Selling Bone Marrow — Flynn v. Holder

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On December 1, 2011, in Flynn v. Holder, the U.S. Court of Appeals for the Ninth Circuit held that the ban on selling “bone marrow” that is part of the National Organ Transplant Act (NOTA) of 1984 does not encompass “peripheral blood stem cells” obtained through apheresis. This ruling means that the sale of blood stem cells for transplantation will now be permitted. The court based its holding solely on statutory interpretation of NOTA, not the plaintiffs’ more radical claim that the prohibition on selling bone marrow violates the Equal Protection Clause of the U.S. Constitution, which prohibits the federal and state governments from denying any person the equal protection of the law. For those seeking to establish a constitutional right to buy and sell body parts in the United States, this case was a loss, but for those narrowly focused on blood stem cells obtained through apheresis, the decision legally sanctions a commercial market.

In Flynn, NOTA was challenged by a group of plaintiffs with various interests, including parents of children with leukemia and aplastic anemia, which can be fatal without bone marrow transplantation; a parent of mixed-race children, for whom sufficiently matched donors are especially scarce; and MoreMarrowDonors.org, a California nonprofit corporation that wanted to offer $3,000 awards in the form of scholarships, housing allowances, or gifts to charities selected by donors, initially to minority and mixed-race donors of bone marrow cells.

Before the district court, the plaintiffs raised two primary arguments. First, they argued that the NOTA prohibition on selling bone marrow violates the substantive due-process protections of the Constitution, which protect a person’s power to possess something, and to do certain things despite the desire of the government to the contrary. Specifically, the plaintiffs argued that when a patient needs an organ to survive and someone is willing to sell it to the patient, the Constitution prohibits the state from interfering with that exchange. The somewhat amorphous doctrine of substantive due process underlies Supreme Court jurisprudence on contraception and abortion, and litigants have tried (unsuccessfully) to use it to get courts to recognize a constitutional right to assisted suicide. In Flynn, the district court rejected this argument, drawing an analogy between the blood-stem-cell case and the D.C. Circuit Court decision in Abigail Alliance v. von Eschenbach, which held that terminally ill patients had no fundamental “right to obtain experimental drugs.” This aspect of the district court decision was not challenged on appeal, nor was it addressed by the Ninth Circuit.

Second, the plaintiffs argued that as applied to bone marrow, NOTA violates the Equal Protection Clause, because there is no rational basis for allowing compensation for providing blood, sperm, and eggs while disallowing compensation for providing bone marrow. The Equal Protection Clause, which underlies much of the Supreme Court jurisprudence on racial discrimination, requires the state to articulate a rational basis for distinctions that it makes in the law (with a more demanding inquiry if the distinctions are based on race or sex).

Both the district court and the Ninth Circuit rejected this challenge and found several possible rational bases for the ban on selling bone marrow, including that it is morally wrong to sell bone marrow (just as it is wrong to sell other body parts) because doing so would turn human beings into commodities; that poor people would be coerced by financial pressure into selling their organs; that the rich would be at a substantial advantage in obtaining organs; that donors would have a strong incentive to provide an inaccurate medical history; and that although blood can legally be sold, certain differences between blood and bone marrow justify the view of Congress that provid-
The statute should not prohibit bone marrow donation either. It rejected the argument by the government that bone marrow derivatives are encompassed in “bone marrow,” noting that this argument “proves too much” in claiming that the “red and white blood cells that flow through the veins come from the bone marrow, just like hematopoietic stem cells.” It also found that these cells fit within the ordinary-language meaning of “blood.” Therefore, it held that “when the ‘peripheral blood stem cell apheresis’ method of ‘bone marrow transplantation’ is used,” NOTA does not criminalize sales of these cells, unlike sales of bone marrow derived through aspiration.²

The Ninth Circuit decision represents both a win and a loss for advocates of organ markets. On the one hand, patients can now buy and sell peripheral-blood stem cells derived through apheresis, which the court claims is the method of bone marrow transplantation used in two thirds of U.S. cases — a significant victory.² On the other hand, this narrow win was achieved through a statutory interpretation of NOTA, and Congress can always change the law by adding the words “peripheral-blood stem cells.” Moreover, the Ninth Circuit rejected the plaintiffs’ broader constitutional theory — that Congress is barred by the Equal Protection Clause from banning the sale of substances with substantial similarity to blood, sperm, or eggs. So unless advocates for the sale of other body parts can find applicable statutory gaps similar to that regarding peripheral-blood stem cells, their claims will probably fail. The plaintiffs retain the possibility of pressing their more libertarian theory about substantive due process (discussed above) in future litigation.

The federal government has options for further review of the Flynn decision. It will probably ask the Ninth Circuit to review it as a larger panel selected from the judges of the circuit court. If that request is denied or if the panel affirms the decision, it could also seek Supreme Court review. Given the narrowness of the Ninth Circuit holding, however, the government may be content to leave it in place and instead seek redress through the legislative process — or merely accept the formation of markets for peripheral-blood stem cells. Nothing in the Ninth Circuit decision foreshadows the creation of markets in any other types of organs.

Disclosure forms provided by the author are available with the full text of this article at NEJM.org.

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