Assessing the Supreme Court's ruling on giving ID to police

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(FindLaw) -- In Hiibel v. Sixth Judicial District Court of Nevada, the U.S. Supreme Court upheld the conviction of Larry Dudley Hiibel.

Hiibel had violated a Nevada statute that requires persons temporarily detained on "reasonable suspicion" of criminal activity to identify themselves to a police officer.

Hiibel -- who claimed he had done nothing wrong and was simply the victim of mistaken identity -- believed he had no obligation to tell the officer his name.

But the Court found that neither Hiibel's Fourth Amendment right against unreasonable searches and seizures, nor his Fifth Amendment right against self-incrimination, was violated. (The high court's ruling)

In so doing, the Court took some liberties in construing its own past precedents, prompting four justices to dissent. But despite its technical deficiencies, the Hiibel decision does not threaten civil liberties.

Nor does it, as some commentators have suggested, pave the way for a system of compulsory national identification cards. Moreover, even if it did, such a system would not necessarily be unwise or unconstitutional.

Background on the Fourth Amendment

The Fourth Amendment prohibits "unreasonable searches and seizures," and authorizes search and arrest warrants only upon a showing of "probable cause" that a crime has been committed. This language has been construed by the Supreme Court to require that in most circumstances, the police must obtain a warrant for a search or an arrest.

But there are exceptions to the warrant requirement, including for "exigent circumstances": where an emergency prevents the police from obtaining a warrant from a neutral magistrate, they may perform a warrantless search or arrest -- if the facts known to them establish probable cause to believe that a crime has been

committed.

In addition, there is an exception to the "probable cause" requirement for a warrantless search or arrest. In the 1968 case of Terry v. Ohio, the Court held that police could "stop and frisk" a suspect on "reasonable suspicion" that he had already committed, or was about to commit, a crime. Such a pat-down search, of course, would be warrantless.

It has been generally understood that the "reasonable suspicion" standard is qualitatively and quantitatively lower than the "probable cause" standard that applies to full searches and arrests. Why was a lesser standard appropriate? The Court reasoned that because a stop and frisk subjects the suspect to a lesser forfeiture of his liberty, it could be justified by a lesser burden of proof -- hence, the "reasonable suspicion" standard.

Later, in 1979, the Court refused to go further, and establish a standard even lower than "reasonable suspicion." In Brown v. Texas, it held that absent reasonable suspicion of criminality, the police might not simply stop people on the street and ask for their names.

The limited issue resolved in Hiibel

The issue in Hiibel was whether someone who had been lawfully subject to a Terry stop -- that is, someone as to whom the police did have reasonable suspicion -- can also be required to provide his name to the police officer who stopped him.

The justices answered yes. But they divided 5-4 on the issue.

All nine justices agreed that a person who is not behaving in a way that gives rise to an articulable suspicion of criminality may not be required to state his name or show identification. All nine justices also agreed that under the Court's prior precedents, the police could ask a person who has been subject to a Terry stop for his name.

The only disagreement that split the justices -- and the specific issue the case addressed -- was whether the person could be prosecuted for failing to answer that question.

The dissenters had precedent on their side

Drawing upon the Supreme Court's prior precedents, the dissenting justices -- led by Justice Breyer -- noted that the Court had previously stated that a person detained for a Terry stop "is not obliged to respond" to a police request that he identify himself.

These dissenters acknowledged that the court's prior statements were "technically dicta." ("Dicta" is a lawyer's term for non-binding asides that are included in a judicial

opinion in the course of resolving other issues.) However, the dissenters opined that such "strong dicta" were by now part of the law.

The dissenters also thought that the suspect's right to decline to provide his name was part of the original justification for permitting Terry stops on less than probable cause. The idea behind the lower "reasonable suspicion" standard, they pointed out, was that a Terry stop was a relatively minimal incursion on liberty. But a requirement that the suspect give his name -- and the reality that he would be prosecuted if he did not -- is an additional intrusion.

A fourth dissenter, Justice Stevens, thought that requiring a Terry detainee to answer questions violated his Fifth Amendment right against self-incrimination. Citing cases such as Miranda v. Arizona, Justice Stevens insisted that the Court's own precedents recognized that the right against self-incrimination is not just a trial right.

If the right applies at the police station, as the Miranda decision says it does, Justice Stevens said, surely it applies at a Terry stop, as well. And if it applies at a Terry stop, then the subject has a right not to give his name; after all, giving one's name to a police officer investigating a possible crime puts one at risk of prosecution. It is thus compelled self-incrimination.

The majority's response

How did the majority respond to the dissenters? Speaking for the Court, Justice Kennedy pointed out that prior dicta were only dicta, after all. He noted that the Court had never formally decided the question at issue: whether a suspect must respond to a police officer's request that he identify himself.

