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ISTEA [Intermodal Surface Transportation Efficiency Act]: TPs [Talking Points] for Calls / Press

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LINDA RICCI
05/20/98 11:43:52 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:
Subject: Transportation guidance for McCurry

Please review asap and get comments back to me. This is for Mc Curry's briefing today.
Thanks. --Linda Ricci

TRANSPOR.W

Message Sent To:

Rahm I. Emanuel/WHO/EOP
Paul E. Begala/WHO/EOP
Lawrence J. Stein/WHO/EOP
Charles M. Brain/WHO/EOP
Charles E. Kieffer/OMB/EOP

Transportation Talking Points
May 20, 1998

1. Will you sign the transportation bill?

The conference report is not final yet, but it appears that Congress is trying hard to produce a bill the President can sign, and we're pleased with the progress Congress is making. America needs a transportation bill in order to build a 21st century infrastructure. We're encouraged that Congress seems to be headed in the right direction -- saving some $20 billion from prior versions of the legislation.

However we still have serious concerns about the issue of spending for mass transit in this bill. There must be the right balance between funding for mass transit and funding for highways, in order that people who use public transportation can count on clean, safe, efficient transport. They should not be shortchanged as Congress strikes continues to work on the right mix between mass transit and highway funding.

3. You suffered a defeat on the .08 measure and yet you won't veto on it. Can you explain that.

We are disappointed that the sanctions against drunk driving, which could save hundreds of lives every year, will not be included in the transportation bill. As we have learned from the success of our efforts to require states to adopt zero tolerance on alcohol for young people, a strong program is necessary to fight drunk driving. We seriously doubt the incentives that have been proposed will be successful, and intend to continue for fight against drunk driving -- and for a nationwide standard of .08

We're obviously disappointed in not getting the tough DUI language we wanted, but we intend to carry that fight on into the future.

4. There are still a lot of demonstration projects. Do you still object to those?

Our overriding goal is for the spending levels to be acceptable, and we're encouraged by the progress that has been made in Congress. Any demonstration projects would have to be in the context of that overall goal.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

GENERAL GOVERNMENT AND FINANCE
Old Executive Office Building
Room 246
Fax Number: 202-395-4639

FACSIMILE TRANSMISSION

Date: 5/21 Number of Pages including Cover 2

PLEASE DELIVER THE FOLLOWING PAGES TO:

Larry Stein 6-6220

FROM:

X MICHAEL DEICH, Associate Director, General Government & Finance (202-395-3120)

___ Pat Romani (202-395-3120)

___ Ted Wartell (202-395-3801)

Comments:

DRAFT

- As you know, last night we agreed with Sen. D'Amato and Sen. Domenici on a package of offsets to pay for the increased transit spending that they seek. In our view, the package equitably spreads the burden across all interested parties.

- As in every good compromise, the package contains some offsets that are neither the first choice of the Administration nor the first choice of the two Chairmen -- we agreed to some of their suggestions; they agreed to some of ours.

- We agreed to two provisions that could reduce the services provided by government mortgage insurers:

  -- increased fees for GNMA (Guaranteed National Mortgage Association) and

  -- ending the rebate of certain FHA mortgage insurance fees.

- In turn, the Chairmen agreed to increase the loan limit on FHA loans, and allow FHA to expand the services that it offers.

  -- Raising the FHA loan limit will expand credit and homeownership opportunities; it will not drain business from the private sector.

  -- As you know, private mortgage insurers have lower costs than does the FHA. Borrowers generally turn to FHA only when they have difficulty gaining credit from the private sector.

  -- Thus, increasing the loan limit will not significantly affect FHA's ability to compete with private mortgage insurers; it will only allow FHA to serve those who now cannot get ready access to private credit.

- Failing to increase the FHA loan limit would eliminate the one provision in the offset package that expands homeownership opportunities. We would be left with offsets that impose new costs on government insurers, and nothing that allows FHA to expand the services that it offers. The burden of the offsets would fall only on those who most need help to buy a new home.

- I want to stress that we looked long and hard at all other offsets, and were unable to find any others that would provide a balanced, equitable package.

