

Judgment Day for Union Agency Fees

High court hears oral argument in Janus v. AFSCME

by JOSHUA DUNN



ORAL ARGUMENT in *Janus v. AFSCME* had a decided sense of déjà vu. The court had already addressed the issue at the crux of this case, the power of public-sector unions to exact agency fees from non-members, in two of its last three terms.

Agency fees, money collected from employees who don't want to join unions to support collective-bargaining activities, appeared to be on the road to extinction in *Friedrichs v. California Teachers Association* (2016), but Justice Antonin Scalia's death left an eight-judge court that deadlocked in a four-to-four vote. February's oral argument in *Janus* didn't reveal much new information, but we did learn two important things.

First, agency fees are in the hands of Justice Neil Gorsuch. Union supporters hoping that two years would soften the mercurial Justice Anthony Kennedy's views had to be disappointed. If anything, Kennedy's position against agency fees seems to have hardened, as reflected in this exchange between Kennedy and the AFSCME attorney, David Frederick:

KENNEDY: I'm asking you whether or not in your view, if you do not prevail in this case, the unions will have less political influence; yes or no?

FREDERICK: Yes, they will have less political influence.

KENNEDY: Isn't that the end of this case?

Kennedy's point is that you cannot draw a line separating the political activities of public-sector unions from everything else they do. Unions are inherently political. It is difficult to recall another case where Kennedy was so contemptuous of one side. Normally, he adopts a Solomonic posture and interrogates both sides equally, but not this time. For instance, when Frederick claimed that collective bargaining doesn't affect state budgets, Kennedy incredulously asked, "The amount of wages paid to government employees, the size of the work force, the amount of overtime, and the existence of tenure do not affect the amount of the state budget?" Even Justice Stephen Breyer, who clearly was trying to salvage AFSCME's position, found that claim implausible, saying that demands for higher wages "all affect the budget."

Apparently the other justices who voted to strike down agency fees in *Friedrichs* have not changed their minds either. Chief Justice John Roberts and Justice Samuel Alito expressed skepticism that agency fees could be reconciled with the basic First Amendment principle against compelled speech. The

famously silent Justice Clarence Thomas did not speak, but one would not expect him to change his mind.

That leaves Gorsuch, who also asked no questions and made no comments. Thus, in order for agency fees to survive, public-sector unions have to hope that he's not the man they said he was when he was nominated for the court. (The National Education Association strongly urged its members to tell their senators to vote against him.) Perhaps Gorsuch will surprise everyone and try to broker a compromise with the court's liberals, but Mark Janus probably feels better right now than the folks at AFSCME do.

The second takeaway gleaned from oral argument is that public-sector unions are willing to threaten labor unrest. In his closing remarks, the AFSCME attorney made this shocking admission when arguing that the court should uphold *Abood* because of the "reliance interests" of the states:

FREDERICK: Now, I'd like to turn to the reliance interest because, if the other side succeeds in persuading a majority of you to overrule *Abood*, it will affect thousands of contracts and, more importantly, it is going to affect the work of state legislatures, city councils, school districts, who are going to have to go back to the drawing board in deciding what are the rules for negotiating and how that works.

And what that means is that the key thing that has been bargained for in this contract for agency fees is a—a limitation on striking. And that is true in many collective-bargaining agreements.

The fees are the tradeoff. Union security is the tradeoff for no strikes. And so if you were to overrule *Abood*, you can raise an untold specter of labor unrest throughout the country.

In short, if you strike down agency fees, we're going to go on strike. The English language has a word for such threats: *extortion*. Justices do not generally appreciate attempts to undermine fundamental rights in the name of preserving order. One suspects that David Frederick will wish he had concluded his remarks differently.

Joshua Dunn is professor of political science at the University of Colorado-Colorado Springs.