



Can the Federal Government Mandate Health Insurance Coverage? And Other Legal Issues in Health Reform

Studying legal challenges in health reform to assist policy-makers and other key stakeholders

SUMMARY

In 2008 and 2009, researchers at Georgetown University's [O'Neill Institute for National and Global Health Law](#) analyzed the legal issues surrounding health reform and suggested ways to structure legislation so that it complied with existing laws and the U.S. Constitution.

Georgetown University launched the O'Neill Institute in 2007 to find ways to use the law to solve pressing health policy concerns.

Key Results

The project:

- Produced eight papers and a summary report on the legal issues likely to arise in the congressional debate on health reform legislation—as well as possible solutions to those issues. Topics included:
 - The constitutional issues in a legislative mandate, requiring that individuals and businesses purchase insurance
 - Existing federal laws involved in setting up health insurance exchanges

The papers are available [online](#). (Scroll down to “Phase 1: Project Overview and Eight Legal Issues.”)

- Created a blog, “[Legal Solutions in Health Reform](#)” to comment on news related to health reform—in both the legislative arena and the court system. The public accessed the blog 11,638 times from its launch in September 2009 until March 2010.
- Held two symposia on the legal issues in health reform, focusing primarily on the health insurance purchase mandate and health insurance exchanges. The events attracted private attorneys and legal and policy staff from federal agencies and the U.S. Congress.

Funding

The Robert Wood Johnson Foundation (RWJF) supported this project with two grants totaling \$784,147.

CONTEXT

In 2008, many pundits believed the United States was on the cusp of a national debate on comprehensive reform of the health care system. Presidential candidates Barack Obama and John McCain were each offering health reform proposals, and other federal officials also were pressing for reform.

To help policy-makers prepare for the debate, the O’Neill Institute for National and Global Health Law wanted to examine the legal issues that were likely to arise during such a discussion.

Founded in 2007, the O’Neill Institute is a joint venture between Georgetown’s Law Center and its Nursing and Health Studies School. Lawyers at the institute focus on devising ways to use the law to solve pressing health policy issues.

RWJF’s Interest in the Area

The O’Neill project was one of a number of initiatives RWJF funded to provide public officials with in-depth information on issues related to health reform. For example, RWJF funded a panel of experts in health care financing and public administration to analyze the administrative challenges both government and private entities would face as they implemented new programs mandated in a federal health reform law. See [Grant Results](#) for ID# 57084.

“Our goal was to ensure that there was a vigorous debate on health reform,” Andrew Hyman, senior program officer at RWJF, explained. “The idea of these programs is to make the world safe for such a debate.”

Americans’ lack of meaningful access to affordable and stable health care coverage has been a central concern of RWJF since its inception 35 years ago.

RWJF has supported numerous initiatives over the years to expand health insurance coverage to the uninsured. Some examples:

- Cover the Uninsured, a national effort with two goals: (1) highlight the fact that too many Americans are living without health insurance and (2) enroll them in available coverage programs. For more information, see the [Web site](#).
- *Covering Kids & Families*, an RWJF national program (2000–2007), designed to find, enroll and retain eligible children and adults in federal and state health care coverage programs. See the national program’s [Web site](#) and [Grant Results](#).

- Covering America, a collection of 17 proposals from noted authors on how to provide health insurance coverage to the uninsured. The proposals were published in 2009 before the Congress passed health reform legislation in 2010. More information is available [online](#).
- *State Health Access Reform Evaluation*, a national program to analyze the effectiveness of state government’s efforts to implement health reform. For more information, see the program [Web site](#).

For more information on RWJF’s work in this area, see the [Health Policy](#) area of www.rwjf.org.

THE PROJECT

To prepare for a national debate on how to reform the health care system, lawyers at the O’Neill Institute produced a series of white papers on the legal issues that were likely to arise. The goal was to provide objective information on how to craft health reform legislation that complied with both existing laws and the U.S. Constitution.

The project focused on the “uniquely legal issues”—not policy issues, Project Director Timothy Westmoreland, J.D., said. “Not, ‘Is it a good idea to provide health insurance to 150 percent of poverty?’” he cited as an example, “but ‘Is there anything in the Constitution that would prevent you from doing this?’”

In May 2008, lawyers from the O’Neill Institute met with about 40 professional staff members for the presidential candidates, federal agencies and advocacy groups to discuss what legal issues were likely to come up during a debate on health reform.

Guided by discussion at the meeting, O’Neill Institute staff chose eight legal issues to focus on and hired legal experts to craft the papers; the project director wrote an introductory paper. The staff also assembled both advisory groups and law students to help the authors complete the papers.

Other Funding

The Georgetown University Law Center funded the costs to research and select the legal issues to analyze, write an initial framing paper (available online) and host the May 2008 meeting.

RESULTS

The project:

- **Produced eight papers and an introductory report on the legal issues likely to arise in the congressional debate on health reform legislation—as well as possible solutions to those issues.** The papers were subsequently published in the

Fall 2009 issue of the *Journal of Law, Medicine & Ethics*, whose readership is primarily lawyers and health policy experts.

