Written by **Jack Kenny** on March 29, 2012

Chief Justice Says States Have Compromised Their Sovereignty

Chief Justice John Roberts said Wednesday what has long been known but seldom spoken. During the third and final day of Supreme Court hearings on whether the Patient Protection and Affordable Care Act of 2010 is unconstitutional, Roberts said states have been compromising their sovereignty for decades through increased reliance on the federal government for money and accompanying directions on the governance of state affairs.

"It seems to me that they have compromised their status as independent sovereigns because they are so dependent on what the federal government has done," the chief justice said during Wednesday's nearly three hours of hearings on the controversial health insurance law.

The final day's arguments had to do with whether the law could stand if the justices find the mandate for uncovered individuals to purchase health insurance is unconstitutional — something the court's conservative majority appears ready to do. Another feature of the law called into question by lawyers opposing the act is the expansion of Medicaid, the federal-state program that provides health care for low-income families. Under the Affordable Care Act, Medicaid is expanded to include a larger number of parents, as well as low-income adults with no dependent children. Half of the 32 million who would get new health insurance coverage under the law would receive it through Medicaid. Starting in 2014, the federal government would pay 100 percent of the cost of newly eligible participants. The federal share would be scaled back to 90 percent by 2020. States would still have the right to opt out of the program, but would stand to lose all of the federal funding, including the money they are already receiving. Currently all 50 states participate in the program.

"Obamacare is going to expand Medicaid, and the taxpayers absolutely can't afford it," Dr. Alieta Eck said at a rally against the law outside the Supreme Court. Thomas Miller, a resident fellow at the conservative American Enterprise Institute, agreed, telling the Public broadcasting Service: "The states say, we can't even afford the current Medicaid program, and this would in effect give them no flexibility to make any adjustments that are reasonable adjustments, and say maybe can cover some more people in a certain way, but not under the rigid federal rules."

Dr. L. Toni Lewis, who is in favor of the Affordable Care Act, voiced her support for the expansion of Medicaid. "As a doctor, I tell you that Medicaid works for seniors, it works for kids, it works for people with disabilities, and it works for families," she said.

Paul Clement, a former U.S. Solicitor General and current Georgetown Law School professor, argued

for the 26 states opposing the law that requiring the states to expand the Medicaid program or lose the federal funding would have a "coercive" effect, a claim that drew a sharp rebuttal from Justice Elena Kagan "It's just a boatload of federal money for you to take and spend on poor people's health care," she said. "It doesn't sound coercive to me, I have to tell you." Roberts observed that the states have been accepting federal money and conditions attached to it, "since the New Deal" of the 1930s.

But the real sticking point in Wednesday's debate was the purchasing mandate and whether the rest of the law could stand without it. The law prohibits insurance companies from turning down applicants or charging higher rates for people with pre-existing conditions, thereby adding costs intended to be offset by bringing in more young and healthy clients through the mandate, with its penalty for not purchasing insurance.

Deputy Solicitor General Edwin Kneedler argued for upholding the validity of the rest of the law even if the controversial mandate is ruled unconstitutional. But if the individual mandate were ruled out, asked Justice Anthony Kennedy, what would happen to the insurance industry, which would now be in the hole for $350 billion over 10 years?

"We don't think it's in the court's place to look at the budgetary implications," Kneedler replied. But the justices grappled with the dilemma of taking what Justice Ruth Bader Ginsburg described as either a "wrecking ball" or "salvage" approach to the law if the mandate is ruled out. They differed over which course would result in the greater intrusion of judicial power into the legislative process. One question yet to be decided was whether letting stand the costly requirements imposed on the insurance companies without the mandate to pay for them would be consistent with the intent of Congress. Kennedy, concerned about what that might do to the insurance industry, suggested that letting the law stand absent the mandate would be a greater imposition of judicial authority than striking the law down in its entirety.

"If we lack the competence to even assess whether there's a risk, then isn't this an awesome exercise of judicial power … to say we're doing something and we're not telling you what the consequences might be?" he asked Kneedler.

" No, I don't think so," the Justice Department attorney replied, " because when you're talking about monetary consequences, you're looking through the act, you're looking behind the act, rather than — the court's function is to look at the text and structure of the (act) and what the substantive provisions of the act themselves mean." Justice Ginsburg contended that "the salvage job" of upholding those portions of the law that pass constitutional muster would be the "more conservative approach." Justice Stephen Breyer appeared at various points in the discussion to be on either side of the issue.

"I would stay out of politics," he said, arguing against a judicial editing of the law. "That's for Congress, not us." Yet at another point he suggested having the opposing lawyers go over the law to find points of agreement and report back to the court, something, he acknowledged might be a "pipe dream." Justice Antonin Scalia, favored ruling the entire law constitutionally invalid rather than have the justices wade through the act's thousands of pages, picking and choosing which provisions pass constitutional muster.

"You really want us to go through these 2,700 pages?" Scalia said. "Is this not totally unrealistic? That we're going to go through this enormous bill item by item and decide each one?" A 1981 Reagan appointee, Scalia was not bashful about addressing the political aspects of the controversy before the court. He asked the Clement if there was "any chance that all 26 states opposing (the law) have

Republican governors, and all of the states supporting it have Democratic governors?"

"There's a correlation, Justice Scalia," Clement acknowledged.

Opposition, however, appears to be driven more by ideological than by partisan considerations, as attorneys for the states and the National Federation of Independent Businesses argued that the law goes beyond the powers delegated to Congress by the constitution, particularly the provision authorizing Congress to regulate commerce among the states. Under the Affordable Care Act, regulation of commerce includes a requirement that all chain restaurants list the calorie count of each item on the menu.

Other lesser-known provisions, said Art Thompson, CEO of the John Birch Society, include home visitations by government agents, the possibility of forced immunizations and "Community Transformation Grants." The law in total, Thomson said, "will intrude on every aspect of life in America, from cradle to grave."