

# Obama Returns to End-of-Life Plan That Caused Stir

*By Robert Pear, New York Times*

*Published: December 25, 2010*

WASHINGTON — When a proposal to encourage end-of-life planning touched off a political storm over “death panels,” Democrats dropped it from legislation to overhaul the health care system. But the Obama administration will achieve the same goal by regulation, starting Jan. 1.

Under the new policy, outlined in a Medicare regulation, the government will pay doctors who advise patients on options for end-of-life care, which may include advance directives to forgo aggressive life-sustaining treatment.

Congressional supporters of the new policy, though pleased, have kept quiet. They fear provoking another furor like the one in 2009 when Republicans seized on the idea of end-of-life counseling to argue that the Democrats’ bill would allow the government to cut off care for the critically ill.

The final version of the health care legislation, signed into law by President Obama in March, authorized Medicare coverage of yearly physical examinations, or wellness visits. The new rule says Medicare will cover “voluntary advance care planning,” to discuss end-of-life treatment, as part of the annual visit.

Under the rule, doctors can provide information to patients on how to prepare an “advance directive,” stating how aggressively they wish to be treated if they are so sick that they cannot make health care decisions for themselves.

While the new law does not mention advance care planning, the Obama administration has been able to achieve its policy goal through the regulation-writing process, a strategy that could become more prevalent in the next two years as the president deals with a strengthened Republican opposition in Congress.

In this case, the administration said research had shown the value of end-of-life planning.

“Advance care planning improves end-of-life care and patient and family satisfaction and reduces stress, anxiety and depression in surviving relatives,” the administration said in the preamble to the Medicare regulation, quoting research published this year in the *British Medical Journal*.

The administration also cited research by Dr. Stacy M. Fischer, an assistant professor at the University of Colorado School of Medicine, who found that “end-of-life discussions between doctor and patient help ensure that one gets the care one wants.” In this sense, Dr. Fischer said, such consultations “protect patient autonomy.”

Opponents said the Obama administration was bringing back a procedure that could be used to justify the premature withdrawal of life-sustaining treatment from people with severe illnesses and disabilities.

Section 1233 of the bill passed by the House in November 2009 — but not included in the final legislation — allowed Medicare to pay for consultations about advance care planning every five years. In contrast, the new rule allows annual discussions as part of the wellness visit.

Elizabeth D. Wickham, executive director of LifeTree, which describes itself as “a pro-life Christian educational ministry,” said she was concerned that end-of-life counseling would encourage patients to forgo or curtail care, thus hastening death.

“The infamous Section 1233 is still alive and kicking,” Ms. Wickham said. “Patients will lose the ability to control treatments at the end of life.”

Several Democratic members of Congress, led by Representative Earl Blumenauer of Oregon and Senator John D. Rockefeller IV of West Virginia, had urged the administration to cover end-of-life planning as a service offered under the Medicare wellness benefit. A national organization of hospice care providers made the same recommendation.

Mr. Blumenauer, the author of the original end-of-life proposal, praised the rule as “a step in the right direction.”

“It will give people more control over the care they receive,” Mr. Blumenauer said in an interview. “It means that doctors and patients can have these conversations in the normal course of business, as part of our health care routine, not as something put off until we are forced to do it.”

After learning of the administration’s decision, Mr. Blumenauer’s office celebrated “a quiet victory,” but urged supporters not to crow about it.

“While we are very happy with the result, we won’t be shouting it from the rooftops because we aren’t out of the woods yet,” Mr. Blumenauer’s office said in an e-mail in early November to people working with him on the issue. “This regulation could be modified or reversed, especially if Republican leaders try to use this small provision to perpetuate the ‘death panel’ myth.”

Moreover, the e-mail said: “We would ask that you not broadcast this accomplishment out to any of your lists, even if they are ‘supporters’ — e-mails can too easily be forwarded.”

The e-mail continued: “Thus far, it seems that no press or blogs have discovered it, but we will be keeping a close watch and may be calling on you if we need a rapid, targeted response. The longer this goes unnoticed, the better our chances of keeping it.”

In the interview, Mr. Blumenauer said, “Lies can go viral if people use them for political purposes.”

The proposal for Medicare coverage of advance care planning was omitted from the final health care bill because of the uproar over unsubstantiated claims that it would encourage euthanasia.

Sarah Palin, the 2008 Republican vice-presidential candidate, and Representative John A. Boehner of Ohio, the House Republican leader, led the criticism in the summer of 2009. Ms. Palin said “Obama’s death panel” would decide who was worthy of health care. Mr. Boehner, who is in line to become speaker, said, “This provision may start us down a treacherous path toward government-encouraged euthanasia.” Forced onto the defensive, Mr. Obama said that nothing in the bill would “pull the plug on grandma.”

A recent poll by the Kaiser Family Foundation suggests that the idea of death panels persists. In the September poll, 30 percent of Americans 65 and older said the new health care law allowed a government panel to make decisions about end-of-life care for people on Medicare. The law has no such provision.

The new policy is included in a huge Medicare regulation setting payment rates for thousands of services including arthroscopy, mastectomy and X-rays.

The rule was issued by Dr. Donald M. Berwick, administrator of the Centers for Medicare and Medicaid Services and a longtime advocate for better end-of-life care.

“Using unwanted procedures in terminal illness is a form of assault,” Dr. Berwick has said. “In economic terms, it is waste. Several techniques, including advance directives and involvement of patients and families in decision-making, have been shown to reduce inappropriate care at the end of life, leading to both lower cost and more humane care.”

Ellen B. Griffith, a spokeswoman for the Medicare agency, said, “The final health care reform law has no provision for voluntary advance care planning.” But Ms. Griffith added, under the new rule, such planning “may be included as an element in both the first and subsequent annual wellness visits, providing an opportunity to periodically review and update the beneficiary’s wishes and preferences for his or her medical care.”

Mr. Blumenauer and Mr. Rockefeller said that advance directives would help doctors and nurses provide care in keeping with patients’ wishes.

“Early advance care planning is important because a person’s ability to make decisions may diminish over time, and he or she may suddenly lose the capability to participate in health care decisions,” the lawmakers said in a letter to Dr. Berwick in August.

In a recent study of 3,700 people near the end of life, Dr. Maria J. Silveira of the University of Michigan found that many had “treatable, life-threatening conditions” but lacked decision-

making capacity in their final days. With the new Medicare coverage, doctors can learn a patient's wishes before a crisis occurs.

For example, Dr. Silveira said, she might ask a person with heart disease, "If you have another heart attack and your heart stops beating, would you want us to try to restart it?" A patient dying of emphysema might be asked, "Do you want to go on a breathing machine for the rest of your life?" And, she said, a patient with incurable cancer might be asked, "When the time comes, do you want us to use technology to try and delay your death?"