Headline hunt

by The San Diego Union-Tribune

There is a reason the 9th U.S. Circuit Court of Appeals is so well-known, and it's not flattering: The judges of the San Francisco-based appellate court have a long, unique history of rewriting law to indulge their personal ideologies. This predilection is so ingrained and so likely to result in absurdities that it is common for the U.S. Supreme Court - even though it has a strong ideological divide - to unanimously overrule the 9th circuit.

For many, the 9th circuit's excesses have seemed like comic relief. But for Californians, the 9th circuit's frequent decisions to interfere in state issues in service of its own whims is more akin to destructive monkey-wrenching. From legislative term limits to the 2003 gubernatorial recall election, from death sentences to a teen curfew San Diego adopted in 1994, 9th circuit judges have never hesitated to intrude with their own agendas.

Now this bad habit seems likely to extend to the state's contentious debate over health reform.

Two weeks ago, U.S. District Judge Jeffrey White of San Francisco threw out that city's mandate that employers either provide health insurance or pay an in-lieu fee. White cited the 1974 Employee Retirement Income Security Act, a plainly written federal law strongly limiting the ability of local or state governments to force employers to provide specific benefits. White's ruling had precise implications for state efforts to impose an employer mandate.

A week later, a three-judge 9th Circuit panel rode to the rescue of those in San Francisco and Sacramento who believe the grand cause of health reform must not be thwarted by plainly written law. It held an emergency hearing on the ruling in which the vast case evidence cited by White was ignored. Leading the charge was Judge William Fletcher, a well-known "living Constitution" advocate who offered the simply incredible argument that if San Francisco can require a higher minimum wage, it could also impose unique benefit obligations.

A ruling in favor of San Francisco's employer mandate in coming days seems certain. But perhaps Fletcher can pause in his quest to be seen as an American Civil Liberties Union pinup to actually read the 9th Circuit binding ruling on ERISA - the 1980 Agsalud v. Standard Oil Co. of California case. The appeals court upheld a lower-court ruling throwing out Hawaii's state employer mandate on the grounds that ERISA blocked all "governmentally required insurance programs." The opinion's author was Mary M. Schroeder, who still sits on the 9th circuit and recently completed a seven-year stint as its chief judge. She noted questions about the vast scope of ERISA pre-emption but said that was a matter "of policy for Congress and not of statutory interpretation for this court."

Exactly - which is why Congress should consider giving states ERISA exemptions and allowing them to experiment. Without such an exemption, a state health reform plan is a waste of time - and an exercise in

getting up the hopes of millions for no good reason.

Somehow we doubt headline-hunting Fletcher will bother to let Agsalud or our Agsalud-driven conclusion interfere with his reasoning. We expect him to either ignore the precedent or offer a "that was then and this is now" rationale for rewriting plainly written law.

Then Fletcher can take his victory laps in front of his liberal peers at ACLU meetings and in law school faculty lounges. Isn't that, after all, what being a 9th circuit judge with a lifetime appointment is really about?

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