

The New York Times

Trump Nominee Is Behind Anti-Union Legal Campaign

By **Noam Scheiber**

July 18, 2018

Even before the Supreme Court struck down mandatory union fees for government workers last month, the next phase of the conservative legal campaign against public-sector unions was underway.

In March, with the decision looming, lawyers representing government workers in Washington State asked a federal court to order one of the state’s largest public-employee unions “to disgorge and refund” fees that nonmembers had already paid. Similar lawsuits were filed in California, New Jersey, New York, Pennsylvania, Minnesota and Ohio.

The complaints could upend the legal system by arguing that states and private parties like unions face liability even though they followed the law as it existed at the time. They could also cost unions hundreds of millions of dollars.

Beyond their legal claims, the cases share another striking detail: The lead counsel in each is a conservative lawyer named Jonathan F. Mitchell.

Mr. Mitchell, 41, has a formidable résumé. He was a Supreme Court clerk to Justice Antonin Scalia; worked at the Justice Department under President George W. Bush; taught at several law schools, including Stanford; and spent more than four years as the solicitor general of Texas.

After the 2016 election, he served as a volunteer attorney on the Trump transition team, where he helped review future executive orders. In September, the president nominated him to head the Administrative Conference of the United States, a small federal agency that advises the government on improving its inner workings. His nomination awaits action by the Senate after the Judiciary Committee approved him on a party-line vote in March.

In the meantime, Mr. Mitchell appears to be a driving force behind the anti-union litigation, suggesting a well-coordinated effort. In an email, he declined to discuss the matter, citing “my pending nomination and my desire not to draw attention to the lawsuits.” It is unclear who funds the work of the firm cited on most of the cases, Mitchell Law.

Mr. Mitchell’s co-counsel in the Washington State case, Hannah Sells, a lawyer for the free-market Freedom Foundation, said she met Mr. Mitchell less than one year ago at an event put on by the Federalist Society, the conservative legal organization. He expressed interest in working on litigation related to union membership and mandatory union fees, Ms. Sells said.

“Jonathan is a brilliant legal mind; I’m a first-year attorney,” she said. “Visionary, I think, is the right way to put it.”

Kermit Roosevelt, an expert on retroactive constitutional claims at the University of Pennsylvania Law School, said Mr. Mitchell’s legal reasoning “would be very destabilizing” beyond union matters if it gained significant traction in the court system.

For instance, he said, if a future Supreme Court struck down affirmative action in college admissions, applicants denied admission under the previous policy would be able to win damage awards retroactively tied their rejection.

Courts have been sympathetic to same-sex spouses seeking to recover benefits or property they were denied before the Supreme Court's recent decisions on same-sex marriage. But courts have specifically rejected such retroactive arguments — so far — in the context of union fees. After a 2014 ruling in which the Supreme Court struck down mandatory union fees for home-based workers paid through government programs like Medicaid, federal district judges dismissed at least three lawsuits seeking refunds of workers' mandatory fees. (A fourth case that had begun earlier was settled after a judge denied the plaintiffs' class-action certification.)

In all three cases, the judges found that the unions could claim a good-faith defense because they had followed “seemingly valid state laws” requiring the fees, as one judge put it, that were only later deemed to be unconstitutional. No appeals court has overturned any of these rulings.

Even so, Mr. Mitchell and his allies may get a favorable reception in the one court that really matters: the Supreme Court.

“This court has shown itself to be so hostile to workers' rights that they will find a way,” said Sharon Block of the Labor and Worklife Program at Harvard Law School, who is a former senior Labor Department official and National Labor Relations Board member.

Jonathan F. Mitchell, a conservative lawyer, is the lead counsel in several



lawsuits against public-employee
Courtesy of Jonathan F. Mitchell

Will Baude, a libertarian-minded professor of constitutional law at the University of Chicago, said the Supreme Court had proved less sympathetic than some lower courts to good-faith defenses for private parties like unions.

“If I were the unions, I’d be really nervous,” said Mr. Baude, who was a co-author of a brief defending mandatory union fees in the case that led the Supreme Court to rule against those fees last month. Mr. Baude’s brief argued that the fees were consistent with uncontroversial government practices in other areas.

Both he and Ms. Block said the court’s decision last month indicated that the conservative majority might rule that the fees should be refunded retroactively. The decision referred to the fees as a “considerable windfall that unions have received,” adding, “It is hard to estimate how many billions of dollars have been taken from nonmembers.”

Amid this possibility, Mr. Mitchell’s central role, and his ties to the Trump

administration, loom large.

On one level, Mr. Mitchell appears well suited to head the administrative conference. It weighs in on such technical questions as how to make the process of creating regulations more efficient and democratic, and how to reduce the backlogs facing immigration judges and administrative judges, like those who preside over Social Security hearings.

The agency's most recent chairman, Paul Verkuil, a law professor and dean who was appointed by President Barack Obama and served until 2015, said he had spoken with Mr. Mitchell and had come away impressed. "He knows the administrative law field very well," Mr. Verkuil said. "He's a smart guy." (The agency has been run by acting chairmen since Mr. Verkuil left.)

But in other ways, Mr. Mitchell is a curious choice, albeit one that may reflect Mr. Trump's impatience with the norms that have historically constrained the federal government.

While presidents nominate members of their own parties as agency chiefs, the conference tends to be studiously bipartisan in its approach. Prominent former government officials serve on the agency's board, like Ronald Klain, a chief of staff to Vice Presidents Al Gore and Joseph R. Biden Jr., and Theodore B. Olson, who was solicitor general under Mr. Bush. A young Antonin Scalia once ran the agency.

But portions of Mr. Mitchell's background, at least as reflected in legal arguments he has advanced, are notably conservative on culture-war issues. In a case he argued after the Supreme Court recognized same-sex marriage, Mr. Mitchell represented two Houston taxpayers who had sued the city to deny benefits to same-sex spouses of city employees.

Senate Democrats have expressed concern that the nomination of Mr. Mitchell, who represented a coalition of states in a Supreme Court case against the Environmental Protection Agency as Texas solicitor general, is part of Mr. Trump's broader strategy to curb rule making by federal agencies.

(In written responses to senators' questions, Mr. Mitchell said that he did not believe that the Supreme Court's gay-marriage decision allowed governments to deny same-sex spouses benefits that opposite-sex spouses received, and that he was not out to destroy the "administrative state," a goal some Trump advisers have espoused.)

And then there are the union cases, which Mr. Mitchell filed after his nomination to head the conference, and which could also suggest a free-market worldview hostile to regulation.

Senator Sheldon Whitehouse, a Rhode Island Democrat who opposed the nomination in the Judiciary Committee, said Mr. Mitchell's role in the cases raised questions about his suitability for the federal position.

"Mr. Mitchell has given us no information about how he got involved in these cases and who is backing them financially," he said. "If he is a clandestine operative of the same powerful ultraconservative special interests out to cripple unions, he is not fit to serve in this post."

Mr. Mitchell said he disclosed his involvement in the cases to the Judiciary Committee and the administrative conference this week, although he declined to explain how he had gotten involved. He denied that conservative groups were financing the cases.

Mr. Verkuil said a chairman would have to stop representing clients in any litigation. Regardless, he said, an ideological agenda is inconsistent with the conference's mission.

“You can't bring those into the agency — that kind of stuff,” he said. “The first job of the chairman is to make sure its credibility is maintained and enhanced.”

Follow Noam Scheiber on Twitter: @noamscheiber.

Alain Delaqu erie contributed research.

A version of this article appears in print on July 19, 2018, on Page B1 of the New York edition with the headline: A Trump Pick Drives the Anti-Union Offensive