

Judicial Power Protects Elites, Not People

By Samuel Francis

Once more into the breech waddles a federal judge to thwart the people's will. This time, in California, an unelected magistrate, U.S. District Judge Mariana Pfaelzer, has decreed that most of California's Proposition 187 violates the Constitution. In doing so she not only swings the sword of the state at the Constitution itself but also stabs it into the breast of the nation's rising resistance to unchecked immigration.

Prop. 187, of course, is the state referendum that denied welfare benefits to illegal immigrants. It passed overwhelmingly last year (by 60 percent), despite the opposition of the national media, the Mexican government, the immigration lobby, Jack Kemp and Bill Bennett and other assorted hooligans who threatened violence against its organizers.

But aside from its effect on illegal immigration, Prop. 187 was mainly significant because it represented a major victory of the people over the elites. The elites, as usual when they lose a round, were not happy, and Judge Pfaelzer's ruling reflects their displeasure.

Judge Pfaelzer says 187 is unconstitutional because immigration control is the business of the federal government. Therefore, when states like California try to exclude illegal immigrants from public benefits, they tread on the toe of the federal leviathan. You know what that means. It's just not done.

The logic of Judge Pfaelzer is a wonder, even for federal judges. Yes, her premise is true. Regulation of immigration has been the business of the federal government since the 1840s, when the U.S. Supreme Court ruled in a series of decisions known as the Passenger Cases that the federal government rather than the states had jurisdiction over immigration under the Constitution's commerce clause. No problem.

But the point is that 187 says nothing about who can enter the country. It merely says that those immigrants who have violated federal law to enter can not receive state benefits. In other words, it does not violate the federal government's right to control immigration but acknowledges it. To claim it intrudes on the rights of the leviathan is to confuse regulating public benefits (the law's purpose) with regulating immigration. But logical reasoning has never been the strong suit of federal judges. More important is what the decision could mean for similar grassroots measures against uncontrolled immigration.

If, as Judge Pfaelzer holds, the states cannot control the benefits illegal immigrants receive, then the efforts

in other states (Florida is a main example) to enact laws similar to 187 have been gutted. All is not lost, however, because there remain the people themselves.

There is a cliché to the effect that the Supreme Court follows the election returns. In the case of Judge Pfaelzer, she obviously doesn't. Deliberately thwarting the people's will as registered in election returns can be dangerous business for the courts, because these days we are witnessing some rather unusual elections, and not all that many office holders return from them.

They don't return because the people are not happy — with immigration, affirmative action, taxes, trade, the economy, gun control, schools, crime, foreign policy and, not least, office holders, including judges. Having thrust a sword at the throat of the new populism, Judge Pfaelzer and her colleagues on the benches may soon find that the people carry a sharper sword, and before the battle is done, it may be her head and those of other judges that roll on the floor.

*The trick of using unelected courts to declare popularly enacted laws unconstitutional is not a new one, of course. In a new and learned book, *Judicial Dictatorship*, University of South Carolina law professors William J. Quirk and Randall Bridewell point out that the trick goes back to the founding itself.*

"From (Alexander) Hamilton to (Michael) Kinsley," they write, "The elite's central belief is that the people are such poor clay that it is ridiculous to try to follow Jefferson's 'mother principle' [that 'governments are republican only in proportion as they embody the will of the people, and execute it']. The elite doesn't want a government that embodies the will of the people. They think it would be ugly."

Judge Pfaelzer's ruling is a classic illustration, though no more so than dozens of similar rulings that have smothered popularly supported laws. The elites that have seized power — in business, in government, the media, both political parties and the judiciary — think it is "ugly" to control immigration.

But what is really ugly is that Americans have lost control of their own government and their own laws and even their capacity to make laws that embody their own will. Judge Pfaelzer's ruling is only the most recent reason they should take all of it back. And they can start taking it back when they strip judicial elites of their power to strangle laws that embody the people's will. ■