

# What if Christie defied court on school funding?

Gov. Chris Christie is famous for shooting from the lip. So when he offhandedly suggests in response to a question that he might defy an order from the New Jersey Supreme Court requiring that he provide additional funding for public schools, perhaps we should take that with a grain of salt.

At most, I think this is a bit of political posturing by our bellicose governor. He just might be trying to get the court to back away from such a result. Or maybe it's a shot across the bow of Associate Justice Helen Hoens, the one member of the panel hearing the case who does not have tenure and is subject to reappointment. Christie already has set a precedent by denying reappointment to one justice (John Wallace) whose rulings he disapproved of.

But if push comes to shove, my guess is that the governor will think better of his threat. After all, this is not Arkansas or Alabama in the mid-1950s, when racist governors stood in the schoolhouse doors in defiance of the U.S. Supreme Court's order to desegregate the schools. On those occasions, President Eisenhower had to send in federal troops to carry out the court's order.

But let's consider the worst scenario: The court orders more school funding, and Christie balks. First, it would have to be decided if anyone was in contempt of court. After all, it takes two to tango — or pass a budget. In this case, school funding would be up to both the Legislature and the governor. If the two branches together couldn't come up with a plan, probably neither would be in contempt.

The way the court handled that back in 1976, after the ruling that the state's funding formula violated the New Jersey constitution provision guaranteeing a "thorough and efficient education," was to order the closure of the state's public schools.

Nobody is quite sure what would have happened had the governor and the Legislature not agreed to comply with the court order. It did comply by enacting a state income tax. But that was a relatively easy decision for the political branches at the time.

Gov. Brendan Byrne and the Democratic-controlled Legislature may well have welcomed the opportunity to blame the court for enactment of a politically unpopular income tax.

Indeed, one of the ironies of that earlier "crisis" was that the chief justice who compelled that result was Richard J. Hughes, who had tried unsuccessfully as governor to pass an income tax.

Such a tactic might not be so easy this time.

Suppose the Democratic-controlled Legislature did pass a budget that complied with the court's order by increasing taxes on the rich, and the governor refused to sign it.

And assume the Republican minority in the Legislature prevented override of the veto. Now we would seem to confront a real constitutional crisis. Could the court order the governor to sign the Democratic budget?

We have now clearly entered the world of constitutional speculation. In our constitutional democracy, the judiciary, which since *Marbury v. Madison* has been the final arbiter of our constitutions, has neither the power of the purse nor the power of the sword. Its only power is the principle of obedience to law.

For two and a half centuries, the other branches have generally acquiesced to the notion of judicial supremacy. But if a chief executive really wanted to test that principle, what could the court do? Unless it was willing to back down and undermine the rule of law, it would have little choice but to hold the governor in contempt.

The court would then have two choices: either put the governor in jail until he agreed to comply with its order, or fine him. Since a governor like Christie might relish the idea of being an imprisoned martyr, the court's better route would be to fine him personally. It could start off with, say, \$10,000 a day. But the fine could then be increased each day until it really started to hurt.

Meanwhile, the Legislature, depending on the political climate and the governor's popularity, might start impeachment proceedings for "high crimes and misdemeanors." That is a phrase whose content is a bit murky, but probably includes violation of the oath of office to uphold the laws and the constitution. Besides which, the definition of "high crimes and misdemeanors" is probably more political than legal — and who but the Legislature can say otherwise.

There might be one more weapon in the court's arsenal. Christie is an attorney and subject to the Rules of Professional Conduct. Rule 8.4 forbids lawyers from "engaging in conduct that is prejudicial to the administration of justice."

Violation of that rule subjects a lawyer to sanctions up to disbarment. Does defiance of a court order amount to a violation of that rule?

I have already engaged in enough idle speculation in this piece. So I will heed the advice often invoked by courts to refrain from deciding prematurely issues not properly before them.

Gov. Brendan Byrne and the Democratic-controlled Legislature may well have welcomed the opportunity to blame the court for enactment of a politically unpopular income tax.

Indeed, one of the ironies of that earlier "crisis" was that the chief justice who compelled that result was Richard J. Hughes, who had tried unsuccessfully as governor to pass an income tax.

Such a tactic might not be so easy this time.

Suppose the Democratic-controlled Legislature did pass a budget that complied with the court's order by increasing taxes on the rich, and the governor refused to sign it.

And assume the Republican minority in the Legislature prevented override of the veto. Now we would seem to confront a real constitutional crisis. Could the court order the governor to sign the Democratic budget?

We have now clearly entered the world of constitutional speculation. In our constitutional democracy, the judiciary, which since *Marbury v. Madison* has been the final arbiter of our constitutions, has neither the power of the purse nor the power of the sword. Its only power is the principle of obedience to law.

For two and a half centuries, the other branches have generally acquiesced to the notion of judicial supremacy. But if a chief executive really wanted to test that principle, what could the court do? Unless it was willing to back down and undermine the rule of law, it would have little choice but to hold the governor in contempt.

The court would then have two choices: either put the governor in jail until he agreed to comply with its order, or fine him. Since a governor like Christie might relish the idea of being an imprisoned martyr, the court's better route would be to fine him personally. It could start off with, say, \$10,000 a day. But the fine could then be increased each day until it really started to hurt.

Meanwhile, the Legislature, depending on the political climate and the governor's popularity, might start impeachment proceedings for "high crimes and misdemeanors." That is a phrase whose content is a bit murky, but probably includes violation of the oath of office to uphold the laws and the constitution. Besides which, the definition of "high crimes and misdemeanors" is probably more political than legal — and who but the Legislature can say otherwise.

There might be one more weapon in the court's arsenal. Christie is an attorney and subject to the Rules of Professional Conduct. Rule 8.4 forbids lawyers from "engaging in conduct that is prejudicial to the administration of justice."

Violation of that rule subjects a lawyer to sanctions up to disbarment. Does defiance of a court order amount to a violation of that rule?

I have already engaged in enough idle speculation in this piece. So I will heed the advice often

**Frank Askin is a law professor and director of the Constitutional Litigation Clinic at Rutgers Law School/Newark.**