PashmanStein WalderHayden

When the Government Lies: Pretext Claims in Times of Extreme Partisanship - *New Jersey Law Journal*

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David N. Cinotti

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By: David N. Cinotti, Pashman Stein Walder Hayden

Consider the following scene from the movie Casablanca

RICK: How can you close me up? On what grounds?
RENAULT: I am shocked, shocked to find that gambling is going on in here!
[The croupier comes out of the gambling room and up to Renault. He hands him a roll of bills.]
CROUPIER: Your winnings, sir.
RENAULT: Oh. Thank you very much.
Julius J. Epstein, Casablanca 106 (1942).

In this famous scene, the French captain Louis Renault closes the café operated by Humphrey Bogart's character, Rick, to appease the Nazis. Renault's proffered reason for his actions was obviously, and humorously, pretextual. But was it an abuse of government power, since, after all, Renault likely did have authority to stop illegal gambling? In U.S. federal law, that problem is arising with more frequency—officials articulate a facially legitimate justification for governmental action, but someone affected by the act challenges it as intended to disguise an illicit purpose. Allegations of government lying seem more prevalent and have taken on increased importance in the current political climate, where the president is accused of lying on a near-daily basis, and where political "factions"—as the Framers called them—have become unyieldingly entrenched.

The United States Supreme Court's current and recent terms include multiple cases concerning whether federal law tolerates government duplicity. An important issue in those cases is whether the judiciary can question the truthfulness of government actors' explanations. Among

others, the travel ban, census, and Bridgegate cases all involved or involve claims that government officials violated constitutional, administrative, or criminal law by concealing the true reasons for its actions. These issues are not limited to the federal level. Take a municipality that authorizes eminent domain on the ground that it needs more public parks, but the property owner claims the taking was really intended to help a competitor's business. Can the court look behind the municipality's explanation for its decision and decide whether it was true?

Out of concerns rooted in separation of powers and federalism, federal courts have been reluctant to question the sincerity of other branches and state officials, even in cases concerning fundamental rights or claims of enormous public importance. The extent of review necessarily depends on the precise legal issue before the court. In constitutional cases, for example, courts will more closely scrutinize executive or legislative action that infringes a fundamental right or makes a suspect classification—so-called strict and intermediate scrutiny—but apply the less searching rational-basis test in other circumstances. Courts also give increased deference in areas within the executive's exclusive or primary authority like national security or foreign affairs. It is therefore important not to overgeneralize. But it should not be controversial that the judiciary's role of constitutional (and, indeed, statutory) gatekeeper requires it to evaluate whether the government has told the truth where there are sufficient allegations or proof (depending on the procedural stage) that officials have lied to cover up an unlawful purpose, or where the lying itself would be unlawful.

Recent and Pending Cases

The 2017-2019 Supreme Court terms included multiple cases concerning government duplicity in different legal contexts. For example, in the travel-ban case, the court considered whether President Trump's proclamation restricting entry into the United States of some foreign nationals violated the Establishment Clause. *See Trump v. Hawaii*, 138 S.Ct. 2392, 2415-23 (2018). The plaintiffs argued that the President's statements and the history of the proclamation disclosed that the true purpose was to ban Muslims. *See id.* at 2435-40 (Sotomayor, J., dissenting) (summarizing those statements and history). In the census case, the court considered whether the Secretary of Commerce's decision to add a citizenship question on the 2020 census was based on false pretenses. *See New York v. Dep't of Commerce*, 139 S.Ct. 2551, 2564 (2019). In the Bridgegate case, which the court will hear this term, two New Jersey officials were convicted for fabricating a traffic study that significantly impeded traffic at the George Washington Bridge as political retribution against the mayor of Fort Lee for his refusal to endorse Governor Chris Christie. *See United States v. Baroni*, 909 F.3d 550, 556 (3d Cir. 2018). Defendant Bridget Anne Kelly's successful petition for certiorari noted that "it has become commonplace to sue public officials on the theory that their actions were in fact motivated by concealed, illicit purposes, rather than by their stated, legitimate goals," and argued that the Third Circuit's opinion would allow criminal-fraud prosecutions based on the same allegations. Pet. for Writ of Cert. at 20, *Kelly v. United States*, No. 18-1059.