- You know that we favor reducing the Social Services Block Grant, but only to pay for more effective programs that provide benefits to children and others in need. In my judgment, cutting the Social Services Block Grant to pay for this particular bill would be a serious mistake. Cutting SSBG now would leave us in the position of paying for highways and transit by cutting benefits to veterans and children.

- I urge you to allow the compromise to move forward.

THE WHITE HOUSE

WASHINGTON

March 3, 1998

RECOMMENDED TELEPHONE CALL

TO: Senator Joseph I. Lieberman (D-CT)

DATE: March 3, 1998

RECOMMENDED BY: Larry Stein
Tracey E. Thornton

PURPOSE: To encourage Senator Lieberman to oppose Senator Mitch McConnell's amendment to the Intermodal Surface Transportation Efficiency Act (ISTEA) which either eliminate or significantly weaken the Disadvantage Business Enterprise Program (DBE). This amendment is likely to reach the Senate floor tomorrow.

BACKGROUND: Sen. Lieberman is concerned that the Disadvantaged Business Enterprise program will be successfully portrayed as an unconstitutional set-aside during the floor debate. He is also concerned about voting to sustain this program in the face of Republican rhetoric about quotas and unfair preferences.

The DBE program does not impose quotas or set-asides of any kind. It simply sets a flexible, national goal that 10% of the highway and transit funds be used for services provided by women and minority owned firms. The program was enacted in 1983 under President Reagan, in response to extremely low participation by minorities in federally assisted highway construction contracting; women were added in 1987. The Justice Department believes that the DBE program meets the constitutional standards enunciated by the Supreme Court in Adarand Constructors, Inc. v. Pena, i.e., that it is narrowly tailored to meet the compelling interest in eradicating the effects of discrimination (DoJ letter attached). In addition, data from states show that when individual state DBE programs are ended, participation by women and minorities plummets, as many prime contractors return to their earlier exclusionary practices.

We are relying on a number of moderate Republicans to vote against the McConnell amendment and that is the reason we need every Democrat to stay with the Caucus on this issue. Senator Daschle believes that Senators Lieberman, Hollings and Byrd are the three most likely to support Senator McConnell. Senator Chafee has been working the Republicans and is counting 8-10 votes on his side, but those are not firm.

TOPICS OF DISCUSSION: 1). Ask the Senator to vote against the McConnell amendment. Tell him that the Administration has already proposed regulations revising the program to make sure it is fair and continues to be constitutional.

2). Let Senator Lieberman know the DBE program is designed to foster economic development for women and minority owned businesses. Even with the DBE program in place, non-DBEs still receive over 85% Federal highway construction funds. Now is not the time to eliminate or significantly restrict this equal opportunity program.

3). Tell him how important defeating Senator McConnell's amendment is to the Administration's long-term objective of "mending not ending" affirmative action in areas where, like the construction industry, there is unequivocal evidence of discrimination and exclusion of women and minorities.

CONTACT PERSON AND PHONE NUMBER: Senator Lieberman
202-224-3121 (Capitol Operator)
202-342-3363/ 202-342-3372 (Senator's Home)

DATE OF SUBMISSION: March 3, 1998

ACTION:

THE WHITE HOUSE

WASHINGTON

March 3, 1998

RECOMMENDED TELEPHONE CALL

TO:	Senator Ernest F. Hollings, (D-SC)
DATE:	March 3, 1998
RECOMMENDED BY:	Larry Stein Tracey E. Thornton
PURPOSE:	To encourage Senator Hollings to oppose Senator Mitch McConnell's amendment to the Intermodal Surface Transportation Efficiency Act (ISTEA) which either eliminate or significantly weaken the Disadvantage Business Enterprise Program (DBE). This amendment is likely to reach the Senate floor tomorrow.

BACKGROUND:

Sen. Hollings is concerned that the Disadvantaged Business Enterprise program will be successfully portrayed as an unconstitutional set-aside during the floor debate. He is also concerned about voting to sustain this program in the face of Republican rhetoric about quotas and unfair preferences.

The DBE program does not impose quotas or set-asides of any kind. It simply sets a flexible, national goal that 10% of the highway and transit funds be used for services provided by women and minority owned firms. The program was enacted in 1983 under President Reagan, in response to extremely low participation by minorities in federally assisted highway construction contracting; women were added in 1987. The Justice Department believes that the DBE program meets the constitutional standards enunciated by the Supreme Court in Adarand Constructors, Inc. v. Pena, i.e., that it is narrowly tailored to meet the compelling interest in eradicating the effects of discrimination (DoJ letter attached). In addition, data from states show that when individual state DBE programs are ended, participation by women and minorities plummets, as many prime contractors return to their earlier exclusionary practices.

