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Proposition 187: The United States May Be Jeopardizing Its International Treaty Obligations

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“Ethnic and racial conflict, it seems evident, will now replace the conflict of ideologies as the explosive issue of our times”¹

INTRODUCTION

California's Proposition 187 sends a strong signal to United States treaty partners: “Shut the borders, we are no longer interested.” Even in an era of international interdependence, nations are increasingly closing off their borders to immigrants and minority ethnic groups — the United States is no different. The recent California legislation, Proposition 187, excludes immigrants from education, medical care and social service benefits provided to its own citizens. Certain international treaty provisions, however, guarantee that non-citizens have a right to a minimum level of education, health service, and freedom from cruel and unusual punishment. Should California's voters have the right to influence future relations between the United States and its treaty partners?

This comment argues that the United States will jeopardize its international treaty obligations if California's Proposition 187 takes effect. The Federal District Court in California placed an injunction on this legislation until such time as the court rules on Proposition 187's constitutionality. The Ninth Circuit Court of Appeals affirmed this injunction. The first section of the comment describes the Proposition 187 legislation and its status in the court system. The second section describes how this legislation would effect the following United States treaties: 1) the International Covenant on Civil and Political Rights;² 2) the Convention on the Rights of the Child;³ and 3) the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁴ The conclusion urges the United States to fulfill its international commitments and ban future isolationist legislation such as Proposition 187.

1. ARTHUR M. SCHLESINGER, *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* 10 (1992).

2. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976) [hereinafter *Covenant*].

3. Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448 (entered into force Sept. 2, 1990).

4. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027 [hereinafter *Convention Against Torture*].

I. PROPOSITION 187: AN *EX POST FACTO* REMEDY TO A STATE'S FINANCIAL TROUBLES

California's state budget has been in deficit throughout the 1990s, leading to cutbacks in various sectors of public spending. Education, health care services, and welfare payments have been downsized in attempts to regain solvency. Both undocumented and legal immigrants have been targeted by conservative California lawmakers and citizens as the scapegoats and perpetrators of this problem.

California's governor, Pete Wilson, launched the "Save Our State" campaign to quell public outrage over expenditures benefitting alleged non-tax paying aliens. In his opinion, undocumented aliens who are denied access to California's public benefits will "self-deport,"⁵ and cure the state of its unwanted economic burden. His conservative rhetoric has spawned a new populist movement in California to rid the state of its unfortunate Achilles heel, the undocumented alien.

On November 8, 1994, 59% of California's voters passed the Proposition 187 legislation.⁶ This legislation not only denies all public benefits to undocumented aliens in California, but places the onus on school administrators and health care providers to seek adequate documentation of U.S. citizenship from many legal foreign citizens.⁷ In effect, a Rodriguez, Nguyen or Wong can anticipate greater scrutiny in California's public schools and health care facilities than a Smith. Is this the future of America's great "melting pot?"

The Provisions of Proposition 187

The Preamble to the legislation states that the "People of California find . . . [t]hat they have suffered and are suffering economic hardship . . . personal injury and damage caused" by the presence of undocumented immigrants."⁸ Proposition 187 then sets forth three restrictive provisions which violate the United States international treaty obligations: 1) education; 2) medical treatment; and 3) social services.

First, Proposition 187 prohibits undocumented aliens from attending any public elementary, secondary, or post-secondary school.⁹ To enforce this measure, school administrators are required to investigate the immigration status of their students and their families,¹⁰ to deny undocu-

5. Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 149 (1994).

6. Keith Bradsher et al., *The 1994 Elections: State by State*, N.Y. TIMES, Nov. 10, 1994, at B11.

7. Ron K. Unz, *Sinking Our State*, REASON, Nov., 1994, at 46.

8. CALIFORNIA SECRETARY OF STATE, CALIFORNIA BALLOT PAMPHLET 91 (Nov. 8, 1994) [hereinafter CALIFORNIA BALLOT PAMPHLET].

9. *Id.* at 91-92.

