

Melame - FYI


THE WHITE HOUSE
WASHINGTON

September 4, 1994

MEETING WITH SENATOR MITCHELL

Date: September 5, 1994

Location: Maine

From: Patrick J. Griffin and Harold Ickes

I. PURPOSE

- * To reiterate your appreciation for all the hard work Senator Mitchell has done on behalf of Administration throughout the Congress.
- * To illustrate how you recognize the difficult political position he is in with regard to crafting a compromise health reform bill that works -- both in terms of substance and in attracting a sufficient amount of votes.
- * To raise real concern about the type of policy Senator Mitchell might have to settle for in order to get enough support from the moderate Republicans (who are apparently trying to reach out to Dole) and to indicate your nervousness that going too far towards the right might produce a bill that could do more harm than good.
- * To share with him our perception that the House Leadership (particularly Gephardt and the Committee and Subcommittee Chairs) is unlikely to be receptive to a significant (but in their minds flawed) health reform initiative that they either thought (and frankly hoped) was dead OR have little or no control over shaping. (Interestingly -- and not surprisingly -- the one exception to this position may well be the Speaker.)
- * To find out where Senator Mitchell currently stands on the feasibility and advisability of pivoting off his current negotiating effort with Senator Chafee et al (if it is not going well) into a much more incremental bill that uses smaller Medicare cuts and the tobacco tax to pay for benefits for kids and the elderly.

II. BACKGROUND

Although it remains very difficult to envision how any overly substantive legislation will emerge from the Congress this year, recent developments make clear that it is at least conceivable. It is even easier to imagine how an agreement between Senator Mitchell and the "mainstream" group could be achieved.

The Majority Leader's exceptional negotiating skills and his great desire to obtain a compromise that succeeds in getting the bill off the Senate floor, combined with the "mainstream" group's determination to remain in the limelight and in the driver's seat, could well produce a "deal."

A Mitchell/"mainstream" agreement has the potential to be extremely problematic. Drafted in the current "compromise" and "moving to the right" environment, the product could raise premiums of the currently working insured by unacceptable levels, while still leaving large numbers of Americans without insurance. Should such a package become law, we (and the Democratic party) would be very vulnerable to being blamed for this and other problems that ensued. Such an outcome would also further erode the public's confidence in the Government and would make it very difficult to build on the reforms that we did pass.

Of additional concern is the fact that the "mainstream" group has every reason to delay a final agreement as long as possible. It is clear the Republicans want to avoid a House/Senate conference and are contemplating a strategy that would lay the bill on the House's doorstep for a "take it or leave it" vote.

Delay strengthens the bargaining hand of the Republicans and enhances their ability to cast Democrats as obstructionists. Moreover, it gives even more time for the "mainstream" Republicans to attempt (as they are apparently now doing) to reunite with Dole. Obviously, the worst outcome for us would be for the Republicans to force the Democrats to kill bad legislation that has been successfully sold as "good" and "moderate" to the elite media.

The House is definitely divided on the health reform issue, with the Speaker clearly more inclined towards a minimalist approach than Majority Leader Gephardt. Not surprisingly, the House continues to be in a reactive (to the Senate's actions) mode. They do not want to join this issue until the Senate's package becomes clear. The risk with this approach is that a delayed Senate bill is likely to leave the House with nowhere to go other than the Senate position, as much as some will object.

Even if the House initiated its own alternative health reform initiative, it is not altogether clear it would be a package we would be comfortable with. In fact, the staffs of Gephardt and the Committee Chairs think it would be at least as likely -- if not more -- to be just the opposite. As such, the House environment underlies the extraordinary importance of any product emerging from the Senate.

With the above in mind, it is advisable to make Senator Mitchell clearly aware of our concerns. It is also advisable to get a sense of where he thinks he might go (or be forced to go) in his negotiations. It appears that this also would be an opportune time to, once again, briefly kick around the concept of a fall-back package of modest but politically and substantively attractive provisions. (You started this conversation during your last meeting, but Senator Mitchell did not focus.) Such a substitute could be used at any strategically appropriate time.

