WASHINGTON

September 10, 1976

MEMORANDUM FOR: PHIL BUCHEN
ROBERT T. HARTMANN
JACK MARSH
MAX FRIEDERSDORF
JIM LYNN
DAVE GERGEN

FROM: JIM CANNON

SUBJECT: Draft Presidential Letters on Abortion

Attached for your comments and recommendations are two draft letters on the President's position on abortion to be used by the correspondence section in replying to letters on abortion. One is for the President's signature, the other for Roland Elliott's.

Could you please reply to Sarah Massengale, Room 220, Ext. 6776 by Tuesday, September 14, close of business.

Thank you.



09/10/76

THE WHITE HOUSE
WASHINGTON

DRAFT

Dear :

Thank you very much for your letter on the proposed Human Life Amendments to the United States Constitution. As President, I am bound by my oath of office to uphold the law as it was interpreted by the Supreme Court in the 1973 decisions on abortion. As a matter of personal philosophy, however, I am opposed to abortion on demand and am on record supporting a Constitutional amendment that would return the power to legislate on this matter to each state. My belief is that abortion should be available only in very limited cases.

At the recent Eucharistic Congress in Philadelphia I expressed my concern over the growing irreverence for life. I am enclosing a copy of my remarks for you.

I appreciate your taking the time to express your views on this important subject.

Sincerely,

Gerald R. Ford



THE WHITE HOUSE
WASHINGTON

DRAFT

Dear

President Ford has asked me to thank you for your thoughtful message concerning the abortion issue. He appreciates the concern which prompted you to share your views on this matter.

As you know, the President is bound by his oath of office to uphold the law as it was interpreted by the Supreme Court in the 1973 decisions on abortion. As a matter of personal philosophy, however, he has expressed his opposition to abortion-on-demand, and has been on record supporting a Constitutional Amendment that would return the power to legislate on this matter to each state. He feels strongly that abortion should only be available in very limited cases.

At the recent Eucharistic Congress in Philadelphia, the President expressed his concern over the growing irreverence for life. I am enclosing a copy of his remarks on that occasion. The President is determined to do his best to serve the interests of all the American people. Toward this end he sincerely appreciates hearing from concerned citizens like you.

Sincerely,

Roland Elliott



THE WHITE HOUSE

WASHINGTON

September 10, 1976

MEMORANDUM FOR: PHIL BUCHEN
ROBERT T. HARTMANN
JACK MARSH
MAX FRIEDERSDORF
JIM LYNN
DAVE GERGEN

FROM: JIM CANNON

SUBJECT: Draft Presidential Letters on Abortion

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Could you please reply to Sarah Massengale, Room 220, Ext. 6776 by Tuesday, September 14, close of business.

Thank you.



THE WHITE HOUSE
WASHINGTON

*Abortion
file*

September 16, 1976 17 AM 7 24

MEMORANDUM FOR: JIM CANNON
FROM: JIM CAVANAUGH
SUBJECT: Use of Federal Funds for Abortions

The President would like to see the Domestic Council study relating to the use of Federal funds for abortions prior to the time he has to act on the Labor-HEW appropriation bill.

Paul O'Neill thinks that that bill should be here in the next day or two.

*Quem has
been told
of this.
on -*



*AP [Signature]
[Signature] money*

R1e Abortions
Health

THE WHITE HOUSE
WASHINGTON

INFORMATION

September 18, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: JIM CANNON *Jim*
SUBJECT: Federally Funded Abortions

As you know, Congress has passed the Labor--HEW Appropriations bill which includes an amendment restricting federal funding of abortions.

While the Conference report needs to be studied to determine the full implications of the language in question, the bill effectively says that no funds in the appropriation can be used for abortions "except where the life of the mother would be endangered if the fetus were carried to term."

We have initiated the study you discussed with the Bishops and will have a preliminary report to you Tuesday, September 21. Our best estimate at this time is that approximately 250,000 to 300,000 abortions are funded by \$45 to \$55 million of the appropriations affected by this amendment. These, however, are unrefined estimates and they require much additional analysis and careful interpretation.



THE WHITE HOUSE
WASHINGTON

file
INFORMATION

September 21, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: JIM CANNON *JC*
SUBJECT: Study of Federal Funding for Abortions

This is a preliminary report on federal funding for abortions.

Background: On September 10th, in a meeting with the Catholic Bishops, the question of the use of federal funds for abortions was discussed. You indicated that you were directing the Domestic Council and the Counsel's Office to study this issue.

Purpose of the Study: The purpose of this study is to determine what current laws do permit the use of federal funds for abortions and to submit an evaluation of whether these funds are used for abortions in ways that exceed the minimum required by law.

Description: This study of the use of federal funds for abortion is focusing on three basic elements:

- The number of federal programs which make available funds for abortion and the number of abortions provided by these programs;
- What is the statutory authority, or other legal basis, for the availability of funds for abortion under the various federal programs; and
- An evaluation of whether the availability of funds under the various federal programs goes beyond the statutory or other legal minimum requirements.

All of the federal departments and agencies that have such programs have been directed to provide pertinent information. Our initial review of available data indicates that the figures are so scattered, diffused and incomplete that we will never get precise answers to your questions. However, in order to get a thorough, objective and accurate report, we will have to address the following difficulties:



- The diverse number of federal departments, agencies and programs which have some authority for funding abortions;
- The variety of legal interpretations in different jurisdictions and under diverse authorities; and
- Precise statistics on the number of abortions are difficult to verify because:
 - a) The different requirements for record keeping under the various federal programs which fund abortions; and
 - b) Abortions may be provided and recorded under different medical diagnosis.

Legal History: The Supreme Court first ruled on the issue of abortion on January 22, 1973 in two concurrent decisions. The Court held 7-2 in both cases that on the basis of a constitutional right to privacy States could not interfere with the decision of a woman and her doctor to terminate a pregnancy during its first three months. Further, while States could exercise some control over abortion in the second three months, on the basis of a legitimate state interest, they could constitutionally ban abortion only in the last trimester.

A majority held that the historic rationale for laws controlling abortion -- to protect the health and safety of a woman -- no longer applied during the early stages of pregnancy.

But key questions remained unanswered, including the difficult legal question of when life actually begins.