10. Minty Siu Chung, *Proposition 187: A Beginner's Tour Through a Recurring Nightmare*, 1 U.C. DAVIS J. INT'L L. & POL'Y 267, 285-286 (1995).

mented students access to the schools, and to report such students to the appropriate authorities. In essence, school administrators act as agents for the Immigration and Naturalization Service (INS). This measure unfortunately places greater scrutiny on those students with a non-Anglo Saxon appearance, as school administrators may examine only those most likely to be undocumented aliens in the interests of time.

Second, Proposition 187 denies non-emergency health care services at publicly-funded clinics until such time as adequate proof of legal immigration status is provided.¹¹ The definition of a health care facility under this legislation is extremely broad, however, covering *any* in-patient or out-patient facility which diagnoses, prevents or treats physical or mental health illness, including convalescent and *rehabilitative* centers.¹² This provision would encompass undocumented aliens serving time in a prison or other correctional facility.¹³

Further, Proposition 187 excludes undocumented aliens from any other public services available in California, including AFDC, state supplemental SSI benefits, and food assistance programs, among others.¹⁴

Status of the Legislation in the Court System

Several individuals have challenged particular sections of Proposition 187 in the Federal Courts of California on the bases of constitutionality¹⁵ and federal preemptive status.¹⁶ In *Gregorio T. v. Wilson*, Judge Mariana R. Pfaelzer, District Judge for the United States District Court for the Central District of California, issued a preliminary injunction against several portions of Proposition 187 finding them violative of the United States Constitution.¹⁷ The Ninth Circuit Court of Appeals affirmed this preliminary injunction holding that the lower court did not abuse its discretion in applying the appropriate legal standard.¹⁸

In a separate legal action involving many of the same parties to *Gregorio T. v. Wilson*, District Judge Jensen denied a challenge to venue in the federal courts by Defendant Wilson and transferred the action to the United States District Court for the Central District of California.¹⁹ The

11. CALIFORNIA BALLOT PAMPHLET, *supra* note 8, at 91-92.

12. *Id.*

13. Chung, *supra* note 10, at 289.

14. CALIFORNIA BALLOT PAMPHLET, *supra* note 8, at 92; Chung, *supra* note 10, at 292.

15. Barbara Nesbet and Sherilyn K. Sellgren, *California's Proposition 187: A Painful History Repeats Itself*, 1 U.C. DAVIS J. INT'L L. & POL'Y 153, 168-169 (1995).

16. Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 208-209 (1995).

17. *Gregorio T. v. Wilson*, No. CV-94-7652-MRP (D. Ca., date) (order granting preliminary injunction); *aff'd*, No. 95-55186, No. 95-55188, No. 95-55191, No. 95-55192, 1995 U.S. App. LEXIS 17044, at 1 (9th Cir. July 5, 1995).

18. *Gregorio T. Wilson*, No. 95-55186, No. 95-55188, No. 95-55191, No. 95-55192, 1995 U.S. App. LEXIS 17044, at 4-5.

19. *Wilson v. City of San Jose*, No. C-95-0633-DLJ, 1995 WL 241452, at 1, 6 (N.D. Cal. Apr. 14, 1995).

judge held that there was a sufficient federal question to warrant federal court jurisdiction.²⁰

At present,²¹ there have been no definitive rulings on the constitutionality and other legal challenges to Proposition 187. The defendants are currently enjoined from implementing the legislation pending a final judicial decision.

II. INTERNATIONAL TREATIES

The provisions of Proposition 187 relating to education, health care, and social services violate the United States treaty obligations laid out in the International Covenant on Civil and Political Rights,²² the Convention on the Rights of the Child,²³ and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.²⁴

The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights was drafted in New York on December 16, 1966, and entered into force on March 23, 1976.²⁵ The United States became a party to this treaty on September 8, 1992.²⁶ The Covenant provides, in pertinent part that:

[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁷

On the broadest level, this Covenant denounces any law which discriminates on the basis of national or social origin. Clearly a policy which denies basic necessities to persons merely on the basis of national origin and immigration status violates this provision.