We may also want to engage the House Leadership in discussions about the advisability of a House fall-back package. Despite the risks mentioned previously, pushing something proactively -- rather than simply reacting to whatever the Senate and House Republicans and conservative Democrats might produce -- might better protect the Democrats against the charge of being obstructionists. Moreover, it could give the Party the opportunity to highlight the Republicans true, obstructionists colors.

Attached is the latest version of the package that Ira and others are developing. In many ways, this alternative (which is similar to one being advocated by Senators' Harkin, Levin and Pryor) could be an easier sell because it is much more modest, should not harm the current market, has limited Medicare cuts and provides coverage to sympathetic groups -- kids and the elderly. It is clear, however, that our close association with it could do more harm than good; in other words, we do this package no favor by claiming it as ours -- it must remain a package authored by the Congress.

We strongly advise that our version of the alternative NOT be handed to Senator Mitchell at this time. In addition, the discussion around it should not get overly detailed. This conversation should be used merely to gauge his openness to such an alternative. It is important to remember that the only way for this back-up to succeed is for Senator Mitchell to have ownership over and investment in it.

It is certainly possible that Senator Mitchell's bottom line may have a lower threshold for acceptability than the Administration's. **It is therefore critical that the Administration be clear and direct with Senator Mitchell on any major concerns we have with where the Senate bill is or may be headed.**

POLITICAL CONCLUSION

This memo has been particularly focused on our fears about the type of flawed policy that could emerge from the legislative process if we do not engage. It is equally important to point out that engaging the Congress at any level also carries risks.

No matter how careful we are in assuring that it is the Congress, and not the Administration, who is the lead sponsor of any alternative, we should not fool ourselves into thinking that we can extricate ourselves entirely from such a package. The perception, if not the reality, is that we are bonded at the hip with the Leadership -- particularly on the Senate side. As a result, a failure to pass any alternative carries with it a risk that the Administration will be labeled as a two-time failure. Therefore, an argument could be made for completely extricating ourselves from the legislative process now and laying the blame on the Congress.

Having said the above, even if a minimalist effort fails, we believe it would likely achieve two important ends: (1) it should stop a potentially flawed policy from being passed (and then possibly vetoed by you) and (2) it would enable us to better defend ourselves against being labeled obstructionists and better lay the more appropriate blame on the Republicans doorstep. With this in mind, we believe this course of action is worth the risk.

TALKING POINTS

- * Thank you George for all you have done. It has been a rough year for both of us, but your work has paid big dividends for us and the country as a whole. You have no idea how much we appreciate all your work and how much we fear your absence in the Senate.
- * I know you are in the middle of a set of negotiations that will be extremely difficult to produce a package that is acceptable to the "mainstream" group, while still retaining the support of our base supporters. I don't envy your position.
- * But I have to tell you how concerned I am about the direction you might find yourself having to go to get a deal. I am worried that the Republican "mainstreamers" are not going to move much -- if at all -- on many critical issues. I fear that their recent efforts to apparently reach out to Dole might move them further to the right.
- * In any event, their insistence on some issues might produce very real substantive and political problems for us. I am particularly concerned that the Republicans may effectively label us obstructionists if we end up being uncomfortable with the policy they insist on.
- * I certainly don't want to pre-judge the outcome of your negotiations, but I am concerned that a compromise product could do more harm than good, particularly for currently insured workers. As you know, major insurance reforms, in the absence of universal coverage, are very difficult to craft without adverse premium hike consequences.
- * George, I just wanted to raise a red flag about my worries that, if we don't get these reforms right, the Administration and Democrats as a whole will be blamed and our credibility for building on this year's reform will be irreparably damaged. I wanted to talk to you about this because it is becoming more and more clear that the House will either do nothing or do almost exactly what comes out of the Senate.
- * If your negotiations do not work out well with the "mainstream" group, what do you think about the possibility of your pivoting from where you now are to something more minimalistic for kids and the elderly, financed from the tobacco tax, relatively modest Medicare cuts, and possibly some Medicaid cuts).

POSSIBLE FALL-BACK OPTION

This package of reforms would take a significant step towards universal coverage, with little risk of harm for those individuals and businesses who currently purchase insurance.

INSURANCE REFORMS

Insurance reforms would include measures designed to close many of the loopholes in the current system, but not more comprehensive changes (like community rating) that could prove disruptive for some who now have health insurance.