We are relying on a number of moderate Republicans to vote against the McConnell amendment and that is the reason we need every Democrat to stay with the Caucus on this issue. Senator Daschle believes that Senators Lieberman, Hollings and Byrd are the three most likely to support Senator McConnell. Senator Chafee has been working the Republicans and is counting 8-10 votes on his side, but those are not firm.

TOPICS OF DISCUSSION: 1). Ask the Senator to vote against the McConnell amendment. Tell him that the Administration has already proposed regulations revising the program to make sure it is fair and continues to be constitutional.

2). Let Senator Hollings know the DBE program is designed to foster economic development for women and minority owned businesses. Even with the DBE program in place, non-DBEs still receive over 85% Federal highway construction funds. Now is not the time to eliminate or significantly restrict this equal opportunity program.

3). Tell him how important defeating Senator McConnell's amendment is to the Administration's long-term objective of "mending not ending" affirmative action in areas where, like the construction industry, there is unequivocal evidence of discrimination and exclusion of women and minorities.

CONTACT PERSON AND PHONE NUMBER: Senator Hollings
202-224-3121 (Capitol Operator)
202-244-1114 (Senator's Home)

DATE OF SUBMISSION: March 3, 1998

ACTION:

U. S. Department of Justice

Office of the Associate Attorney General

The Associate Attorney General

Washington, D.C. 20530

March 3, 1998

The Honorable Thomas A. Daschle
United States Senate
Washington, D.C. 20510

Dear Senator Daschle:

This letter responds to your request for the Department of Justice's views regarding the constitutionality of the Disadvantaged Business Enterprise (DBE) program of the Intermodal Surface Transportation Efficiency Act (ISTEA). I have been charged with supervising the Department's review of affirmative action programs at federal agencies, to ensure that such programs meet the constitutional standards enunciated by the Supreme Court in Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). The Congress has repeatedly found that racial discrimination and its effects continue, and that eradicating the effects of discrimination is a compelling interest. As we discuss further below, we believe that the ISTEA program is narrowly tailored to meet this compelling interest and is constitutional under the Adarand standards.

Under the ISTEA DBE program, the Department of Transportation takes steps to ensure that firms qualifying as disadvantaged businesses are made aware of contracting and subcontracting opportunities in federally assisted state and local construction projects, and that prime contractors use DBEs to do some portion of federally assisted construction projects. As explained below, Congress has found that without the use of affirmative action measures such as the ISTEA DBE program, minority-owned firms would be severely disadvantaged in federally assisted construction projects. The program serves a compelling interest and is narrowly tailored to accomplish that interest.

Congress originally established the federal highway DBE program in the Surface Transportation Assistance Act of 1982, based on a compelling record demonstrating that efforts were needed to ensure that federal highway dollars were not used to perpetuate the effects of racial discrimination on the ability of minority-owned small businesses to participate in government contracting opportunities. Indeed, the Supreme Court in 1980 addressed a very similar provision involving federally-assisted public works projects. See Fullilove v. Klutznick, 448 U.S. 448 (1980). The Court analyzed a number of Congressional studies and reports issued prior to the provision at issue there, and found that "Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuate the effects of prior discrimination." 448 U.S. at 477-478.

Since that time, Congress has continued to oversee the DBE program and has frequently reevaluated the continuing need for it. See, e.g., The Disadvantaged Business Enterprise Program of the Federal-Aid Highway Act: Hearing Before the Subcomm. on Transp. of the Senate Comm. on Environment and Pub. Works, 99th Cong., 1st Sess. (1985) (testimony on need for program and capacity of minority-owned firms); Review of the 10-Percent Set Aside Program, Section 105(f) of the Surface Transportation Assistance Act of 1982: Hearings Before the House Comm. on Small Business, 98th Cong., 2d Sess. (1984) (testimony on problems faced by DBEs).