The drafters of the Covenant did recognize the possibility that a nation in crisis may need some latitude in compliance with these measures. As such, Article 4 was drafted to read:

[i]n time of public emergency which threatens the life of the nation and *the existence of which is officially proclaimed* . . . the States Parties to the present Covenant may take measures derogating from their

20. *Id.* at 6.

21. October 1, 1995.

22. Covenant, *supra* note 2.

23. Convention on the Rights of the Child, *supra* note 3.

24. Convention Against Torture, *supra* note 4.

25. UNITED STATES DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1995 363 (1995) (hereinafter TREATIES IN FORCE).

26. *Id.*

27. Covenant, *supra* note 2, art. 26, at 179 (emphasis added).

obligations . . . provided that such measures are *not inconsistent with their other obligations under international law* and do not involve discrimination solely on the ground of race, colour, language, religion or social origin.²⁸

Recognizing that “national origin” was explicitly excluded from the laundry list at the bottom of this article, only if Proposition 187 meets the following requirements will the exception apply: 1) it was enacted due to a “public emergency” threatening the “life of the nation;” 2) which is “officially proclaimed;” and 3) it is not violative of other obligations under international law. Without satisfying these elements, California’s “economic hardship”²⁹ plea will not suffice.

First, there is no evidence that the life of the United States is in jeopardy. Governor Wilson of California has only declared that *his* state is under siege in the “Save Our State Campaign.” Second, the Covenant specifically requires that a nation’s government officially recognize a public emergency. The United States President has not done so, and has been less than supportive of California’s legislation. Article 4 also requires any state invoking this exception to “inform the other States . . . through the intermediary of the Secretary-General of the United Nations.”³⁰ This has not been done.

Finally, Proposition 187, as described more fully below, violates several other international obligations of the United States, including the recently signed Convention on the Rights of the Child. For these reasons, the exception to the International Covenant on Civil and Political Rights will not apply in this case.

Convention on the Rights of the Child

The Convention on the Rights of the Child was adopted by the United Nations General Assembly on November 20, 1989.³¹ The United States signed the Convention on February 16, 1995, pledging to join the other 169 countries worldwide who had already signed and ratified the Convention.³² Congress must still ratify the treaty for it to become binding U.S. Law.³³

The Convention on the Rights of the Child states that refugee children or those seeking refugee status shall “receive appropriate protection and humanitarian assistance in the enjoyment of” rights under this Convention and other international human rights instruments.³⁴ On a general level, this provision appears to single out refugee children as a group

28. *Id.* art. 4, at 174 (emphasis added).

29. CALIFORNIA BALLOT PAMPHLET, *supra* note 8, preamble, at 91.

30. Covenant, *supra* note 2, art. 4, at 174.

31. Convention on the Rights of the Child, *supra* note 3.

32. *U.S. Joins Convention Protecting Children*, UPI, Feb. 16. 1995, available in LEXIS, CUR. NEWS Library, Upi File.

33. Convention on the Rights of the Child, *supra* note 3.

34. *Id.* art. 22, at 1464.

which should receive special attention under the laws of any nation in which such children reside.

The Convention on the Rights of the Child has several articles relating specifically to the programs which Proposition 187 targets: education (Articles 28 and 29), medical treatment (Article 24), and social security (Article 26). Recognizing the right of the child to education, this Convention requires states to "make primary education compulsory and available free to all."³⁵ It further sets forth guidelines for the content of such primary education and provisions for refugee access to higher education.³⁶

In Article 24, the Convention on the Rights of the Child mandates that states "shall strive to ensure that no child is deprived of his or her right of access to . . . health care services."³⁷ It also requires states to "ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care."³⁸

Finally, this Convention also states:

States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law . . . [t]he benefits should . . . be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child³⁹

Clearly, the Convention on the Rights of the Child not only prohibits, but condemns, the denial of education, health care and social service benefits to any children, irrespective of their nationality or refugee status or that of their parents. Further, Proposition 187 denies the children of illegal immigrants these three basic needs solely on the basis that their parents have sought refuge in the United States. It violates both the spirit and the letter of this Convention to punish children accordingly.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was completed on December 10, 1984, and entered into force on June 26, 1987.⁴⁰ The United States became a party to the Convention on November 20, 1994.⁴¹ Under this Convention, the term "torture" is used to describe:

35. *Id.* art. 28, at 1467.

36. *Id.*

37. *Id.* art. 24, at 1465.

38. *Id.*

39. Convention on the Rights of the Child, *supra* note 3, at art. 26, 28 ICM 1466 (emphasis added).

40. TREATIES IN FORCE, *supra* note 25, at 433.

41. *Id.*

*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . for such purposes as . . . punishing him for an act he or a third person has committed or is suspected of having committed.*⁴²

The following elements classify the provisions of Proposition 187 legislation as "torture:" 1) severe pain or suffering; 2) intentional infliction; and 3) punishment for an act he/she or a third person has committed or is suspected of having committed. First, the deprivation of essential medical treatment is a cruel treatment or punishment which, under certain circumstances, may lead to death and or permanent injury (severe pain or suffering). Second, as a codified instrument of California state policy, this denial of health care refuses treatment to any individual, provided that he/she cannot provide adequate proof of lawful resident status. As no other factors are taken into account, this broad-based policy constitutes an intentional infliction of such treatment on these persons.

Finally, the sole purpose of Proposition 187 legislation is to punish immigrants for an unlawful entry into the United States by denying benefits. Even Governor Wilson has expressed his desire to see resident aliens "self-deport."⁴³ As stated earlier, California's definition of a health care facility includes those located in rehabilitative centers.⁴⁴ Once sentenced to a correctional facility, immigrant inmates have no alternative access to health care facilities not governed by this legislation. As such, Proposition 187 prohibits these individuals from seeking any medical attention whatsoever, as they are not permitted to leave the confines of the rehabilitative center or receive care at the medical facilities present. Further, those law-abiding children outside of the correctional facilities are denied medical treatment for acts that their parents (third persons) committed, namely crossing the United States borders. There is no question that California's legislation is intended as punishment for illegal and undocumented aliens.

Once satisfied that Proposition 187 constitutes "torture" in the manner envisioned by the drafters and parties of this Convention, "no exceptional circumstances whatsoever, whether . . . internal political instability or any other public emergency" can justify such tortuous treatment.⁴⁵ Accordingly, California's plea to "Save Our State" does not excuse its policy towards immigrants.

CONCLUSION

California has placed the United States treaty obligations in jeopardy. Not only do its provisions violate several key international treaties and agreements currently in place, but it threatens to alienate the United

42. Convention Against Torture, *supra* note 4, art. 1, at 1027, 1028 (emphasis added).

43. Spiro, *supra* note 5, at 149.

44. CALIFORNIA BALLOT PAMPHLET, *supra* note 8, at 91-92.

45. Convention Against Torture, *supra* note 4, art. 2, at 1028.

States from current and future treaty or trading partners. In the wake of the NAFTA agreements, California's attempts to punish Mexican nationals on United States territory will pose a hurdle to future amicable relations. In turn, such restrictive policies taken by one state could spark "in-kind" retaliatory acts against United States citizens both travelling abroad and in need of medical attention.

For these reasons, the California District Courts should be applauded for placing an injunction against Proposition 187. This injunction, however, only buys time. Proposition 187, if it takes effect, will have a devastating impact on the United States' role and reputation as a world leader. California's Federal Court Judges must nip isolationist legislation in the bud: one state's citizens can not seal the fate of the United States' foreign relations.