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Judicial Activism at its Worst—A Big Win for Abortionists

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In her sweeping decision, Judge Hamilton ruled that the Partial-Birth Abortion Ban Act is unconstitutional on several grounds, and her decision permanently prevents the enforcement of the Act, at least as related to the Planned Parenthood Federation of America and its associated physicians. According to press reports, these doctors perform up to half of all abortions in America.

Judge Hamilton's decision is a macabre legal argument in defense of a gruesome medical procedure. Partial-birth abortion came to the nation's attention in the 1990's, when abortionists began to reveal the practice of allowing a baby to pass almost entirely through the birth canal, stopping the birth only just before the baby's head would emerge from the canal. At that point, when the baby is still very much alive, the abortionist inserts a sharp object into the baby's cranium, killing the baby, evacuating the cranial contents and collapsing the head.

The very description of this procedure defies the moral imagination. Only inches in the birth canal make the difference between life and death. The procedure is legally defined as an abortion rather than murder only because the baby's head is not allowed to emerge from the birth canal. How can any sane society allow such a procedure to be performed?

Judge Hamilton, a Clinton appointee to the United States District Court of the Northern District of California, found that the Partial-Birth Abortion Ban Act is unconstitutional because it poses "an undue burden on a woman's ability to choose a second trimester abortion." She further ruled that the Act is unconstitutionally vague and lacks a valid health exemption for the mother.

After the legislation had twice passed through Congress, only to be vetoed by President Bill Clinton, the 108th Congress passed the final version of the Act, which was then signed into law by President George W. Bush on November 5, 2003. That very day, pro-abortion groups filed lawsuits, claiming that the Act violates their due process rights. On November 6, 2003, Judge Hamilton issued an injunction temporarily enjoining enforcement of the Act. Tuesday's decision came at the end of a trial process that has stretched over the intervening months.

Several aspects of Judge Hamilton's decision deserve careful attention. First, the judge clearly privileged the testimony and evidence presented by pro-abortion authorities. On issues ranging from the necessity of a partial-birth procedure to the existence of fetal pain, Judge Hamilton discarded or discounted the evidence presented by the government's witnesses. Her logic is genuinely chilling—effectively establishing that only those doctors who have performed partial-birth abortions are qualified to evaluate the procedure. This is tantamount to allowing the foxes to set the rules for guarding the hen house. In dismissing the government's witnesses on the issue of a health exemption for the mother, Judge Hamilton ruled that "none had performed the intact D-and-E procedure at issue in this case." In other words, those whose moral and ethical convictions would not allow partial-birth abortion were then disallowed from even providing

credible testimony as to whether the procedure would ever be medically necessary. Later, she ruled “that the government’s experts lacked the background, experience, and instruction to qualify as experts regarding the technique of the intact D-and-E procedure.”

The judge’s ideological blinders also came into play when experts testified concerning the existence of fetal pain during the partial-birth procedure. Judge Hamilton asserted that “the four government witnesses who were qualified as experts in [obstetrics], all revealed a strong objection either to abortion in general or, at a minimum, to the D-and-E method of abortion.” She then ruled: “The court finds that their objections to entirely legal and acceptable abortion procedures color, to some extent, their opinions on the contested intact D-and-E procedure.” In reality, Judge Hamilton just ruled that the testimony from experts who opposed abortion was to be discounted, simply on those ideological grounds. But there was no equivalent discounting of the testimony of pro-abortion experts who argue that the fetus feels no pain. Judge Hamilton seems absolutely unconcerned about the conflict of interest represented by those who testified on behalf of a gruesome procedure that produces enormous profits for the abortion industry. By discounting the testimony of the expert witnesses opposed to the procedure, Judge Hamilton stacked the deck and now claims to base her own decision on expert testimony.

Congress also came under Judge Hamilton’s censure. She ruled that Congress’ determination that the partial-birth abortion procedure is not medically necessary “is not reasonable and is not based on substantial evidence.” Judge Hamilton placed herself above the authority of Congress, rejected congressional testimony, and accepted instead the claims of pro-abortion groups that this procedure would at times be necessary for a woman’s health. This flies in the face of official statements of the American Medical Association to the contrary.

Why would Judge Hamilton find that a partial-birth abortion would, at times, be important for a woman’s health? The judge ruled that “since the fetus undergoes less disarticulation, the risk of leaving fetal parts in the uterus is diminished, and the procedure is likely to take less time.” Less time? Should we really be convinced that the procedure is made necessary by the fact that other methods pose a greater risk of “leaving fetal parts in the uterus?”