On the basis of extensive evidence that the effects of discrimination continue to hamper the efforts of minority firms to compete equally in public construction contracting, Congress has twice reauthorized the program, first in the Surface Transportation and Uniform Relocation Assistance Act of 1987 (which also added a provision including women-owned businesses in the program[1]), and again in 1991 in ISTEA. In 1987, Congress expressly found that "barriers still remain" to full participation by minorities and women in the highway and mass transit construction industry. S.Rep. No. 100-4 at 11. The House Committee on Small Business found "discrimination and the present effects of past discrimination" caused minority businesses to receive "a disproportionately small share of Federal purchases." H.R. Rep. No. 100-460 at 18 (1987).

The compelling interest that supported the DBE provisions of prior legislation still exists today. Congress has continued through the 1990s to hear testimony and review statistical evidence supporting the ongoing need for race- and gender-conscious measures to ensure that minority- and women-owned firms are not disproportionately excluded from federally assisted highway and transit projects. For example, in 1994 the House Committee on Government Operations found that minority-owned firms face particular difficulties in the construction industry due to negative perceptions by commercial lenders and domination of the industry by "old buddy" networks and family firms. H.R. Rep. No. 103-870 at 6-8, 15 & n.36 (1994). One particularly troubling area is discriminatory treatment in obtaining credit and bonding, which creates a negative cycle in which minority firms are unable to overcome their perceived high-risk status. See, e.g., Discrimination in Surety Bonding: Hearing Before the Subcomm. on Minority Enterprise, Finance, and Urban Development of the House Comm. on Small Business, 103d Cong., 1st Sess. 2-3, 7-9, 16, 18, 25-26, 41 (1993); Availability of

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[1] Courts have applied intermediate scrutiny to gender-based affirmative action programs, requiring that such programs serve important governmental objectives and be substantially related to achieving those objectives.

Credit to Minority-Owned Small Business: Hearing Before the Subcomm. on Financial Institutions Supervision, Regulation and Deposit Insurance of the House Comm. on Banking, Finance and Urban Affairs, 103d Cong., 2d Sess. 19-20, 22, 27 (1994). See generally 61 Fed. Reg. 26,042, 26,057-26,058 (1996). Congress's examination of these problems demonstrates quite clearly that discrimination is in part responsible for the condition of firms owned by minorities and by women, and that remedial action is still necessary to ensure that the effects of discrimination do not prevent minority- and women-owned small businesses from competing on an equal footing for the federal expenditures that will be authorized in the new highway and mass transit bill.

In addition, the ISTEA program is narrowly tailored to meet the compelling interest identified by Congress. The ISTEA goals are not quotas, are renegotiated on an annual basis and are not mandatory. Rather, the program allows recipients the flexibility to determine the level of DBE participation appropriate to current local conditions. Moreover, under the current program, agencies are permitted to waive goals when achievement in a particular contract, or even for a specific year, is not possible.[2]

Recent regulations proposed by the Department of Transportation will further ensure that the ISTEA's DBE program is operated in a constitutional manner. The new regulations would require the state or local goal for DBE participation to be based on an assessment of the availability and capacity of DBEs in the state or local construction market. In this way, non-minority firms will not be unfairly disadvantaged by the use of affirmative action measures. The regulations also direct states and localities first to use race-neutral means (such as outreach and technical assistance, or simplifying bonding or surety costs in bid requirements) to achieve their goals; where the state or locality achieves the goal in that manner, affirmative action measures that provide competitive advantages to DBEs would be unnecessary. The regulations also bolster provisions that ensure that firms owned by wealthy individuals will not be certified as DBEs, and clarify that non-minority individuals who also have suffered discrimination can be certified as owners of DBEs and therefore receive the same benefits that may be available to minority-owned DBEs. Finally, the new regulations expand methods by which challenges can be filed by third parties, as well as by state and local officials, where questions are raised about the bona fide status of any firm certified as a DBE.

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[2] The ISTEA program was addressed in Adarand v. Pena, 965 F.Supp. 1556 (D. Colo. 1997). On appeal, we have argued that the district court improperly reached the constitutionality of the ISTEA program.

The Honorable Thomas A. Daschle
Page 4

In sum, as we have stated in defending the ISTEA program in court, the Department of Justice believes that the ISTEA program is constitutional.

Sincerely,

Raymond C. Fisher