- **Limits on pre-existing condition exclusions:** Pre-existing condition exclusions would be limited to six months, and prohibited for people who change from one plan to another (e.g., when changing jobs).
- **Guaranteed renewal:** Health plans would be required to renew coverage (except for non-payment, fraud, or misrepresentation).
- **No lifetime limits (if effect on premiums is minimal):** Health plans would be prohibited from imposing lifetime limits on benefits.

AFFORDABLE COVERAGE FOR CHILDREN

Subsidies would be provided to children in families with income up to 300% of the poverty level (about \$42,000 for a family of four). States would have broad flexibility in delivering coverage, but would be encouraged to do so through private health plans.

PROTECTION FOR WORKERS IN-BETWEEN JOBS

If workable and affordable, provide temporary subsidies to workers (for up to six months) who have lost their jobs to purchase insurance.

LONG TERM CARE

A limited home and community-based long term care program would be phased in over a period of years. (The \$95 billion \$700 a year deductible Medicare prescription drug benefit is probably too expensive -- about twice as the envisioned long term care benefit).

COST AND COVERAGE COMMISSION

A national cost and coverage commission would monitor health care costs and coverage (with some expanded data collection), and make recommendations for more comprehensive reforms to achieve universal coverage. It would issue a report at the beginning of each new Congress, with the first scheduled out in March 1995. The authorizing language for this Commission might establish targets for both coverage and cost containment and Congress could be directed to vote on its recommendations through an expedited approval process.

FINANCING

Expanded coverage would be financed through an increase in the tobacco tax (at the level proposed in the House and Senate Leadership bills) and relatively modest Medicare and possibly Medicaid savings.

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MEMORANDUM

TO: Mainstream Senators
FROM: Staff
RE: Status of Discussions with Representatives of the Majority Leader and
the Republican Leader
DATE: September 13, 1994

The Mainstream staff worked through the recess and was available to representatives of both the Majority Leader and the Republican Leader. Mainstream staff has met with staff from the Majority Leader's offices and representatives of the Republican Leader in an attempt to resolve and identify differences between our proposals.

Progress

1. Representatives of the Republican Leader

There have been two official meetings at which both substance and process were discussed. We answered questions and expressed the desire of Mainstream members to develop a list of areas in agreement and disagreement. The Republican Leader's representatives indicated that they were in the process of developing such a list to give to the Republican Leader. Mainstream staff suggested the possibility of attempting to discuss such issues to see if staff could work some of them out before the return of the Members. The Republican Leader's representatives felt that would be beyond the authority they had been given. Every attempt has been made, and will continue to be made, to involve the Republican Leader in ongoing discussions and to be responsive to his concerns.

2. Representatives of the Majority Leader

We have made a great deal of progress--probably 85% of issues could be resolved if an overall agreement were reached. Among the 15% or so issues that remain outstanding, there are only a few that Members will absolutely have to work out among themselves.

Senator Mitchell has accepted the Mainstream's position on a number of important issues, for example:

- o Agreement to work off of the language drafted by the Mainstream.
- o Willingness to negotiate on a "tax cap" as applied to large businesses, and abandonment of the notion of a tax on high cost plans which included a baseline set by the federal government.
- o Dropping his triggered employer mandate, his cost commission report (accompanied by expedited legislative procedures), and his new private right of action for potential civil rights violations.
- o Indication of some flexibility on issues related to the threshold for community rating/self-insuring.

Attached is a list of issues that remain outstanding, divided into two categories: (1) those that must be resolved by Members, and (2) those that staff could work out with some guidance from our respective Senators. On issues in both categories, Mainstream staff have had internal discussions to determine whether any possible compromises might exist.

ISSUES THAT MEMBERS MUST RESOLVE:

Issue: Individual deduction

Mainstream Position: The Mainstream proposal provides for an eventual 100% deduction for the self-employed and for individuals whose employers do not provide health insurance.

✓ Mitchell Position: The Mitchell bill contains only a 50% deduction for the self-employed and no deduction for individuals.

Comments: Although fairness may dictate the need for the individual deduction in addition to the deduction for the self-employed, CBO and Joint Tax agree that the cost of the individual deduction is not justified by any real increase in coverage. They also have pointed out that, while the individual deduction will effectively do nothing to expand coverage, its likely real world effect would be to encourage employers to drop employees from company health plans. The cost of the individual deduction in the Mainstream bill is approximately 70% of the total estimated \$29 billion over ten years for both deductions.