Another revealing dimension of Judge Hamilton’s ruling is found in her acceptance of the twisted terminology of the Culture of Death. Throughout her written ruling, Judge Hamilton referred to the dismemberment of the fetus as “disarticulation.” This bizarre term is clearly preferred by those who perform abortions, because it is far less likely to be understood by those outside the abortion industry. To speak of a fetus being “disarticulated” is to refer to the procedure whereby it is surgically dismembered in the womb.

The use of this tortured vocabulary is evidence of the moral bankruptcy of abortion rights worldview. When the dismemberment of a human baby is reduced to a dishonest term like “disarticulation,” moral coherence is lost and the sanctity of human life is effectively denied. This is precisely the kind of euphemistic moral vocabulary used by the Nazi Third Reich and its murderous physicians, but it is now the vocabulary establishing both fact and judgment in a U.S. Federal Court decision.

The Partial-Birth Abortion Ban Act of 2003 established the moral abhorrence of the procedure. “A moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion—an abortion in which a physician delivers an unborn child’s body until only the head remains inside the womb, punctures the back of the child’s skull with a sharp instrument, and sucks the child’s brains out before completing delivery of the dead infant—is a gruesome and inhumane procedure that is never medically necessary and should be prohibited,” the Act declared.

Furthermore, “Rather than being an abortion procedure that is embraced by the medical community, particularly among physicians who routinely perform other abortion procedures, partial-birth abortion remains a disfavored procedure that is not only unnecessary to preserve the health of the mother, but in fact poses serious risks to the long term health of women and in some circumstances, their lives.”

For that reason, an overwhelming majority of both representatives and senators passed legislation adopting a ban on this procedure twice in the 1990s, only to face a promised veto by President Bill Clinton. All this changed with the election of President George W. Bush. The successful passage of the Partial-Birth Abortion Ban Act of 2003, signed boldly into law by President Bush, represented the first major legislative gain for the sanctity of human life since the U.S. Supreme Court’s infamous 1973 decision, *Roe v. Wade*. Judge Hamilton’s nullification of the Act throws the issue into the appeals process—and ultimately to the U.S. Supreme Court. Federal courts in Manhattan and Nebraska are also

considering the constitutionality of the Act, and, at this point, only a decision by the U.S. Supreme Court can bring clarity to the situation.

This comes as cold comfort to those concerned for the sanctity of human life, because the nation's high court struck down similar legislation in its decision, *Stenberg v. Carhart*, in 2000, nullifying the law on the claims of a Nebraska plaintiff.

Judge Hamilton is well known as a stalwart defender of abortion. The official web site of the Planned Parenthood Federation of America celebrates the fact that on March 5, 2004, Judge Hamilton denied the Department of Justice's motion to compel the production of medical records for approximately nine hundred abortion patients from Planned Parenthood affiliates across the country. Acting on the basis of the Partial-Birth Abortion Ban Act, Attorney General John Ashcroft had sought these medical records in order to determine whether or not criminal acts had been committed. Judge Hamilton denied the Department of Justice's motion, ruling that "women are entitled to not have the government looking at their records." Of course, this ruling effectively meant that the government had no way of enforcing its legislation—a situation that would be inconceivable if related to any other medical procedure.

Observers of the courts will remember that Judge Hamilton also gained national notoriety in 2003, when she ruled that a California elementary school was entirely within its rights to require students to adopt Muslim names and pray to Allah as part of a history and geography class. The Judge ruled that this practice was teaching the students about the Muslim religion, rather than revealing "any devotional or religious intent." No sane observer of the court could imagine that Judge Hamilton would have ruled similarly if the children had been required to dress up as Mary and Joseph and participate in a nativity play.

Here we have a case of judicial activism at its worst. Judge Phyllis Hamilton, acting alone, has single-handedly defied the will of the American people, legislation overwhelmingly passed by Congress, and the executive power of the President in signing the legislation. According to a Gallup poll reported in 2003, sixty-eight percent of the American people believe the partial-birth abortion procedure should be illegal. What is left of democracy when a single federal judge can act in such open defiance of a national consensus? What reading of the U.S. Constitution can find in that text a "right" to demand such a murderous procedure?

According to one of the maxims of democracy, a nation eventually has the government it deserves. How did we come to deserve this?