Pending Supreme Court Ruling: The Supreme Court has accepted certiorari to a 1975 decision by the Third Circuit Court of Appeals which held that the State of Pennsylvania was required under Medicaid to pay for non-therapeutic abortions. A memorandum on the case is attached at Tab A. This decision could support the concept that abortions should be available regardless of ability to pay, an issue that is raised in this year's Labor-HEW appropriations abortion amendment.

The Court, which will convene in October, has not yet heard oral arguments on the merits. The Solicitor General did file an amicus curiae brief in March, 1976, supporting Pennsylvania's request for review and its position that the state is not required to pay under Medicaid for non-therapeutic abortion (i.e. abortion on demand). The Solicitor General stated that neither Title XIX of the Social Security Act nor the Fourteenth Amendment to the U.S. Constitution required a federally-funded state Medicaid program to pay for abortions that were not medically indicated.



Specifically in regard to the Fourteenth Amendment, the Solicitor General argued as follows:

Moreover, the fact that a woman has a qualified right to an abortion does not imply a correlative constitutional right to free treatment. Individuals presumably have a "right" to undergo many recognized medical procedures by a licensed physician but the Equal Protection Clause does not affirmatively require a state to cover the costs incurred by indigents in undergoing such procedures.

1977 Labor-HEW Appropriations: As you know, the Labor-HEW Appropriations bill includes an amendment restricting federal funding of abortions. The effect of this provision is that no funds in the appropriation can be used for abortions "Except where the life of the mother would be endangered if the fetus were carried to term".

The conference report is not as restrictive as the language of the amendment and in some respects is contradictory; for example, it indicates that abortion would be permitted in cases of rape or incest.

The Conference Report states:

It is the intent of the Conferees to limit the financing of abortions under the Medicaid program to instances where the performance of an abortion is deemed by a physician to be of medical necessity and to prohibit payment for abortions as a method of family planning, or for emotional or social convenience. It is not our intent to preclude payment for abortions when the life of the woman is clearly endangered, as in the case of multiple sclerosis or renal disease, if the pregnancy were carried to term. Nor is it the intent of the Conferees to prohibit medical procedures necessary for the termination of an ectopic pregnancy or for the treatment of rape or incest victims; nor is it intended to prohibit the use of drugs or devices to prevent implantation of the fertilized ovum.

At issue here is whether the federal government will pay for non-therapeutic abortions for the poor.



Preliminary Findings:

A. Current Policies: Our initial analysis indicates that four agencies have legislative authority for medical services which they have interpreted to include authority to permit them to fund or provide abortions: HEW, DOD, VA, and Civil Service Commission.

It is worth noting that the Congress has not acted consistently to prohibit abortion as a means of family planning. For example, AID, which has family planning authority, is prohibited by Act of Congress from funding abortion. Similarly, in HEW the Congress has prohibited abortion under Title X of the Public Health Service Act (Family Planning) but has not addressed this issue in family planning under Title XIX (Medicaid) or Title XX (Social Services).

It is also worth noting that the Executive Branch over the years has not been consistent. As an administrative matter, HEW has decided that abortion can be a reimbursable service under the family planning section of Title XX. CSA, however, which has legislative authority for family planning has acted administratively to prohibit the use of CSA funds for any surgical procedures intended to cause abortion.

In December 1975, HEW, in order to comply with its General Counsel's interpretation of the Supreme Court decision, ordered all PHS facilities to provide abortions as a normal medical procedure in all states. Previously this procedure was not available where prohibited by State law, even if the State law was unconstitutional.

In March 1971, as a result of an Executive Order by President Nixon, the Secretary of Defense directed that military medical facilities should observe applicable state laws regulating abortion procedures in military medical facilities. In September, 1975, in order to comply with the Supreme Court decision of 1973, upon the ruling of its General Counsel, DOD ordered all military facilities to provide therapeutic abortions as a normal medical service for its beneficiaries and their dependents. Outside of military medical facilities, abortions are provided under the CHAMPUS program where this practice is consistent with State law.



The VA provides therapeutic abortions for a veteran when the procedure approved by a properly constituted VA medical board. Under the VA CHAMPUS program, survivors and dependents of veterans who are or were totally disabled from a service-connected disability can receive either therapeutic or non-therapeutic abortions. This is the same benefit provided certain dependents and survivors of active duty and retired members of the Armed Forces under the CHAMPUS program and in fact is administered by CHAMPUS as a result of a DOD/VA agreement.

Under the Federal Employees Health Benefits Program the Civil Service Commission provides abortion benefits for all covered Federal employees and their families through the payment of group health insurance premiums.

B. Current Practices: It is estimated that HEW is currently financing between 250,000 and 300,000 abortions annually at a cost of \$45-55 million. No information exists for departmental programs separating therapeutic from non-therapeutic abortions.

- The Social and Rehabilitation Service provides most of the funding for abortion services under Social Security Act Title XIX (Medicaid) and Title XX (Social Services). Expenditures for such abortion procedures must be estimated since Social Services and Medicaid data are not available on diagnostic or clinical classification or surgical or medical procedures.
- The Indian Health Service (IHS) provides comprehensive health services to American Indians and Alaskan natives. During fiscal year 1973, the IHS provided approximately \$750,000 for an estimated 3,100 abortion procedures.
- The Bureau of Medical Services estimates that in Public Health Service hospitals approximately \$34,000 was expended for abortion services in such hospitals during fiscal year 1974.

In calendar year 1975 DOD provided 6,849 abortions in its own facilities and 13,087 through CHAMPUS at an estimated cost of \$9 million.

During FY 76 only one veteran received a therapeutic abortion in a VA hospital. Figures for dependents and survivors of veterans are not kept separately from the CHAMPUS program and are included with the DOD statistics.

The Federal Employees Health Benefits Program administered by the Civil Service Commission is the single largest insured group in the nation. There are no separately kept statistics on the utilization of federal employee health benefits for abortions.

Comments: The study is underway and we are proceeding to sort out the legal issues and the details of current practices under existing Federal programs.

The question of sorting out the statistics on what is the current use of Federal funds for abortions will of necessity involve a good deal of estimating. We will seek to provide the most sound and responsible estimates that can be arrived at.

Initial analysis indicates that in some cases it may be difficult to determine the legal minimum requirements.

