



N.J. Gov. Christie urging court toward activism

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By **Star-Ledger Guest Columnist**



John O'Boyle/The Star-Ledger

The New Jersey Supreme Court, which is weighing the latest school funding issues, is being asked to behave in an activist manner by Gov. Chris Christie, says Rutgers law professor Paul Tractenberg.

By Paul Tractenberg

Like many things, judicial activism is in the eye of the beholder.

Since he was sworn into office, Gov. Chris Christie has crusaded to rid the state Supreme Court of activist tendencies and justices.

Last year, he chose, symbolically, not to renominate the court's only black justice, John Wallace, because Wallace supposedly was part of the state's activist judge problem. And the court's long-standing involvement in *Abbott vs. Burke* was

Christie's most frequent example of the court's wayward behavior.

Ironically, Wallace, less than two years from mandatory retirement as a justice, had not been a significant judicial player — let alone a leader — in the *Abbott* litigation, but that didn't matter to Christie. He had a message to deliver and Wallace was the only messenger available.

So Wallace was not renominated, outraging many in the state's minority communities. Many were appalled, too, by Christie's blatant attempt to transform a court — long renowned nationally for its independence, integrity and excellence — into a rubber stamp for his policies.

Christie's action provoked a strong legislative and popular reaction, and Wallace's seat on the court remains unfilled, apparently until the date when he would have reached 70 and had to retire.

Meanwhile, the Abbott case is back before the state Supreme Court, with a decision awaited soon. Judicial activism is central to that decision. Only this time, it is Christie who is urging the court to behave in an activist manner.

The issue directly before the court is whether the School Funding Reform Act, adopted by the Legislature and signed into law by Gov. Jon Corzine three years ago to cure the state's educational funding problems, is constitutional, even though the state is underfunding it this year by almost 20 percent.

Anyone who wants to understand the issue has to know some basic facts:

- The statutory funding formula was devised by the state education department, not by the court, and it was based on a multiyear professional "costing out" study designed to identify how much it costs to provide all New Jersey public school students with the ability to meet the state's Core Curriculum Content Standards, the benchmarks of a "thorough and efficient" education;
- This formula was the executive and legislative branches' response to the Supreme Court's constitutional rulings and a substitute for the court-imposed Abbott remedies. The new statutory formula ended the Abbott remedies and sought to provide funding statewide to students, especially at-risk students, without regard to their ZIP codes;
- In 2009, the state's attorney general committed the state to full funding and even suggested that the Supreme Court build a full-funding requirement into its decision. The court did so, and its decision had two express conditions — full funding for at least three years and a detailed review by the education commissioner thereafter of whether the statute was enabling students to receive a constitutional education.

Abbott is back in the Supreme Court because the Education Law Center, lawyer for New Jersey's at-risk urban students, is seeking "strict construction" — for the court to require the state to abide by the specific terms of its 3-year-old statute.

It is Christie who is seeking judicial activism. He claims the state can't afford to meet its statutory and constitutional obligations to 1.35 million public school children, so the court should decide how much underfunding is acceptable.

What benchmarks does Christie offer the court to guide the activism he seeks? Presumably his budget, reflecting his choices about what we tax and what we don't, and his choices about what we spend public dollars on and what we don't.

Perhaps it's just me, but, if the court is going to behave in an "activist" manner, I'd prefer it use the state constitution as a basis and not a gubernatorial budget proposal.

Actually, when a court construes a constitution, as New Jersey's Supreme Court has been doing in Abbott, it is discharging its constitutional obligation, not engaging in inappropriate "activist" behavior as Christie has charged. Over many years, the court has proudly proclaimed that it is "the last-resort guarantor of constitutional rights."

Is that inappropriate judicial activism? Not to me, but I guess that's in the eye of the beholder.

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