Topics covered in the papers include:

- “[The Constitutionality of Mandates to Purchase Health Insurance](#),” by Mark Hall, J.D., argues that Congress has the authority via the Commerce Clause of the U.S. Constitution to mandate that individuals and businesses purchase insurance. The Commerce Clause gives Congress authority to regulate interstate commerce.
- “[Health Insurance Exchanges: Legal Issues](#),” by Timothy Jost, J.D., examined a myriad of legal issues involved in the creation of health insurance exchanges on either the federal or state level. In addition to the Commerce Clause, other issues include the Takings Clause, also in the U.S. Constitution, that prohibits the government from taking personal property without due process of law. Jost concludes that both the federal and state governments have the authority to create health insurance exchanges.

See the [Appendix](#) and [Bibliography](#) for a list of the papers. Because the papers were published in a legal journal, they also are available through popular legal databases, such as Westlaw and LexisNexis.

- **Created a blog “[Legal Solutions in Health Reform](#)” to comment on news events—in both the legislative arena and the court system—related to health reform.** The public accessed the blog 11,638 times from its launch in September 2009 until March 2010.

The blog provides:

- Analysis of legal issues in various legislative proposals as well as discussion of public policy topics. Individual posts included:
 - “Hit the Delete Key on ‘Bending the Cost Curve’” by Peter Jacobson, J.D., posted on November 27, 2009. Jacobson argues that Congress should concentrate on expanding access to the uninsured in health reform legislation and take up measures to control health care costs separately. Available [online](#). (Scroll down to fourth post on page.)
 - “Can Health Reform Include Malpractice Reform?” by Jost, posted on November 5, 2009. Jost discusses the tort reform provisions in a proposal by House Republicans. Available [online](#). (Scroll down to fifth post on page.)
- Interviews with experts on health reform, including:
 - Kenneth E. Thorpe, Ph.D., chair of the department of health policy and management at Emory University’s Rollins School of Public Health. Posted on December 8, 2009, the discussion centered on how health reform legislation will change the way health care services are delivered, including

ideas to focus more money on primary care to help patients manage their chronic diseases. Available [online](#) (first post on page).

Karen Pollitz, M.P.P., who was a research professor at Georgetown University's Health Policy Institute when the interview was posted on November 17, 2009, discusses a proposal to allow the sale of health insurance across state lines. (In June 2010, Pollitz was named deputy director of consumer support at the office of consumer information and insurance oversight at the U.S. Department of Health and Human Services.) Available [online](#) (third post on page).

- **Held two symposia about legal issues in health reform, focusing primarily on the health insurance mandate and exchanges. The events attracted private attorneys and legal and policy staff from federal agencies and the U.S. Congress.**
 - “Legal Solutions in Health Reform Spring Symposium” on April 27, 2009, in Washington, attracted about 70 attendees. A webcast of the event and an agenda are available [online](#). (Scroll down to “Spring 2009 Symposium” subhead.)
 - “Legal Solutions in Health Reform: State of the Debate” on October 26, 2009, in Washington, attracted 75 attendees. A webcast of the event and an agenda are available [online](#). (Scroll down to “Fall 2009 Symposium” subhead.)
- **Launched a [Web site](#) home for information on legal issues in health reform.** The Web site houses the nine white papers, the “Legal Solutions in Health Reform” blog and webcasts of the two symposia. Traffic to the site averaged 28 unique visitors and 40 total hits per day during the grant period.

Significance to the Field

Sen. Max Baucus (D-Mont.) introduced Hall's paper on the constitutionality of the mandate to purchase health insurance into the U.S. Senate Record on December 20, 2009. The constitutionality of the individual mandate was the subject of papers or blog posts from numerous organizations, including the Congressional Research Service, New America Foundation, American Center for Law and Justice and the Federalist Society.

RWJF's Hyman said, “Frankly, that is what we were looking for. We were hoping to inform the debate.”

LESSONS LEARNED

1. **Frame research questions narrowly so that they can be addressed adequately in a single paper.** For example, one paper focused specifically on whether the U.S. Constitution grants Congress the authority to mandate that individuals and businesses purchase health insurance. (Project Director/Westmoreland)
2. **When embarking on a research project in a politically charged area of public policy, get input from both conservatives and liberals early in the information-**

gathering process. This will reinforce that your work is objective and nonpartisan. In May 2008, the project director invited representatives from across the political spectrum to help pick out the legal questions to be addressed in the research project. As a result, attendees concluded that the project “was a legitimate academic enterprise to try to figure out what the legal issues were,” Project Director Westmoreland said.

