THE CRIME REPORT
YOUR COMPLETE CRIMINAL JUSTICE RESOURCE

Viewpoints

Crime and 'Religious Immunity': Congress Needs to Set Limits

October 15, 2014 09:10:37 am

By Caleb Mason

In my column yesterday (http://www.thecrimereport.org/viewpoints/2014-10-is-there-a-constitutional-right-to-refuse-to-testify), I highlighted a Utah case, *Perez v. Paragon Contractors*, which appeared to place a worrying new burden on the government's ability to prosecute criminal activity. In that case, a federal judge upheld the refusal of a member of a fundamentalist Mormon church to testify about alleged illegal child labor practices—accepting his argument that the Religious Freedom Restoration Act (RFRA) allows individuals to refuse to testify about alleged crimes committed by their church.

The judge based his opinion (http://thecrimereport.s3.amazonaws.com/2/fd/8/2598/perez_v._paragon_decision.pdf) on the Supreme Court's ruling in *Burwell v. Hobby Lobby*, which captured headlines in June. In *Hobby Lobby*, the Justices agreed with a private company's claim that it was entitled not to offer contraceptive health benefits to its employees, as required under the Affordable Care Act, because the company's owners had religious objections to contraception.

As I explained yesterday, RFRA prohibits all government action that substantially burdens religious exercise unless the government can show that the action is the least restrictive means to further a compelling government interest. *Hobby Lobby* was, to put it mildly, a surprisingly broad interpretation of the statute.

There are two big questions in any RFRA case: What is a "substantial burden" on religious exercise? And what government interests are compelling?

You may have heard that *Hobby Lobby* has been criticized by many lawyers and academics—and rightly, I think—for its application of the "substantial burden" side of the test.

Paragon pushes on the other side of the test, the "compelling interest" side. Before *Paragon*, I, and most other practicing lawyers, would have confidently said, "Are you kidding? Of course the government's interest in preventing child labor is a compelling interest." So it was quite surprising to learn that it's not, at least to one district judge.

Some law-blog commentators, including some with nice resumes, have defended the ruling, saying, "Oh, this wasn't the least restrictive means to further a compelling interest because the government could always get the information it needed some other way."

Anyone who says that didn't bother to look at the docket and read the pleadings (http://thecrimereport.s3.amazonaws.com/2/98/7/2588/perez_v._paragon.pdf) .

Here's what the department wanted to ask Steed:

- Who recorded and distributed the voicemail telling church members to take the week off school and bring their kids to the fields?
- How are voicemails from "the Bishop" created and distributed?
- Who was the voicemail sent to, and where is the list of recipients maintained?
- Who owned those 15-passenger vans?

TCR at a Glance

The Social Worker in the Patrol Car

APRIL 6, 2015

Cops and civilians are teaming up in pilot programs aimed at changing how the justice system deals with the mentally ill—with impre...

Your Data at Risk

APRIL 3, 2015

Corporate America still underestimates the threat of cyber-sabotage, a New York panel is told.

Stalking by Cellphone

SPECIAL REPORT APRIL 2, 2015

Are tracking apps a new tool for domestic abuse? The Crime Report investigates.

Taking on Overt Drug Markets

NEW & NOTABLE APRIL 1, 2015

A new National Network for Safe Communities guide seeks to provide step-by-step instructions for communities struggling with public drug ...

Study: Former Abuse Victims Not More Likely to Commit Abuse

NEW & NOTABLE MARCH 31, 2015

A 30-year-study finds those who are abused as children are often more scrutinized as parents, but not necessarily more likely to be physi...

Conn., N.C. and Ga. See Steep Drops in Black, Hispanic Prison Populations

NEW & NOTABLE MARCH 30, 2015

A new policy brief released by the Council of State Governments credits bipartisan reforms for the declines

Summiteers Agree: Too Many Inmates, Long Road To Reform

MARCH 27, 2015

Obama, Gingrich head list of speakers from left and right at DC gathering.

- Who is the custodian of records for the FLDS membership lists and business records?
- Where are those records stored?
- Which church leaders have information regarding the ranch?

These are not fishing-expedition questions about "church organization." They are specific questions about the alleged illegal activity, and are within the scope of Steed's personal knowledge. "Just get it some other way"? Really? What other way? The way you get information about an organization's records is to ask the guy in charge of record keeping.

How about, you know, just asking someone else? Someone who doesn't have a religious objection? Who would that be? The case is about a church-owned business, allegedly using church facilities and the authority of the church leader, to compel church members to put their kids to work in the fields. If church members are all exempt from testifying, there's no one to ask.

"Just get the information some other way" has never been a valid legal objection to a government investigation. It is never possible to know in advance exactly where the evidence you need is, and exactly what that evidence will show, and then map out an *ex ante* investigatory plan that will be the "least restrictive means" of getting your answers.

And do you really want to live in a society in which members of a religious organization can just take a vow not to talk about the organization and be forever immune from court proceedings? I sure don't. If an organization commits a crime, I want to investigate it—whether it's a street gang, a drug cartel, or a church.

Finally, the *Paragon* court committed the most basic of judicial sins: it ignored a clear, on-point precedent from the governing appellate court. As it happens, in 1988 the Tenth Circuit, which covers Utah, decided a case applying the *Sherbert* test to a claim by a witness that giving testimony to a grand jury violated his free exercise of religion.

In this case, called *In Re Grand Jury Proceedings of John Doe*, (http://caselaw.findlaw.com/us-2nd-circuit/1227092.html) the court roundly rejected the free exercise argument, holding that even if the "burden" side of the test were met, the government has a compelling interest in investigating criminal activity; and that, in doing so, it has "a right to every man's evidence," in the ancient phrase.

This is a pre-*Smith* case, applying the *Sherbert/Yoder* "compelling interest" test—the very same test that the *Paragon* court was applying per RFRA. That means it should have controlled in *Paragon*.

The Department of Labor, to its credit, cited the *John Doe* case in its briefing. But the *Paragon* court ignored it. I think that will be fatal on appeal, assuming the department appeals.

But the main lesson of *Paragon*, for me, is that Congress ought to set some limits on the RFRA test. For example: "Compliance with a lawful subpoena to give testimony shall not be deemed a substantial burden on the free exercise of religion." I'd like to see that language proposed just to see if any members would oppose it, and what arguments they'd make. And what positions our various religious denominations would take.

Because this might be trite, but I'm pretty proud of the fact that refugees from all over the world seek out asylum in the U.S. because in our country, religious groups and leaders are *not* above the law. If cases like *Paragon* really are an unintended consequence of RFRA, as lots of commentators have suggested, then Congress ought to fix RFRA.

I don't know what it would take to get Congress to act, but I can tell you I've already started on my *Law and Order* spec script about a fundamentalist in some religion or other who witnesses a murder by a member of his group and refuses to testify under RFRA. I can see Jack McCoy's jaw clenching already.

Depressing as it is, I fear that it would actually take a high-profile case like that to clue Congress in that it needs to put RFRA on a leash. In the meantime, hopefully the circuits put the kibosh on these testimonial immunity arguments.

Otherwise, we're going to start seeing a lot more lawyers arguing that *Hobby Lobby* created a brand-new religious immunity from government investigation.

A lawyer's job, after all, is to zealously represent his or her client with all the legal tools available. And the tools are there: Congress gave us RFRA, and the Supreme Court interpreted it broadly in *Hobby Lobby*. So if you just got a subpoena, but Jesus is telling you to clam up, call me.

Caleb Mason is an attorney at Brown, White and Newhouse in Los Angeles, and a former federal prosecutor.