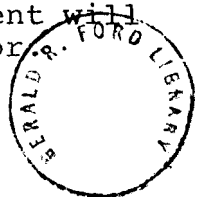
It is worth noting that the immediate legal context is subject to change by:

- a) Supreme Court decision in regard to the Pennsylvania case over the required use of medicaid funds for abortions,
- b) Final resolution of the "Hyde" amendment in the Labor-HEW Appropriations bill and subsequent legal challenges to that provision.

In effect, the key question of federal funding for abortions will in most instances crystalize into whether the poor are denied a medical service which is available to the rest of the population.

Summary: We can, at this stage, report that:

1. The data base in regard to funding abortions is incomplete and confusing.
2. The legal basis for much of this funding is not always clear and is in a process of change.
3. Both Congressional and Executive Branch actions have lacked consistency.
4. The key issue is whether the federal government will pay for non-therapeutic abortions for the poor.





THE WHITE HOUSE

WASHINGTON

September 4, 1976

MEMORANDUM FOR THE FILES

FROM: BOBBIE GREENE KILBERG BX

SUBJECT: Beal v. Doe and Other Cases Involving
Government Funding and Abortion

This is to provide information on the amicus curiae brief file in March, 1976 by Solicitor General Bork in the case of Beal v. Doe. The brief was filed in support of the petitioners request that the U.S. Supreme Court grant certiorari to review a 1975 decision by the Third Circuit Court of Appeals that held that the State of Pennsylvania was required under the Medicaid program of Title XIX of the Social Security Act to pay for non-therapeutic abortions. Under Pennsylvania's Medicaid plan, payments for abortions had been limited to those abortions which were medically indicated, i.e., abortions certified by physicians as necessary for the health of the woman or necessary to prevent the birth of an infant with an incapacitating deformity or mental deficiency. Medicaid payments for abortions that were not required for medical reasons had been barred. This limitation had meant, in effect, that women covered by Medicaid in Pennsylvania who had voluntary, non-therapeutic abortions had to use their own money to pay for the abortions.

In contrast to the Third Circuit decision, the Second and Sixth Circuits had ruled that Title XIX permitted State Medicaid plans to deny coverage of abortions that were not medically necessary. In the 1975 Second Circuit decision in Roe v. Norton, the Justice Department filed an amicus brief in which it argued that the Medicaid statute required only that necessary medical services be covered. Justice argued that since non-therapeutic abortions were not "necessary medical services", states should have the option to determine for themselves whether to include those abortions in their Medicaid programs.



In his amicus brief, the Solicitor General stated that the United States Government believed the Supreme Court should review the Beal v. Doe case because of the conflicting decisions of the lower courts and the substantial importance of the questions presented in the case to the federal government's oversight responsibilities under Title XIX. The Solicitor General further stated that the Government was of the view that neither Title XIX of the Social Security Act nor the Fourteenth Amendment to the U.S. Constitution required a federally-funded state Medicaid program to pay for abortions that were not medically indicated. Specifically in regard to the Fourteenth Amendment, the Solicitor General argued as follows:

Moreover, the fact that a woman has a qualified right to an abortion does not imply a correlative constitutional right to free treatment. Individuals presumably have a "right" to undergo many recognized medical procedures by a licensed physician but the Equal Protection Clause does not affirmatively require a state to cover the costs incurred by indigents in undergoing such procedures.

The plaintiffs in the Beal v. Doe case had raised the issue of both Title XIX and the equal protection clause of the Fourteenth Amendment. The U.S. District Court for the Western District of Pennsylvania ruled that the Pennsylvania limitation of coverage to abortions that are medically necessary did not contravene Title XIX but that the state restriction as applied during the first trimester of pregnancy did deny equal protection since it created "an unlawful distinction between indigent women who choose to carry their pregnancies to birth, and indigent women who choose to terminate their pregnancies by abortion." The defendants appealed to the Third Circuit Court of Appeals which held that Title XIX prohibits a participating state from requiring a physician's certification of medical necessity as a condition for funding during both the first and second trimesters of pregnancy. In light of this disposition, the court found it unnecessary to address the constitutional question. Though the Second and Sixth Circuits had ruled upon the statutory question, the Solicitor General's amicus brief addressed itself to both the statutory and constitutional questions since they were both raised by the respondents in opposing the granting of certiorari.



The Supreme Court has accepted certiorari in Beal v. Doe but has not yet heard oral arguments on the merits.

Government funding also is involved in a group of cases involving the general question of whether hospitals that provide obstetric services are required as a result of the 1973 Supreme Court abortion decisions to permit abortions to be performed on their premises. Generally, the lower courts have found that public hospitals do have a duty to permit abortions to be performed on their premises but that private hospitals do not. Most of the litigation in regard to private hospitals has turned on the question of government funding and "state action". The prevailing, though not unanimous, view of the lower courts has been that even when private hospitals have sizable government funding, this funding is not sufficient "state action" to require those hospitals to accept abortion patients, absent a showing that the state sought to influence a hospital's policy respecting abortions either by direct regulation or by discriminatory application of its powers or benefits. In addition, on December 1, 1975, the Supreme Court refused to hear a challenge to a 1973 Federal statute that permitted federally aided private hospitals to decline, on either religious or moral grounds, to permit abortions or sterilizations.



THE WHITE HOUSE

INFORMATION

WASHINGTON

September 21, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: JIM CANNON

SUBJECT: Study of Federal Funding for Abortions

This is a preliminary report on federal funding for abortions.

*What
can't
be done
can*

Background: On September 10th, in a meeting with the Catholic Bishops, the question of the use of federal funds for abortions was discussed. You indicated that you were directing the Domestic Council and the Counsel's Office to study this issue.

Purpose of the Study: The purpose of the Study is to determine the current availability of federal funds for abortions and to submit an evaluation of whether these funds are used for abortions in ways that exceed the minimum required by law.

STUDY OF

Description: This ~~report~~ *STUDY OF* the use of federal funds for abortion is focusing on three basic ~~questions~~ *ELEMENTS:*

- The number of federal programs which make available funds for abortion and the number of abortions provided by these programs;
- What is the statutory authority, or other legal basis, for the availability of funds for abortion under the various federal programs; and
- An evaluation of whether the availability of funds under the various federal programs goes beyond the statutory or other legal minimum requirements.