3. **Involving your intended audience early in a project is a good way to get buy-in.** Westmoreland said some of the attendees at the May 2008 meeting agreed to serve as either authors or advisers to one of the authors; others attended the symposia.
4. **Posting information on more than one Web site helps expand your project’s reach.** Westmoreland said numerous experts in health policy told him that they had found out about the project’s white papers on RWJF’s Web site—not the O’Neill Institute’s Web site. “There are a lot of health policy research types who are not lawyers and wouldn’t look at our Web site,” Westmoreland said.
5. **If you create a Web site for a project, plan to update content continually to keep it relevant and timely.** “It is not just going to happen organically,” RWJF’s Hyman said. “That is a myth of the first order. It means you need to write content, and you need to disseminate it, and you’ve got to do outreach constantly.”
6. **Experts in health policy should be familiar with concepts in health law, and health lawyers need to understand health policy.** Project Director Westmoreland said he was surprised by how big the “disconnect” was between the two groups. “I ran across policy people that when I said, ‘What aspects of the civil rights law apply to insurance?’ they said, ‘I never thought of that.’ In turn, when I talked to lawyers about how to control costs, the law people would look at me and say, ‘Well, what does that have to do with anything?’”
7. **To maximize the learning experience for students assigned to help authors of white papers or journal articles, detail precisely what activities are appropriate for the students to do.** Westmoreland said he did not give the authors he hired to write the legal papers enough direction about how to involve students in the work. As a result, the quality of the educational experience varied. “Some of [the authors] expected too much from the students and others expected too little—like just correcting the bibliography,” Westmoreland said.

AFTERWARD

Writers for the O’Neill Institute continue to post new items to the “[Legal Solutions in Health Reform](#)” blog.

RWJF funded two related projects on health reform:

- A 16-month, \$380,032 grant to George Washington University, which began in January 2010, to analyze key provisions in federal health reform and communicate

information on the new law (the university's activities include a Web site, [Health Reform GPS](#)).

- A two-year, \$450,000 grant to the National Academy of Social Insurance, Washington, to develop model legislation for state governments to use in creating health exchanges required in the federal health reform law.

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APPENDIX

Legal Topics Addressed in Series of White Papers on Legal Issues in Health Reform

The topics covered were:

- “Project Overview and Emerging Themes.” An introductory paper discusses the difference between legal issues and policy issues. It also briefly discussed the issues to be covered in the other papers. Available [online](#).
- “Executive Authority to Reform Health: Options and Limitations.” Under the law, the administration can make some changes to reform the health system without new legislation from Congress. Available [online](#).
- “Tax Credits for Health Insurance.” The paper details how to use the tax code to reform the health care system. Available [online](#).
- “The Constitutionality of Mandates to Purchase Health Insurance.” The legal issues include the Commerce Clause of the U.S. Constitution, which gives Congress the authority to regulate interstate commerce.
- “The Role of ERISA Preemption in Health Reform: Opportunities and Limits.” The Employee Retirement Income Security Act regulates employer-sponsored benefits, including health insurance. A primary component of this law is the exemption it provides employers from state insurance laws. The legal issue: Are employers who provide health insurance through ERISA exempt from provisions in a new law in which authority is handed down to the state governments, such as to provide insurance exchanges? Available [online](#).
- “Health Insurance Exchanges: Legal Issues.” There are a myriad of legal issues involved in the creation of health insurance exchanges on either the federal or the state level. Among those issues are the Commerce Clause and the Takings Clause in the U.S. Constitution (that prohibits the government from taking personal property without due process of law). Available [online](#).
- “The Purchase of Insurance Across State Lines in the Individual Market.” State governments traditionally have only allowed insurers to sell plans within a state’s boundaries. States are granted this authority through a federal law, the McCarran-Ferguson Act. Federal legislation to allow insurers to sell their policies across state lines would have to address this issue. Available [online](#).

- “Privacy and Health Information Technology.” The paper examines what is needed in the law to protect the privacy of individual health records in a digitized world. Available [online](#).
- “Insurance Discrimination on the Basis of Health Status: An Overview of Discrimination Practices, Federal Law and Federal Reform Options.” This paper discusses the federal laws aimed at regulating discrimination in health insurance underwriting and the loopholes within those laws. Available [online](#).

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Meetings and Conferences

“Legal Solutions in Health Reform Spring Symposium,” April 27, 2009, Washington. More than 70 people attended the event, including attorneys and representatives of

federal agencies and Congress. Webcast available [online](#). (Scroll halfway down page to “Spring Symposium 2009.”)

“Legal Solutions in Health Reform Fall Symposium—State of the Debate,” October 26, 2009, Washington. More than 75 people attended the event, including attorneys and representatives of federal agencies and Congress. Webcast available [online](#). (Scroll halfway down page to “Fall Symposium 2009.”)

Web Sites

<http://www.law.georgetown.edu/oneillinstitute/national-health-law/legal-solutions-in-health-reform/index.html>. Web site disseminates the papers, publicizes the project, provides a forum for viewing events online and houses the “Legal Solutions in Health Reform” blog.

<http://oneillhealthreform.wordpress.com/>. “Legal Solutions in Health Reform” blog housed at the O’Neill Institute for National and Global Health Law Web site.