

Opinion: Supreme Court Decision on Borrowing Not Unexpected, But Murphy ‘Must Proceed Carefully’

CARL GOLDEN | AUGUST 21, 2020 | [OPINION](#), [BUDGET](#)

For the opposition, the odds of winning over the court were exceedingly slender. History shows why



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While the state Supreme Court ruling upholding the Murphy administration’s proposal to borrow nearly \$10 billion to rescue the state budget from the ravages of the COVID-19 pandemic drew cries of outrage, the odds of the court issuing a decision of unconstitutionality were never particularly favorable.

The 1947 Constitution vested extraordinary, Caesar-like powers in the governor’s office — deliberately so — and established New Jersey’s chief executive as arguably the strongest in the nation.

In legal challenges to that authority, the courts have more often than not ruled in favor of the executive, recognizing that the constitutional restraints on a governor are less than rigid and more generally in favor of far-reaching action, particularly in addressing an emergency.

The courts have tilted toward the executive branch, in large measure reflecting the wishes of the Constitution’s framers but to a lesser degree due to the prior executive-branch experiences of sitting justices.

Of the current seven Supreme Court justices, six served either in high level positions in the governor’s office or in Cabinet posts. Many of their predecessors possessed similar backgrounds.

They were, in many instances, wielders or co-wielders of the constitutional powers and developed a strong understanding and appreciation for executive-branch authority. They brought those qualities to their service on the bench.

No evidence of a biased court

It would be a mistake to construe this history as evidence of a biased court whose members hold preconceived notions about cases before them. Rulings must be constitutionally sound and able to withstand scrutiny by academics and legal scholars.

In upholding the administration's proposal to issue bonded debt without voter approval, the court imposed conditions to restrict the revenue to fairly narrow uses related to addressing the COVID-19 pandemic.

The administration contended the pandemic was so unprecedented in its scope and so devastating to the state's economic, social and political environments that without the authority to borrow, government would be crippled.

The court agreed to a point, holding that before any revenue deriving from the bond sales can be allocated, approval by a legislative panel would be required and no revenue could be sought in excess of an amount determined to meet the crisis.

The court emphasized it took no position on the merits of the borrowing scheme, declaring, in effect, that the Legislature was the proper forum for debating and acting upon the proposal.

The history of executive authority is not confined solely to fiscal matters, though.

The history

In the mid-1970s, for instance, Gov. Brendan Byrne affixed his signature to an executive order that placed nearly 1 million acres of the Pinelands off-limits to any further development.

In 1984, the court ruled that a governor's line-item veto power under the Constitution was not confined to actual dollar amounts appropriated by the Legislature but could be applied as well to language inserted in the budget.

In 2004, the court struck down an effort by former Gov. Jim McGreevey to issue bonded debt to cover a budgetary shortfall, ruling that such debt could not be considered revenue merely to cover a potential deficit.

The court was not involved in 2017 when former Gov. Chris Christie employed creative bookkeeping to rack up a \$300 million debt to finance renovation of the State House, bypassing the legislative process and foreclosing a referendum.

The Murphy administration has insisted that without the authority to issue bonds of as much as \$9.9 billion, state and local governments would be impacted to a point of paralysis.

The governor has predicted massive public employee layoffs, along with major increases in property taxes, crippling reductions in state aid to local governments, and elimination of a broad range of government-funded programs.

Major increases in federal funding to assist in shoring up state and local governments has not been forthcoming, and Murphy has warned that time is running out.

The Murphy argument

He's also argued that the anticipated revenue shortfall is too great to be overcome by spending cuts alone and that major tax increases would inflict greater damage on an already fragile state economy. It is unlikely as well that the Legislature, facing reelection in 2021, would be supportive of tax increases.

The court, in taking official note of the threatening circumstances that lay on the horizon of inaction, upheld the executive's emergency powers, agreeing that an unprecedented crisis demanded an unprecedented response.

The opposition faced a steep uphill climb, aware that the odds of winning over the court were exceedingly slender, not merely because of any historical tilt toward the executive but because the public health crisis and its impact were greater than any that had occurred in the last century.

Murphy, though, despite being armed with the court's sanction, must proceed carefully and with great deliberation to assure that whatever spending occurs be accomplished with transparency and unshakeable rationale.

Anything less will damage not only him but the court as well.

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