All of the federal departments and agencies that have such programs have been directed to provide pertinent information. To complete this compilation of information, and the subsequent analysis, it will be necessary to overcome several complexities in order to have a thorough, objective and accurate report:

- The diverse number of federal departments, agencies and programs which have some authority for funding abortions.



- The variety of legal interpretations in different jurisdictions and under diverse authorities.
- Precise statistics on the number of abortions are difficult to verify because:
 - a. The different requirements for record keeping under the various federal programs which fund abortions.
 - b. Abortions may be provided and recorded under different medical diagnosis.

Legal History: The Supreme Court first ~~faced~~ ^{dealt with} the issue of abortion and ruled on January 22, 1973 on two concurrent decisions on abortion. The Court held 7-2 in both cases that the States could not interfere with the decision of a woman and her doctor to terminate a pregnancy during its first three months. Further, while States could exercise some control over abortion in the second three months, they could constitutionally ban abortion only in the last trimester.

A majority held that the historic rationale for laws controlling abortion -- to protect the health and safety of a woman -- no longer applied during the early stages of pregnancy. But key questions remained unanswered. The Court did not find whether or not an unborn child is a "person" entitled to constitutional protection or resolve the question of when life actually begins.

Pending Supreme Court Ruling: The Supreme Court has accepted certiorari to a 1975 decision by the Third Circuit Court of Appeals that held that the State of Pennsylvania was required under Medicaid to pay for non-therapeutic abortions. A memorandum on the case is attached at Tab A. This decision supports the concept that abortions should be available regardless of ability to pay, an issue ~~that~~ ^{which} is raised in this year's Labor-HEW appropriations abortion amendment.

The Court, which will convene in October, has not yet heard oral arguments on the merits. The Solicitor General did file an amicus curiae brief in March, 1976, supporting the petitioner's request for review. ~~which is what?~~

In his amicus brief, the Solicitor General stated that the United States Government believed the Supreme Court should review the Beal v. Doe case because of the conflicting decisions of the lower courts and the substantial importance of the questions presented in the case to the federal government's oversight responsibilities under Title XIX. The Solicitor General further stated that the Government was of the view ~~that~~ neither Title XIX of the Social Security Act nor the



Fourteenth Amendment to the U.S. Constitution required a federally-funded state Medicaid program to pay for abortions that were not medically indicated.

Specifically in regard to the Fourteenth Amendment, the Solicitor General argued as follows:

Moreover, the fact that a woman has a qualified right to an abortion does not imply a correlative constitutional right to free treatment. Individuals presumably have a "right" to undergo many recognized medical procedures by a licensed physician but the Equal Protection Clause does not affirmatively require a state to cover the costs incurred by indigents in undergoing such procedures.

1977 Labor-HEW Appropriation: As you know, the Labor-HEW Appropriations bill includes an amendment restricting federal funding of abortions. The effect of this provision is that no funds in the appropriation can be used for abortions "Except where the life of the mother would be endangered if the fetus were carried to term".

Further, the Conference Report states:

It is the intent of the Conferees to limit the financing of abortions under the Medicaid program to instances where the performance of an abortion is deemed by a physician to be of medical necessity and to prohibit payment for abortions as a method of family planning, or for emotional or social convenience. It is not our intent to preclude payment for abortions when the life of the woman is clearly endangered, as in the case of multiple sclerosis or renal disease, if the pregnancy were carried to term. Nor is it the intent of the Conferees to prohibit medical procedures necessary for the termination of an ectopic pregnancy or for the treatment of rape or incest victims; nor is it intended to prohibit the use of drugs or devices to prevent implantation of the fertilized ovum.

~~At issue here is whether a medical service would be denied the poor in a state where abortion was legal. In effect, in such a circumstance, this amendment would deny a procedure to the poor that the rich could afford. As a matter of principle it would establish a separate class -- in fact a second class -- of medical care in this instance, something that has been against the principles of this Administration~~



Assumed they

for Preliminary Summary: Our initial analysis indicates that ~~five agencies clearly~~ have legislative authority that would permit them to fund or provide abortions: HEW, DOD, VA, Civil Service Commission, and CSA. CSA, however, has issued *why?* a directive that no project funds shall be expended for any surgical procedures intended to cause abortions. AID, which has family planning authority, is prohibited by Act of Congress from funding abortions.

~~HEW reimburses states for abortions under Medicaid (Title XIX) and under Social Services (Title XX). Under these programs, since the states are permitted to establish their own eligibility and payment criteria, there are in fact 50 different programs which further complicates analysis and evaluation.~~ In December 1975, HEW, in order to comply with the Supreme Court decision, ordered all PHS facilities to provide abortions as a normal medical procedure in all states. Previously this procedure was not available where prohibited by State law, even if the State law was unconstitutional.

It is estimated that HEW is currently financing between 250,000 and 300,000 abortions annually at a cost of \$45-55 million. *→* The preponderance of funding is under Social Security Act Title XIX (Medicaid). No information exists for departmental programs separating therapeutic from non-therapeutic abortions. *]*

- The Social and Rehabilitation Service provides financing of abortion services for eligible individuals under Social Security Act Title XX (Social Services) as well as Medicaid. Expenditures for such abortion procedures can only be estimated since Social Services and Medicaid data are not available on diagnostic or clinical classification or surgical or medical procedures.
- The Indian Health Service (IHS) within the Health Services Administration (HSA) provides comprehensive health services to American Indians and Alaskan natives. During fiscal year 1973, the IHS provided approximately \$750,000 for an estimated 3,100 abortion procedures.
- The Bureau of Medical Services within HSA administers Public Health Service Hospitals. While data are not available for specific types of medical procedures performed in Public Health Service Hospitals, the Bureau of Medical Services estimates that approximately \$34,000 was expended for abortion services in such hospitals during fiscal year 1974.

In March 1971, as a result of an Executive Order by President Nixon, the Secretary of Defense directed that military medical facilities should observe applicable state laws regulating abortion procedures in military medical facilities. In September, 1975, in order to comply with the Supreme Court decision of 1973, upon the ruling of their General Counsel, DOD ordered all military facilities to provide therapeutic abortions as a normal medical service for its beneficiaries and their dependents. Outside of military medical facilities, abortions are provided under the CHAMPUS program where this practice is consistent with State law. In calendar year 1975 DOD provided 6,849 abortions in its own facilities and 13,087 through CHAMPUS at an estimated cost of \$9 million.

