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PERSPECTIVE

Census case shows that facts still matter, at least in courts

By Cody S. Harris

Facts still matter, at least in court. This year's showdown over the Trump administration's efforts to add a citizenship question to the census highlights an attorney's duty to ensure that her case rests on a sound factual foundation. The census case, *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), turned on whether Commerce Secretary Wilbur Ross' proffered explanation for adding the citizenship question was legitimate or pretextual. In a 5-4 decision, the Supreme Court held that there was "a significant mismatch" between the secretary's decision to add the citizenship question and his rationale for that decision, which "seems to have been contrived." The court used many other turns of phrase to describe the situation. The secretary's decision was "incongruent" with the record; there was a "disconnect" between his decision and its explanation; the secretary's rationale was "more of a distraction" than an explanation for the agency's action. These are all politic ways of saying the same thing: The government's position was based on a lie.

The dissembling continued on remand. In seeking expedited review, the government had repeatedly told the courts that the issue had to be resolved by June 30, 2019, so as not to delay the constitutionally-mandated decennial census. But when the remand came, the government abruptly changed course, arguing it had time to keep trying to get the question on the census forms. Around that time, all of the Department of Justice attorneys who had been representing the government in the census case suddenly withdrew from the matter, to be replaced by an entirely new set of DOJ lawyers. Amid the chaos, the Trump administration relented, conceding that the question would not appear on the 2020 census. The plaintiffs, meanwhile, are seeking sanctions in district court.

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Most litigators are not involved in battles against or on behalf of the United States government in highly charged cases with national implications. But all lawyers have a duty of candor to the court. And the census case teaches that when lawyers defend the factually indefensible — when the record, fairly read, simply does not support the legal position taken — there may eventually be a reckoning.

Some areas of civil litigation are rife with instances in which the facts do not support the legal positions taken. Private securities fraud actions stand out in that regard. Under the Private Securities Litigation Reform Act, securities-fraud plaintiffs must clear a high pleading bar to get their case off the ground. Allegations attributed to confidential witnesses can help clear that hurdle. Consequently, securities-fraud complaints often include alleged statements by confidential witnesses that supposedly show that a company's leaders were lying when they made certain statements to the market. But, ironically, it is sometimes the complaint that contains the lies. Litigation often reveals that these confidential witnesses never made the statements attributed to them in the complaint, or were never given the chance to review or confirm those statements, and that they are ultimately unwilling to testify to those facts under oath.

The issue is so prevalent that one could string-cite cases from federal courts across the country chastising or sanctioning lawyers for playing this game. *See, e.g., City of Livonia Emps. Ret. Sys. v. The Boeing Co.*, 306 F.R.D. 175 (N.D. Ill. 2014); *In re Star Gas Sec. Litig.*, 745 F. Supp. 2d 26 (D. Conn. 2010); *In re BankAtlantic Bancorp, Inc. Sec. Litig.*, 851 F. Supp. 2d 1299 (S.D. Fla. 2011). As one court put it, "[n]umerous reported decisions have recounted claims by [confidential witnesses] that ... complaints inaccurately attributed facts and statements to them." *In re Millennial Media*, 1:14-cv-07923, at *12 (2015). In one case, a contemporaneous recording of a confidential witness' interview disproved the allegations attributed to that witness in the complaint. In another case, the witness disavowed making key assertions attributed to him, and the plaintiffs' investigator admitted to destroying the recording of the witness's interview.

The trouble is that the tactic often works. Courts generally refuse to consider at the motion-to-dismiss stage evidence that a complaint has mischaracterized or misrepresented a confidential witness' statements. And if the complaint survives Rule 12(b), then the lawyers who promoted the ruse might get a sternly worded decision somewhere down the line, or even a monetary sanction, but those are small prices to pay for the fees that come with a large settlement.

These sorts of cases may not receive the same attention that a major battle like the census case receives, but they are equally important when it comes to attorneys' obligations to represent their clients both zealously and ethically. All parties involved have a role to play. Plaintiffs' lawyers should allow confidential witnesses to review and confirm the allegations attributed to them, and retain documentation showing the same. Defense lawyers should approach confidential witness statements with skepticism, while taking care to ensure that any recantation is free of pressure or threats of retaliation. And judges should carefully consider the record evidence when it comes before them and decide whether the complaint's allegations are incongruous with the facts. And if they are, then the consequences should be appropriately severe to deter such conduct in the future.

Politics in the Trump era may have left facts behind, with shoot-from-the-hip slogans and name-calling taking the place of anything approaching reasoned argument. But as the census case showed, the courts, for now, remain an outlier. Facts still matter, and all judicial officers — lawyers included — should stick to them.

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