Issue: Risk Adjustment

Mainstream Position: The Mainstream proposal does not risk adjust from the experience-rated pool to the community-rated pool.

Mitchell Position: The Mitchell bill risk adjusts from the experience-rated pool to the community-rated pool.

Comments: It has been the Mainstream's position that a risk adjustment of this kind constitutes a hidden tax on large employer plans. This remains an essentially "either-or" proposition.

Issue: State Flexibility

Mainstream Position: For the sake of national uniformity, the Mainstream proposal would not allow states to implement state-level reforms either (1) ahead of the time frame in federal reform legislation or (2) that would affect ERISA plans. However, the Mainstream agreement retains current ERISA waivers for Maryland and Hawaii, and allows states to set up single payer systems with a carve-out for large multi-state employers (1,000 or more employees).

Mitchell Position: Mitchell wants to allow (1) and (2), and wants to allow states to impose additional or different requirements than those imposed by federal reform legislation. Specifically, Mitchell's bill grants waivers to certain states (Maryland, Hawaii and New York) to tax self-insured plans, impose employer mandates, and/or continue all payer hospital reimbursement systems. Also, it allows States to set up single payer systems without a carve-out for large employers and allows "Fast-Track" states to implement federal uniform standards in advance of their effective dates.

Comments: While the Mainstream and Mitchell approach agree on the grandfathering in of certain existing ERISA and Medicaid waivers and expanding both the Hawaii and Maryland waiver, there is still disagreement on the New York waiver, the "Fast-Track" states, and the single payer opt out for large companies.

Issue: Medicare Outpatient Prescription Drug Benefit

Mainstream Position: The Mainstream is opposed to a new non-means-tested entitlement but gives seniors access to certified health plans which would provide prescription drugs.

Mitchell Position: The Mitchell bill includes a new benefit under Medicare to cover prescription drugs.

Issue: Fail-Safe

Mainstream Position: The Mainstream bill provides for reductions in new spending programs enacted as part of health care reform to offset any unanticipated growth in total federal health spending, including Medicare. The bill requires that if Medicare spending causes the fail-safe to be triggered, the President must send a proposal to Congress that would reduce Medicare spending thereby preventing the fail-safe from being triggered. If such legislation is not enacted, the new reform programs would be sequestered.

Mitchell Position: The Mitchell bill prevents unanticipated growth in Medicare from triggering a subsidy cut, and therefore excludes Medicare spending from the current health spending baseline.

Issue: Malpractice

Mainstream Position: The Mainstream bill contains a \$250,000 cap on non-economic damages.

Mitchell Position: The Mitchell bill does not contain a cap on non-economic damages.

Comments: Mitchell may also have some concerns about (1) mandatory fee shifting (English rule) in ADR cases and (2) Mainstream's provisions on several liability.

ISSUES WHICH STAFF CAN RESOLVE WITH SOME GUIDANCE:

Issue: Limit on Tax Deductibility and Employer Deductions/Employee Exclusion for Cost-Sharing Supplementals

Mainstream Position:

(1) The Mainstream bill contains a dual formula for calculating the limit on deductibility for experience-rated plans, under which an experience-rated employer can choose a limit of either 110% of the average premium for community-rated plans in their area, or the level of that company's actual spending in 1997 not increased for growth.

(2) Mainstream would not allow an employer deduction or individual exclusion for supplementals that cover cost sharing under the standard plan (first dollar coverage) beginning in the year 2000.

Mitchell Position:

(1) Mitchell would like to change the formula that determines level of deductibility for experience-rated plans.

(2) Mitchell does not contain the provision which eliminates the deductibility and excludability of cost sharing supplemental plans.

Comments: Mitchell's staff has indicated a willingness to negotiate on the issue of the limit on deductibility for experience-rated plans, ~~and they have already agreed to the limit on deductibility for community-rated plans.~~

Issue: Insurance Reform

Mainstream Position:

(1) The Mainstream proposal limits community-rating to firms with fewer than 100 workers.