The VA provides therapeutic abortions for a veteran when the procedure approved by a properly constituted VA medical board. Under the VA CHAMPUS program, survivors and dependents of veterans who are or were totally disabled from a service-connected disability can receive either therapeutic or non-therapeutic abortions. This is the same benefit provided certain dependents and survivors of active duty and retired members of the Armed Forces under the CHAMPUS program and in fact is administered by CHAMPUS as a result of a DOD/VA agreement. During FY 76 only one veteran received a therapeutic abortion in a VA hospital. Figures for dependents and survivors of veterans are not kept separately from the CHAMPUS program and are included with the DOD statistics.

Under the Federal Employees Health Benefits Program the Civil Service Commission provides abortion benefits for all covered Federal employees and their families through the payment of group health insurance premiums. This is the single largest insured group in the nation and there are no separately kept statistics which provide us with the utilization of federal employee health benefits for abortions.

Conclusion: The study is underway and we are proceeding to sort out the legal issues and the details of current practices under existing Federal programs.

The question of sorting out the statistics on what is the current use of Federal funds for abortions will of necessity involve a good deal of estimating. We will seek to provide the most sound and responsible estimates that can be arrived at.

Initial analysis indicates that the most difficult question will be the identification of the legal minimum requirements under existing law.

It is worth noting that the immediate legal context is subject to change by:

- a) Supreme Court decision in regard to the Pennsylvania case over the required use of medicaid funds for abortions.
- b) *final evolution of the Hyde Amendment*
the status of legislation, either in terms of *14 1/2 hr. (how)*
~~enacting a "Hyde" type provision or in regard~~ *not a present*
to court actions once such a provision exists *legal challenge*
be enacted.

In sum, the key question of federal funding for abortions will in most instances crystalize into whether the poor are denied a medical service which is available to the rest of the population.

To the extent that the courts address and answer this issue, the evaluation of "exceeding the minimum required by law" will be made easier. In the absence of court decisions identifying this "minimum" is extremely difficult open to challenge.



Abortion

THE WHITE HOUSE

WASHINGTON

September 21, 1976

MEMORANDUM FOR THE FILES

FROM: BOBBIE GREENE KILBERG

SUBJECT: Cases on Federal Funding and Abortion

This is to provide information on the amicus curiae brief filed in March, 1976 by Solicitor General Bork in the case of Beal v. Doe. The brief was filed in support of the petitioners request that the U.S. Supreme Court grant certiorari to review a 1975 decision by the Third Circuit Court of Appeals that held that the State of Pennsylvania was required under the Medicaid program of Title XIX of the Social Security Act to pay for non-therapeutic abortions. Under Pennsylvania's Medicaid plan, payments for abortions had been limited to those abortions which were medically indicated, i.e. abortions certified by physicians as necessary for the health of the woman or necessary to prevent the birth of an infant with an incapacitating deformity or mental deficiency. Medicaid payments for abortions that were not required for medical reasons had been barred. This limitation had meant, in effect, that women covered by Medicaid in Pennsylvania who had voluntary, non-therapeutic abortions had to use their own money to pay for the abortions.

In contrast to the Third Circuit decision, the Second and Sixth Circuits had ruled that Title XIX permitted state Medicaid plans to deny coverage of abortions that were not medically necessary. In the 1975 Second Circuit decision in Roe v. Norton, the Justice Department filed an amicus brief in which it argued that the Medicaid statute required only that necessary medical services be covered. Justice argued that since non-therapeutic abortions were not "necessary medical services", states should have the option to determine for themselves whether to include those abortions in their Medicaid programs.

In his amicus brief, the Solicitor General stated that the United States Government believed the Supreme Court should review the Beal v. Doe case because of the conflicting



decisions of the lower courts and the substantial importance of the questions presented in the case to the federal government's oversight responsibilities under Title XIX. The Solicitor General further stated that the Government was of the view that neither Title XIX of the Social Security Act nor the Fourteenth Amendment to the U.S. Constitution required a federally-funded state Medicaid program to pay for abortions that were not medically indicated. Specifically in regard to the Fourteenth Amendment, the Solicitor General argues as follows:

Moreover, the fact that a woman has a qualified right to an abortion does not imply a correlative constitutional right to free treatment. Individuals presumably have a "right" to undergo many recognized medical procedures by a licensed physician but the Equal Protection Clause does not affirmatively require a state to cover the costs incurred by indigents in undergoing such procedures.

The plaintiffs in the Beal v. Doe case had raised the issue of both Title XIX and the equal protection clause of the Fourteenth Amendment. The U.S. District Court for the Western District of Pennsylvania ruled that the Pennsylvania limitation of coverage to abortions that are medically necessary did not contravene Title XIX but that the state restriction as applied during the first trimester of pregnancy did deny equal protection since it created "an unlawful distinction between indigent women who choose to carry their pregnancies to birth, and indigent women who choose to terminate their pregnancies by abortion." The defendants appealed to the Third Circuit Court of Appeals which held that Title XIX prohibits a participating state from requiring a physician's certification of medical necessity as a condition for funding during both the first and second trimesters of pregnancy. In light of this disposition, the court found it unnecessary to address the constitutional question. Though the Second and Sixth Circuits had ruled upon the statutory question, the Solicitor General's amicus brief addressed itself to both the statutory and constitutional questions since they were both raised by the respondents in opposing the granting of certiorari.



The Solicitor General's Office has informed me that the U.S. Supreme Court has accepted certiorari in Beal v. Doe but has not yet heard oral arguments on the merits. It is also my understanding that the Solicitor General's Office has decided not to file a separate brief on the merits.

Federal funding also is involved in a group of cases involving the general question of whether hospitals that provide obstetric services are required as a result of the 1973 Supreme Court abortion decisions to permit abortions to be performed on their premises. Generally, the lower courts have found that public hospitals do have a duty to permit abortions to be performed on their premises but that private hospitals do not. On December 1, 1975, the Supreme Court refused to hear a challenge to a 1973 statute that permitted federally aided private hospitals to decline, on either religious or moral grounds, to permit abortions or sterilizations. The specific case involved a hospital in Montana run by a Roman Catholic Order.

