

Congress gave short shrift to HEW's indemnification bill. The House Health Subcommittee held a hearing June 28, with the drug companies and HEW, as well as Cheek. Cooper was questioned hard. The companies got little sympathy. Nobody but they liked indemnification, not even the Administration witnesses. There was a smell of rip-off in the air.

WAXMAN. Dr. Cooper, are you in effect saying that the insurance industry is using the possibility of a swine flu pandemic as an excuse to blackmail the American people into paying higher insurance rates?

COOPER. Well. . . .

WAXMAN. You suggest that you don't understand why they are charging three or four times more than is customary.

COOPER. I do not. . . .

WAXMAN. It's your view that the insurance industry is not acting responsibly when they are asking to charge three or four times the usual rate for a vaccine that does not offer significant risk, while at the same time they are insuring vaccination programs where there are more substantial risks involved.¹⁴

Congressman Andrew Maguire of New Jersey joined his colleague Waxman in sharp questioning. They took it that there had to be some other, better way and that it would soon show itself with more intensive bargaining and higher level pressure. This was a message for Mathews. Chairman Rogers underscored it. He told Taft, who had entered the scene in Barrett's temporary absence, to get back to the bargaining table and work the thing out by contract.

Cheek recalls, as he told us:

The subcommittee did not understand why insurers were reluctant to insure a vaccine whose medical risks appeared minimal; they certainly did not sympathize with the industry, or with our argument that the incalculable number of spurious claims and new liability doctrines made the manufacturers uninsurable at any price. . . . They just didn't believe us.

In the first week of July, the manufacturers and OGC restaged their dialogue. The stakes were higher, the publicity greater, the players more prominent, but the game was essentially the same. Feiner stretched the proffered contract language a bit more and Taft cleared it with Justice:

D. If any claim or action by a third party is asserted against the Contractor [manufacturer] arising in whole or in part from an alleged failure by the Government properly to discharge the responsibilities assumed by it in this Article, the Contractor shall promptly notify the contracting officer. . . . The Government shall, at its option, either defend against or assist in the defense or settlement of such claim. . . .

E. In the event of the Government's breach of, or failure to carry out, its responsibilities . . . any measure of resulting damages to the Contractor shall include, but need not be limited to, damages (including money judgments . . . and reasonable attorneys' fees . . .) sustained in connection with claims against the Contractor caused by the breach or failure.¹⁵

Counsel for the manufacturers expressed themselves as nearly satisfied and talked to the insurers on July 9. But the latter's representatives were not so sanguine. They found protection still inadequate; besides, to the extent the clause *did* satisfy, it violated the spirit if not the letter of the Anti-Deficiency Act.

Mathews thereupon insisted that executives of the insurance firms meet with the manufacturers and him. They did so July 13, in his office. The drug companies took a friendly stance which they could well afford; the insurers were firm. Some observers now believe that Mathews could have budged them had he locked the door, with cameras just outside, and kept them there until they compromised. He scoffs at this. The insurance representatives were not at the right level. Besides, by July 13 his lawyers had found merit in their argument. He soon left the meeting for Cooper to run. Nothing of substance occurred. Mathews met instead with congressional staff: legislation now was of the essence again. Afterwards he called in the press: ". . . the question which has been paramount in these discussions [is] . . . who pays for suits that prove to be baseless? That is the point of great concern in this matter. . . ."

Mathews then made a date with the President. They met July 19. In preparation for that meeting Cooper sent the Domestic Council an options paper longer, more varied, and calmer in tone than Sencer's action-memorandum of four months before. We find nothing to suggest that it had any influence on Cavanaugh, O'Neill or Ford.

What influenced Ford was a simple answer to a simple question. He met with Mathews, Cavanaugh and Cooper and asked Cooper, as they all recall, if anything had changed since March in their assumptions about the disease. Cooper told him no: a pandemic remained "possible," with probabilities "unknown." The lack of cases since changed neither term. In fact, that lack had changed the feelings of most specialists who sensed that odds were dropping week by week. But there can be no fall-off from "unknown." So Cooper was correct. For Ford this was conclusive.

The program must continue; he decided that it should. Congress had to be brought back into the act and he would help with that.

After the meeting Ford talked to the press:

. . . we are going to find a way, either with or without the help of Congress, to carry out this program that is absolutely essential, a program that was recommended to me unanimously by 25 or 30 of the top medical people in this particular field.¹⁶

He also asked Mathews to call Rogers and to draft him a letter for Congress, which Cavanaugh actually did. Ford sent it July 23, in time for a new set of hearings.

There is no excuse to let this program, a program that could affect the lives of many, many Americans, bog down in petty wrangling. Let's work together to get on with the job.

On July 20 and again on the 23rd Rogers held more hearings. These evidently were intended to give Mathews more clout. They were aimed at the insurers' heads. This time, at Rogers' insistence, the primary insurers were represented by their own executives. Maguire and Waxman had at them with a will, and Rogers in his nice way too, all of it televised with snippets on the network news.

Under severe pressure, the insurers promised Rogers what they had not given Mathews, a price tag on coverage for swine flu liability. Days later they presented both to Rogers and to Mathews three separate proposals for insurance pools. Only one was a complete package, and it was wildly priced. When manufacturers expressed some interest anyway, its sponsors promptly found that they could not get enough underwriting for their own plan. They were able to get the "first" level of potential costs covered (for high fees) by domestic companies, but neither at home nor abroad did they find subscribers for the "excess" level built into their plan. That was a level of potential loss per manufacturer above \$12.5 million. As one of our informants said, "The excess market abandoned us."