(2) The Mainstream proposal allows existing association plans to continue selling experience-rated and self-insured plans to their members, but does not allow new plans to develop.

(3) The Mainstream bill contains a provision that would allow large (over 100,000) purchasing cooperatives that serve public employees to continue offering experience-rated plans.

Mitchell Position:

(1) The Mitchell bill limits community-rating to firms with fewer than 500 workers.

(2) The Mitchell bill would effectively eliminate association plans with the exception of Taft-Hartley plans, rural electric cooperative plans and certain church plans.

(3) The Mitchell bill would not allow large purchasing cooperatives that serve public employees to continue offering experience-rated plans.

Comments: Staff has been considering some options that may lead to an agreement on these issues. The underlying issues require a balancing between the continued existence of current purchasing arrangements and the protection of the community-rated pools.

Home and Community-Based Long Term Care Benefit.

Mainstream Position: The Mainstream bill funds this capped entitlement to states at \$10 billion over ten years.

Mitchell Position: The Mitchell bill funds this program at \$47 billion over ten years.

Comments: Differences also remain in the level of income-related cost-sharing that would be required of beneficiaries. Mitchell favors a 50% cost share at 400% of poverty while the Mainstream favor a 100% cost share at a lower level of poverty.

Issue: Underserved/Public Health

Mainstream Position: The Mainstream bill does not include any mandatory spending for public health programs or programs to assist underserved populations.

Mitchell Position: The Mitchell bill provides for direct (mandatory) funding for a series of programs devoted to underserved populations and public health functions. The amount of direct funding that Mitchell ultimately wants is negotiable, but Mitchell's staff want some mandatory outlays for underserved programs (network development, enabling services, and capital), school based clinics, the National Health Service Corps, essential public health activities, the community based scholarship program, and additional funding for WIC.

Comment: The Mitchell bill originally contained \$37 billion in mandatory funding; they have communicated they may be willing to accept significantly less.

Issue: Benefit Package / Role of the Health Board

Mainstream Position: The Mainstream bill contains three defined benefit packages and it provides more flexibility with regard to the nature of particular covered items and services within the nationally defined categories. The Board would define the limitations on specific items and services and would set cost-sharing for the benefit packages.

Mitchell Position: The Mitchell bill contains two defined benefit packages and it would have the Commission specifically define all covered items and services, and cost sharing. After the initial packages were defined, the Board would be able to change cost-sharing and covered items and services without Congressional approval.

Issue: Workforce / Graduate Medical Education

Mainstream Position: The Mainstream proposal does not include a specific workforce requirement, but would set up a commission to report on workforce reform (a proposal would come to Congress under expedited legislative procedures).

Mitchell Position: Mitchell wants to impose a national "workforce" goal of 55% primary care physicians to 45% specialty physicians and target new federal spending to the achievement of this goal.

Comments: Differences also remain in the amount of funding that would be raised through a new "all-payer" tax on health plans, but it is not clear if this is a major concern of Mitchell's.

Federal Employees Health Benefits Program (FEHBP).

Mainstream Position: The Mainstream proposal requires all locally-offered plans that participate in FEHBP to offer themselves to the community-rated market.

Mitchell Position: Mitchell would (1) require that all employers offer FEHBP to their employees and (2) blend the community rate and federal employee rate over time.

Comments: Mitchell's staff has suggested the following compromise: adding a "cash and carry" provision that would allow all employees of community-rated employers to choose an FEHBP plan and retain their employers' contribution.

Issue: Outcomes and Quality Research

Mainstream Position: The Mainstream bill would not devote part of its all-payer tax (.6%) for graduate medical education to increase funding for the Agency for Health Care Policy and Research.

Mitchell Position: Mitchell would devote a part of his 1.75% all-payer tax on premiums to increase funding for the Agency for Health Care Policy and Research. AHCPR is currently funded through discretionary appropriations and the Medicare trust fund.

Issue: Plans and HIPC's

Mainstream Position: Under the Mainstream bill, plans are not required to offer themselves to all HIPC's in the area, but all plans will be listed, comparative information will be available and individuals will be able to enroll in plans at a state designated site.

Mitchell Position: The Mitchell bill requires all health insurance plans to be offered through a HIPC, although there is no requirement for individuals to purchase through a HIPC.