Most of the litigation in regard to private hospitals has turned on the question of government funding and "state action." The prevailing, though not unanimous, view of the lower courts has been that the 1973 Supreme Court abortion decisions prohibit only state-imposed bars to abortion and do not cover bars imposed by private groups. Most courts have held that even when the private hospitals have sizable government funding, this funding is not sufficient "state action" to bring the hospitals within the law. A case in point is Doe v. Bellin Memorial Hospital in which the Seventh Circuit Court of Appeals ruled in 1973 as follows:

(1) that a private hospital, by accepting funds under the Hill-Burton Act, did not surrender its right to determine whether it would accept abortion patients; and

(2) that notwithstanding the acceptance by private hospital officials of financial support from both Federal and state governments and the detailed regulation of the hospital by the state, implementation of private hospital rules relating to abortions did not constitute action "under color" of state law within the meaning of civil rights statutes, in the absence of a showing that the state sought to influence hospitals' policy respecting abortions either by direct regulation or by discriminatory application of its powers or benefits.



THE WHITE HOUSE
WASHINGTON

Abortions
INFORMATION

September 21, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: JIM CANNON

SUBJECT: Study of Federal Funding for Abortions

This is a preliminary report on federal funding for abortions.

Background: On September 10th, in a meeting with the Catholic Bishops, the question of the use of federal funds for abortions was discussed. You indicated that you were directing the Domestic Council and the Counsel's Office to study this issue.

Purpose of the Study: The purpose of this study is to determine what current laws do permit the use of federal funds for abortions and to submit an evaluation of whether these funds are used for abortions in ways that exceed the minimum required by law.

Description: This study of the use of federal funds for abortion is focusing on three basic elements:

- The number of federal programs which make available funds for abortion and the number of abortions provided by these programs;
- What is the statutory authority, or other legal basis, for the availability of funds for abortion under the various federal programs; and
- An evaluation of whether the availability of funds under the various federal programs goes beyond the statutory or other legal minimum requirements.

All of the federal departments and agencies that have such programs have been directed to provide pertinent information. Our initial review of available data indicates that the figures are so scattered, diffused and incomplete that we will never get precise answers to your questions. However, in order to get a thorough, objective and accurate report, we will have to address the following difficulties:



- The diverse number of federal departments, agencies and programs which have some authority for funding abortions;
- The variety of legal interpretations in different jurisdictions and under diverse authorities; and
- Precise statistics on the number of abortions are difficult to verify because:
 - a) The different requirements for record keeping under the various federal programs which fund abortions; and
 - b) Abortions may be provided and recorded under different medical diagnosis.

Legal History: The Supreme Court first ruled on the issue of abortion on January 22, 1973 in two concurrent decisions. The Court held 7-2 in both cases that on the basis of a constitutional right to privacy States could not interfere with the decision of a woman and her doctor to terminate a pregnancy during its first three months. Further, while States could exercise some control over abortion in the second three months, on the basis of a legitimate state interest, they could constitutionally ban abortion only in the last trimester.

A majority held that the historic rationale for laws controlling abortion -- to protect the health and safety of a woman -- no longer applied during the early stages of pregnancy.

But key questions remained unanswered, including the difficult legal question of when life actually begins.

Pending Supreme Court Ruling: The Supreme Court has accepted certiorari to a 1975 decision by the Third Circuit Court of Appeals which held that the State of Pennsylvania was required under Medicaid to pay for non-therapeutic abortions. A memorandum on the case is attached at Tab A. This decision supports the concept that abortions should be available regardless of ability to pay, an issue that is raised in this year's Labor-HEW appropriations abortion amendment.

The Court, which will convene in October, has not yet heard oral arguments on the merits. The Solicitor General did file an amicus curiae brief in March, 1976, supporting Pennsylvania's request for review and its position that the state is not required to pay under Medicaid for non-therapeutic abortion (i.e. abortion on demand). The Solicitor General stated that neither Title XIX of the Social Security Act nor the Fourteenth Amendment to the U.S. Constitution required a federally-funded state Medicaid program to pay for abortions that were not medically indicated.



Specifically in regard to the Fourteenth Amendment, the Solicitor General argued as follows:

Moreover, the fact that a woman has a qualified right to an abortion does not imply a correlative constitutional right to free treatment. Individuals presumably have a "right" to undergo many recognized medical procedures by a licensed physician but the Equal Protection Clause does not affirmatively require a state to cover the costs incurred by indigents in undergoing such procedures.

1977 Labor-HEW Appropriations: As you know, the Labor-HEW Appropriations bill includes an amendment restricting federal funding of abortions. The effect of this provision is that no funds in the appropriation can be used for abortions "Except where the life of the mother would be endangered if the fetus were carried to term".

The conference report is not as restrictive as the language of the amendment and in some respects is contradictory, for example, it indicates that abortion would be permitted in cases of rape or incest.

The Conference Report states:

It is the intent of the Conferees to limit the financing of abortions under the Medicaid program to instances where the performance of an abortion is deemed by a physician to be of medical necessity and to prohibit payment for abortions as a method of family planning, or for emotional or social convenience. It is not our intent to preclude payment for abortions when the life of the woman is clearly endangered, as in the case of multiple sclerosis or renal disease, if the pregnancy were carried to term. Nor is it the intent of the Conferees to prohibit medical procedures necessary for the termination of an ectopic pregnancy or for the treatment of rape or incest victims; nor is it intended to prohibit the use of drugs or devices to prevent implantation of the fertilized ovum.

At issue here is whether the federal government will pay for non-therapeutic abortions for the poor.

Preliminary Findings:

A. Current Policies: Our initial analysis indicates that four agencies have legislative authority for medical services which they have interpreted to include authority to permit them to fund or provide abortions: HEW, DOD, VA, and Civil Service Commission.

It is worth noting that the Congress has not acted consistently to prohibit abortion as a means of family planning. For example, AID, which has family planning authority, is prohibited by Act of Congress from funding abortion. Similarly, in HEW the Congress has prohibited abortion under Title X of the Public Health Service Act (Family Planning) but has not addressed this issue in family planning under Title XIX (Medicaid) or Title XX (Social Services).