On July 30 the insurers reverted to their previous stance. There were *no* terms on which their industry could cover liability for manufacturers of swine vaccine.

Mathews, disgusted, told Cooper and Taft to make another try for legislation. Rogers, disheartened, joined in. His subcommittee staff director, a public health professional, Dr. Lee Hyde, took leadership in looking for a substitute to indemnification. Attention came to rest on a device which had been used at HUD, an adaptation of the Tort Claims Act.

But Congress was due to recess in two weeks. Prospects for action were dim.

Prospects were not improved by a subsidiary theme of subcommittee hearings two days earlier. The vaccine manufacturers had told what they were doing in the absence of insurance. They were producing only in bulk. 100 million doses sat in vats, unpooled, unbatched, unvialled, and unlabeled. To go from bulk to doses in the hands of immunizers would take weeks. If nothing moved another step without new legislation, when (if ever) would inoculations start? Cooper and Sencer had once said these should *end* in November. Moreover, all around the world there had not been a single case of swine flu for six months. What were the arguments for legislating *now* some form of special benefit for insurance and drug companies? Symbolically, only oil companies could have been worse.

The answer to that question came out of the blue. On August 1 the press began reporting a new respiratory disease in Pennsylvania. By August 2 it was named "Legionnaire's Disease"; all of its victims had been at an American Legion State Convention. The disease was severe, there were deaths. The press began a body count. The TV covered funerals. And for four days swine flu seemed a possible cause. On August 5, the CDC announced its lab reports: whatever this might be, it was not that. By then legislation was well on its way to enactment. Even if this were not swine flu, a swine outbreak might well be just as photogenic.

Sencer had once put a gun to Ford's head; now events did the same to Congress.

The immediate beneficiary was the legislative formula Taft, Hyde and their associates had chanced upon. Using the Tort Claims Act as a model, Congress could specify that any claim arising from the swine flu program should be filed against the Federal government, while preserving the government's right to sue for compensation from other participants.

There was no need to "indemnify." Manufacturers were freed from the duty to warn, at least in the first instance, while they and the insurers both were freed from overhead cost: civil servants would process the claims and defend against groundless suits. With luck the insurers might never go to court at all. With still more luck they could insure the manufacturers against sheer negligence and then have none arise, thus pocketing the premiums (which did, in the event, amount to \$8.5 million).

A swine flu tort claims bill, so called, drafted in a weekend, went to

the House and Senate August 1. Its subsequent progress was extraordinary, testifying partly to the news, partly to Rogers' devotion. His subcommittee held a mark-up session the next day, approved the measure, and passed it along to the full House Commerce Committee. One observer's recollection helps explain Rogers' persistence: "During the mark-up, Lee Hyde kept telling stories about 1918. He believed in it; he thought it was coming. As late as that, he was deeply concerned. . . ." On August 5, however, with swine flu no longer the culprit in Philadelphia and passage no longer a matter of grave urgency, the committee chose to sit on the bill. There weren't many Hydies around. Only one week remained before Congress would quit for the Republican Convention. Ford was concerned and said so:

HEW Secretary Mathews and the leaders of Congress reported to me Wednesday that after long hours of hearings, discussions, negotiations, Congress finally would act yesterday to pass legislation to provide swine flu vaccine to all the American people. Needless to say, I was keenly disappointed to learn last evening that the news from the doctors in Pennsylvania had led to another slowdown in the Congress.

I am frankly very dumbfounded. . . .¹⁷

The Senate remained. Rogers and Hyde appealed to their opposite numbers. Chairman Kennedy responded. He disliked acting on a novel measure in such haste but felt he had no choice. On August 6 his subcommittee held a short hearing and voted approval; the Senate adopted a resolution sending the bill directly to the floor. On the weekend of August 7-8, HEW aides and legislative staffers hovered over the bill, squeezing in favorite provisions catch as catch can. Meanwhile, insurers slapped together plans to correspond with the protection they could now foresee. On August 10, after Rogers had failed once again to spring his own bill, the Senate acted on its version by voice vote and sent it to the House.

The President then intervened by phone and pressed the Speaker for a no-amendment rule. The Speaker called the Chairman of the Rules Committee who acquiesced on grounds akin to national security. "Don't tell me anything about it, I don't want to know," he reportedly responded to a skeptical colleague. That was the mood in the Hall of the House. The Senate bill was rushed there without even copies for members. It was voted three to one. Ford signed it (PL 94-380) with alacrity on August 12.

Thus the swine flu program was saved. Ford, Rogers, Mathews, Cavanaugh and Cooper, maybe Sencer, surely Taft the late arrival, were each in his way pleased, a hard task done, a purpose carried through; at last an open door to immunization. One or two levels down in PHS

and CDC, a thrill went through some of the troops. Hattwick and company raced to be ready. Epidemiologists stiffened at their posts. Some others, however, were secretly sorry. For numbers of those who now had dirty work to do, coping with disgruntled states, fending off a captious press, making a late start on a no-longer shiny program (and discounting a pandemic, as by now many did), the prospect of congressional inaction had been soothing, the more so the closer it came. By no fault of their own, they would be prevented from doing their duty—or, put another way, from doing the overblown thing their bosses had gotten them into. In ten days' time the prospect had been snatched away. Now they had to do it. Their reaction was, "Oh, shit."