The Supreme Court's approach to allegations of government lying has depended on the specific context. Space limits do not permit a full discussion of the issue, so a few examples will have to suffice here. In the travel-ban case, a 5-4 majority noted that, because the proclamation concerned the exclusion of aliens, the court might have been limited to

deciding whether the proclamation was "facially legitimate and bona fide." *Trump*, 138 S.Ct. at 2420. But because the government agreed that some further review was appropriate, the court applied the rational-basis test to ask whether "the entry policy [was] plausibly related to the Government's stated objective to protect the country and improve vetting processes," which the court said allowed it to consider extrinsic evidence to a limited degree. *Id.* The court held that the proclamation was valid because it was not "inexplicable by anything but animus" against Muslims. *Id.* at 2421 (internal quotation marks omitted). Justice Kennedy wrote in a concurrence: "The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary can correct or even comment upon what those officials say or do," suggesting that the oath itself is a check on government power. *Id.* at 2424 (Kennedy, J., concurring).

In dissent, Justice Sotomayor (joined by Justice Ginsburg) heavily focused on the president's statements and conduct to conclude that the proclamation reflected an anti-Muslim policy that "masquerades behind a facade of national-security concerns." *Id.* at 2433 (Sotomayor, J., dissenting). She observed that the majority opinion "completely sets aside the President's charged statements about Muslims as irrelevant." *Id.* at 2447.

In contrast to the travel-ban case, a 5-4 majority in the census case scrutinized the government's stated reasons and found them to be pretextual. Although the court rejected a constitutional challenge to the addition of the citizenship question, and upheld the Secretary's decision as substantively reasonable, it nevertheless held that the decision was arbitrary and capricious under the Administrative Procedures Act (APA). *See* 139 S.Ct. 2551, 2566-76 (2019). The court considered extra-record evidence obtained in discovery, even though APA review is normally confined to the administrative record, because the government had stipulated to including voluminous internal deliberative material in the record, which the Supreme Court concluded justified discovery. *See id.* at 2573-74 (internal quotation marks omitted).

The discovery convinced the majority that there was "a significant mismatch between the decision the Secretary made and the rationale he provided," in other words, that the Secretary was not truthful when he said that he added the citizenship question at the Department of Justice's request to help enforce the Voting Rights Act. *Id.* at 2575. The Court stated that "judicial inquiry into 'executive motivation' represents a substantial intrusion into the workings of another branch of Government and should normally be avoided" and that its "review is deferential," but concluded that it was "not required to exhibit a naiveté from which ordinary citizens are free." *Id.* at 2573, 2575 (internal quotation marks omitted).

Justice Thomas dissented in part, along with Justices Gorsuch and Kavanaugh. He wrote that the court's decision "[e]choes the din of suspicion and distrust that seems to typify modern discourse," and that "[i]t is not difficult for political opponents of executive actions to generate controversy with accusations of pretext, deceit, and illicit motives." *Id.* at 2576 (Thomas, J., dissenting in part). In Justice Thomas's view, "pretext is virtually never an appropriate or relevant inquiry for a reviewing court to undertake" when considering administrative action. *Id.* at 2579.

Conclusions

As these examples illustrate, pretext claims present significant separation-of-powers issues. And, where state officials are involved, federalism concerns arise as well. It is a grave step for federal judges to conclude that federal or state officials have lied, and the justices have shown reticence to do so. It is also not clear whether the Supreme Court's willingness to consider extrinsic evidence in the travel-ban and census cases turned on the government's concession that such evidence could be part of the record. But the cases seem to illustrate that courts will consider pretext evidence even on rational-basis review (travel-ban case), and will find that government officials have been duplicitous if the evidence is very strong and there is no other reasonable explanation for the action (census case).

What the standard is, and how it differs depending on the specific claims and legal context, will likely develop further in the near future. As recognized in Justice Thomas's dissent and Ms. Kelly's certiorari petition, mistrust of government officials is widespread in our culture and in our courtrooms. But judicial scrutiny of allegations that government officials have lied to cover up illicit motives, or where the lying itself renders the decision unlawful, is justified. James Madison wrote, "If angels were to govern men, neither external nor internal controls on government would be necessary." *The Federalist No. 51*. The Framers established an independent judiciary as one of the central controls on abuse of power. The court was right to conclude in the census case that it should not be blind to what ordinary citizens know. Nor should there be a "*Casablanca* rule," under which pretext claims succeed, or perhaps even survive prejudgment dismissal, only where the evidence of pretext is overwhelming. Instead, courts, with due regard to the specific legal issues before them, should be able to examine government officials' stated reasons for their actions when there are sufficient allegations or proof—sufficient depending on the procedural rules applicable at each stage of the case—that those reasons were false. Actions taken for purportedly legitimate reasons clothed in lies that reveal unlawful means or ends are as much an abuse of power as nakedly unlawful acts. Justice Kennedy's suggestion that we can rely on public servants' adherence to their oath of office as an effective check unfortunately seems unrealistic in our no-holds-barred political reality.