It is also worth noting that the Executive Branch over the years has not been consistent. As an administrative matter, HEW has decided that abortion can be a reimbursable service under the family planning section of Title XX. CSA, however, which has legislative authority for family planning has acted administratively to prohibit the use of CSA funds for any surgical procedures intended to cause abortion.

In December 1975, HEW, in order to comply with its General Counsel's interpretation of the Supreme Court decision, ordered all PHS facilities to provide abortions as a normal medical procedure in all states. Previously this procedure was not available where prohibited by State law, even if the State law was unconstitutional.

In March 1971, as a result of an Executive Order by President Nixon, the Secretary of Defense directed that military medical facilities should observe applicable state laws regulating abortion procedures in military medical facilities. In September, 1975, in order to comply with the Supreme Court decision of 1973, upon the ruling of its General Counsel, DOD ordered all military facilities to provide therapeutic abortions as a normal medical service for its beneficiaries and their dependents. Outside of military medical facilities, abortions are provided under the CHAMPUS program where this practice is consistent with State law.

The VA provides therapeutic abortions for a veteran when the procedure approved by a properly constituted VA medical board. Under the VA CHAMPUS program, survivors and dependents of veterans who are or were totally disabled from a service-connected disability can receive either therapeutic or non-therapeutic abortions. This is the same benefit provided certain dependents and survivors of active duty and retired members of the Armed Forces under the CHAMPUS program and in fact is administered by CHAMPUS as a result of a DOD/VA agreement.

Under the Federal Employees Health Benefits Program the Civil Service Commission provides abortion benefits for all covered Federal employees and their families through the payment of group health insurance premiums.

B. Current Practices: It is estimated that HEW is currently financing between 250,000 and 300,000 abortions annually at a cost of \$45-55 million. No information exists for departmental programs separating therapeutic from non-therapeutic abortions.

- The Social and Rehabilitation Service provides most of the funding for abortion services under Social Security Act Title XIX (Medicaid) and Title XX (Social Services). Expenditures for such abortion procedures must be estimated since Social Services and Medicaid data are not available on diagnostic or clinical classification or surgical or medical procedures.
- The Indian Health Service (IHS) provides comprehensive health services to American Indians and Alaskan natives. During fiscal year 1973, the IHS provided approximately \$750,000 for an estimated 3,100 abortion procedures.
- The Bureau of Medical Services estimates that approximately \$34,000 was expended for abortion services in such hospitals during fiscal year 1974.

In calendar year 1975 DOD provided 6,849 abortions in its own facilities and 13,087 through CHAMPUS at an estimated cost of \$9 million.

During FY 76 only one veteran received a therapeutic abortion in a VA hospital. Figures for dependents and survivors of veterans are not kept separately from the CHAMPUS program and are included with the DOD statistics.



The Federal Employees Health Benefits Program administered by the Civil Service Commission is the single largest insured group in the nation. There are no separately kept statistics on the utilization of federal employee health benefits for abortions.

Comments: The study is underway and we are proceeding to sort out the legal issues and the details of current practices under existing Federal programs.

The question of sorting out the statistics on what is the current use of Federal funds for abortions will of necessity involve a good deal of estimating. We will seek to provide the most sound and responsible estimates that can be arrived at.

Initial analysis indicates that the most difficult question will be the identification of the legal minimum requirements under existing law.

It is worth noting that the immediate legal context is subject to change by:

- a) Supreme Court decision in regard to the Pennsylvania case over the required use of medicaid funds for abortions,
- b) Final resolution of the "Hyde" amendment in the Labor-HEW Appropriations bill and subsequent legal challenges to that provision.

In effect, the key question of federal funding for abortions will in most instances crystalize into whether the poor are denied a medical service which is available to the rest of the population.

Summary: We can, at this stage, report that:

1. The data base in regard to funding abortions is incomplete and confusing.
2. The legal basis for much of this funding is not always clear and is in a process of change.
3. Both Congressional and Executive Branch actions have lacked consistency.
4. The key issue is whether the federal government will pay for non-therapeutic abortions for the poor.

[ca. Oct. 1976]

SUBJECT: ABORTION

Q: What are you doing about stopping abortions under the Hyde Amendment of the Labor-Hew Appropriations?

A: As soon as the veto was over-ridden, the President directed the Domestic Council group to see that the law is carried out promptly and effectively.



[Ca. Oct. 1976]

SUBJECT: ABORTION

Q: What are you doing about stopping abortions under the Hyde Amendment of the Labor-Hew Appropriations?

A: As soon as the veto was over-ridden, the President directed the Domestic Council group to see that the law is carried out promptly and effectively.



THE WHITE HOUSE
WASHINGTON

file

Sarah's comments:

She said Nicholson does not plan to set this meeting up but what he wants to know is how to respond to Dr. Jefferson.

Whatever is said to her she will take to the press.

Sarah suggests: Standard reply - regret but due to President's schedule, he will be unable to fit it in, etc. which Jefferson won't like, but it won't give her any real fuel to do damage with.



4:45

*Call Nicholson
offin.*

Done 10/11/76

*"No" response on basis
of press of time.
Say nothing
re: Pres.
abortion
position.
AM.*

THE WHITE HOUSE
WASHINGTON

DATE: 9/29 /
TO: Art / Sarah
FROM: ALLEN MOORE

SUBJECT:

ACTION:

FYI:



please advise

Shen

THE WHITE HOUSE
WASHINGTON

September 30, 1976

1976 SEP 30 PM 8 21

File

MEMORANDUM FOR: BILL NICHOLSON

FROM: BOBBIE GREENE KILBERG *Bobbie*

SUBJECT: Request that the President Meet with
Dr. Mildred Jefferson and Leaders of
Majority of Pro-Life Constituents

I strongly recommend that you reject the request for a meeting between the President and the National Right-to-Life Committee. As the letter from Mrs. Brown indicates, the Committee will not support any candidate who does not accept a right-to-life constitutional amendment and considers a states' rights approach to be unacceptable. The President would gain nothing from this meeting and would only subject himself to unnecessary controversy. In my opinion, it would be bad politics.

cc: Phil Buchen ✓
Jim Cannon ✓
Jim Cavanaugh



[ca. Oct. 1976]

- 2 -

some instances, are underway throughout the country. About 35 million doses of vaccine have been certified and 25 million doses distributed.

