The original documents are located in Box C50, folder "Presidential Handwriting, 10/12/1976 (1)" of the Presidential Handwriting File at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE

WASHINGTON

October 12, 1976

MR PRESIDENT:

Study of Federal Funding for Abortions

The attached report was prepared jointly by the Domestic Council and members of Phil Buchen's staff. It was reviewed by OMB (McGurk) and they had no further comments.

Jim Connor

THE PRESIDENT HAS SEEN...

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.

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.

A

THE WHITE HOUSE

WASHINGTON

September 4, 1976

MEMORANDUM FOR THE FILES

FROM: BOBBIE GREENE KILBERG BK

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.

On the question of public hospitals and the provision of abortion services, the Supreme Court has accepted certiorari in the case of Doe v. Poelker, 515 F.2d 541 (1975). In that case, the Eighth Circuit Court of Appeals held that St. Louis, Missouri's policy prohibiting all non-therapeutic abortions in its publicly owned hospitals was unconstitutional "as a unwarranted infringement on pregnant women's right to privacy and as a denial of equal protection to indigent pregnant women." The Court of Appeals ruled that the two city-owned hospital facilities had to be made available for abortion services as they were for other medical services.

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: September 28, 1976 Time:

FOR ACTION: cc (for information):

Phil Buchen*
Jim Lynn

FROM THE STAFF SECRETARY

DUE: Date: Thursday, September 30 Time: 10 A.M

SUBJECT:

Jim Cannon memo 9/21/76 re Study of Federal Funding for Abortions

ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

__X__ For Your Comments ____ Draft Remarks

REMARKS:

*Phil Buchen - do you have any additional comments to make.

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

Jim Connor
For the President

OMB
Missing

Mc Gurk working on it-

Mc Gurk
X4844

on 10/8
Mc Gurk
said OMB
had
letter

Jim Cavanaugh
wants low
CO to
9/28/76

THE WHITE HOUSE

WASHINGTON

September 27, 1976

MEMORANDUM FOR: JIM CONNOR

FROM: JIM CAVANAUGH

SUBJECT: Domestic Council Study of Federal Funding for Abortions

We discussed this a day or two ago. I think it should be staffed to Phil Buchen and OMB before it goes to the President.

Attachment

THE WHITE HOUSE INFORMATION

WASHINGTON

September 21, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: JIM CANNON

SUBJECT: Study of Federal Funding for Abortions

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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.

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-- The variety of legal interpretations in different jurisdictions and under diverse authorities; and

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a) The different requirements for record keeping under the various federal programs which fund abortions; and

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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.

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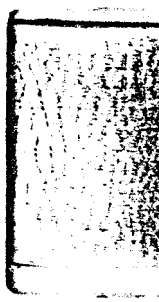
4. The key issue is whether the federal government will pay for non-therapeutic abortions for the poor.



THE WHITE HOUSE

WASHINGTON

September 4, 1976

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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

WASHINGTON

September 28, 1976

MEMORANDUM FOR: JIM CONNOR

THROUGH: PHIL BUCHEN P.

FROM: BOBBIE GREENE KILBERG BK

SUBJECT: Cannon memo 9/21/76 re Study of Federal Funding of Abortions

We participated in the drafting of the attached memorandum from Jim Cannon to the President, and we concur in its contents.

Since this memorandum has not yet been sent into the President, we would like to add an additional paragraph to page 3 of the attachment at Tab A. That paragraph will indicate that the Supreme Court has now accepted certiorari in a case involving public hospitals and the provision of abortion services. A re-typed page which includes the additional paragraph is attached (page 3 of Tab A).

Attachment

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

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On the question of public hospitals and the provision of abortion services, the Supreme Court has accepted certiorari in the case of Doe v. Poelker, 515 F.2d 541 (1975). In that case, the Eighth Circuit Court of Appeals held that St. Louis, Missouri's policy prohibiting all non-therapeutic abortions in its publicly owned hospitals was unconstitutional "as a unwarranted infringement on pregnant women's right to privacy and as a denial of equal protection to indigent pregnant women." The Court of Appeals ruled that the two city-owned hospital facilities had to be made available for abortion services as they were for other medical services.

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.