The Arts

Jim Connor has staffed the Vice President's memorandum on the Arts initiative (see last week's status report). We have suggested that the initiative be announced at the October 14th dinner the President and Mrs. Ford are giving for Martha Graham.

Status of restriction on HEW funding of abortion

After the Congress overrode the veto to the HEW/Labor Appropriations bill, a number of law suits were filed in Federal courts to challenge the restriction. One in Washington, D.C. and another in New York City have resulted in two temporary restraining orders. These orders will prevent the legislatively-imposed restriction from being implemented across the nation until there has been a hearing in court.

At the hearings on October 12 (Washington, D.C.) and October 20 (New York City), plaintiffs (those challenging the restriction) will ask for a preliminary injunction. The courts can either deny the request or grant an injunction.

The Supreme Court will be considering this fall, the constitutionality of a state ban on the use of Medicaid funds for abortion. (Maher v. Roe, from Connecticut). It is possible that the preliminary injunction will be granted until the Supreme Court rules on this case.

While the temporary restraining order is in effect, HEW funds will continue to be used to reimburse for abortion services.

Abortion letters have been approved and sent to Correspondence -- Presidential clearance was not needed because there were no changes.



Abortion

THE WHITE HOUSE
WASHINGTON

1976 SEP 29 PM 1 09
September 29, 1976

MEMORANDUM FOR: JAMES CAVANAUGH
✓ JAMES CANNON
BOBBIE KILBERG

FROM: WILLIAM NICHOLSON *WUN*

SUBJECT: Attached request that the President meet with Dr. Mildred Jefferson and the leaders of the majority of pro-life constituents in the US prior to the election.

I would appreciate your comments and recommendation on the attached request. Please respond as soon as possible.

Thank you.

COMMENTS:

ADVISE: NOT TO MEET

Such a meeting would require us to explain why we are not meeting with pro-abortion groups or to set up a series of meetings with the various pro-abortion groups. Meeting with

Bishops was part of a series of meetings with religious leaders & subjects in addition to abortion were discussed.



September 24, 1976

Mr. William Nicholson
White House Staff
White House
Washington, DC 20500

Dear Mr. Nicholson:

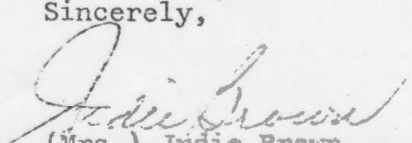
Dr. Mildred F. Jefferson has asked me to correspond with you relative to the telephone conversation which you and I had on Monday, September 20, 1976. Dr. Jefferson speaks as one of the pro-life leaders in this nation and has viewed the Presidential campaigns of both contenders closely during the past two weeks.

Please be advised that the pro-life movement, as viewed by a leader who has been observing the political situation, can in no way endorse a candidate who does not accept a Human Life Amendment but rather a states right's approach which is unacceptable.

In order to clarify the position of the pro-life movement in this nation, I have enclosed a copy of the text of Dr. Mildred F. Jefferson's testimony as given at the Republican National Convention (see page ten as noted on the enclosed copy of the National Right to Life News).

Having read the enclosed, perhaps you can better understand why the leaders of this movement maintain that it would be advisable for President Ford to sit down and discuss this issue with the leaders of the majority of pro-life constituents in this nation. This is not an issue based on religion; this is not a movement based on religion. Therefore, it is not a constituency who can "solidly support" a candidate who does not address the Human Life Amendment as an amendment without room for compromise.

Sincerely,


(Mrs.) Jodie Brown
Director of Public Relations
National Right to Life Committee
557 National Press Building
Washington, DC 20045

cc: Dr. Mildred F. Jefferson



THE WHITE HOUSE
WASHINGTON

October 2, 1976 4 PM 12 59

MEMORANDUM FOR: JIM CANNON
FROM: JIM CAVANAUGH
SUBJECT: Your September 28 Memo to Dick Cheney
on Assignments and Deadlines

Thanks for sending me a copy of your memo to Dick Cheney. I tried to call you about it this afternoon, but you had left.

I agree with you that in the case of the Domestic Council it is helpful to have important assignments in writing.

Just for the record I am attaching a copy of my September 16 memo to you with this assignment, which followed up the telephone conversation you and I had. I don't recall talking to Art Quern about it but may have.

Thanks for helping to make the system work.

Attachment

cc: Dick Cheney



THE WHITE HOUSE

WASHINGTON

September 16, 1976

MEMORANDUM FOR: JIM CANNON
FROM: JIM CAVANAUGH
SUBJECT: Use of Federal Funds for Abortions

The President would like to see the Domestic Council study relating to the use of Federal funds for abortions prior to the time he has to act on the Labor-HEW appropriation bill.

Paul O'Neill thinks that that bill should be here in the next day or two.



Clinton

THE WHITE HOUSE
WASHINGTON

Mr. Reilly phoned in on
10/11 for a reply.
We did not receive the
letter until 10/12. It
went through the computer
to Sarah Massengale for
action. Art Quern has a
copy also.

SJ



→ MOORE
FY1

1976 Oct 11

936 National Press Building

Washington, D. C. 20045

(202) 347-7825

8
20

8 Oct 76

Mr. James M. Cannon
The Domestic Council
The White House
Washington, D.C. 20500



Dear Mr. Cannon:

On Sept. 10 Archbishop Bernardin said that during the meeting he and the other leading bishops had just had with the President, Mrs Ford "indicated his personal position is against government funding, government participation" in abortion. The president, according to ~~Rx~~ Archbishop Bernardin, "acknowledged that at times some of the agencies seem to go beyond what he feels should be done" and he "indicated that he would make a study of the situation to determine what needs to be done on his part in order to impose or bring about some restraints."

Mr. Nessen has announced that you were charged by the President to undertake this study, and I have since been informed by a press officer that a preliminary study has been made, and a further study is under way.

I should be grateful for whatever information you can give this newspaper about:

- the persons actually carrying out the study;
- the offices under investigation (I use the phrase unprejudicially);
- results of the study thus far obtained;
- estimated time of completion of the study
- how much of the study will be rendered public.

Thank you. Yrs faithfully,

[Signature]