Turning to that question, Justice Kennedy said that in many cases, knowing the identity of a Terry detainee would be of great value to the police in evaluating the situation. Consider Hiibel's case itself. There, the police had received a call describing an assault. Knowing the suspect's identity would enable them to know whether to make a full arrest, or to release him and continue to look for someone else. According to the majority, the same factors that make it reasonable for the police to ask a Terry detainee his identity make it reasonable to require that he answer.

Interestingly, Justice Kennedy's response to Justice Breyer's Fourth Amendment objections made his argument somewhat more vulnerable to the Fifth Amendment objections posed by Justice Stevens. Suppose one agrees with Justice Kennedy that the requirement that a suspect identify himself is indeed justified on the ground that his identity is relevant to determining whether he has engaged in criminal conduct. On that assumption, the requirement to identify oneself (or be prosecuted) appears to be a requirement that the suspect not just identify himself but in the process incriminate himself -- in violation of the Fifth Amendment right against self-incrimination.

Justice Kennedy and the majority nonetheless attempted to thread the needle between the Fourth and Fifth amendments -- contending that compulsory identification fell in the territory between the two, and thus violated neither. They argued that a suspect's identity could be sufficiently relevant to make the requirement that he reveal it "reasonable" within the meaning of the Fourth Amendment, but could still not be so very relevant as to make it "incriminating" within the meaning of the Fifth Amendment.

The majority acknowledged that there might be rare cases where the mere statement of a person's name -- in connection with other information known to the police -- was so incriminating as to privilege a Terry detainee in refusing to identify himself. But the majority thought that in the typical case, and in Hiibel's case, there was no basis for Fifth Amendment protection.

The implications of Hiibel

Civil libertarians may worry that in the wake of Hiibel, the government will require all persons to carry formal identification papers with them or risk arrest. However, as noted above, the Hiibel majority took care not to disturb precedents like Brown v. Texas. Accordingly, it is clear that even after Hiibel, the Supreme Court will protect the right to remain anonymous of persons who are not suspected of any criminal wrongdoing.

To be sure, the reasonable suspicion standard is not as protective as the probable cause standard. But it is hardly toothless. On any given day, the overwhelming majority of the population takes no action that gives rise to reasonable suspicion for the police to stop and frisk.

Moreover, the fear that the Terry stop power will be converted into a police power to identify people seems backwards. A stop and frisk -- in which the police physically accost and pat down a person -- is more intrusive than a request for identification.

So if, as Sucher and others claim, the reasonable suspicion standard is toothless, then for thirty-six years it has been causing more serious privacy invasions than anything authorized by the Hiibel decision.

The coming debate over ID cards and privacy

Nonetheless, civil libertarians have good cause to see Hiibel as one step down a road -- albeit a long road -- toward allowing the government to require all persons to carry official identification, including a national identification card. And such a requirement would undoubtedly sacrifice privacy.

The ability to proceed about their daily business anonymously gives people a sense of

privacy. To paraphrase the old "Cheers" song, many of us want to go to a place where nobody knows our name.

But the sacrifice of privacy that a system of national identification cards would entail may well be justified if it provides greater security. Already, we as a society routinely produce identification to enter government buildings, sports arenas, and private office buildings.

Why is the requirement of producing identification before entering these venues tolerated? Presumably not because the edifices deserve special protection. Rather, those responsible for our security understand that terrorists target places in which large numbers of people congregate.

But as shown by bombings of a discotheque and private residences in Bali and Riyadh, respectively, terrorists will attack "soft targets" when more obvious targets are hardened. And that means that if we want to protect not just buildings but people, we will want the police and FBI to be able to identify possible terrorists wherever they are.

In other words, given the nature of the threat, the reasonableness of identification requirements in selected public venues entails the reasonableness of identification requirements in general.

The real constitutional problem with a system of national identification cards is not that they sacrifice privacy for security. The Fourth Amendment sensibly makes the legality of a search or seizure turn on whether it is reasonable, and few would deny that a "reasonableness" standard must balance costs and benefits.

Likewise, although the Fifth Amendment's prohibition on compelled self-incrimination appears to speak in absolute terms, as with any constitutional provision, there is sufficient wiggle room in the doctrine to allow an interpretation that would permit a generally applicable requirement that people carry identification.

The real problem with a system of national identification cards is the potential for abuse. Government officials armed with detailed information about individuals' movements could use that information for private gain, personal vendettas, and mere prurient interest.

Indeed, as biometric identification systems advance, law enforcement officials will be able to obtain this information without any sort of national identification card and, given longstanding interpretations of the Fourth and Fifth amendments, without constitutional constraint.

Thus, whether or not we move towards a system of national identification cards, and quite apart from any implications of the Hiibel decision, we need to find institutional

mechanisms to ensure that the government does not abuse information about individuals' movements.

Strong statutory prohibitions backed by judicial review would comprise one such mechanism, so long as we can trust the courts to stand up to executive overreaching. Supreme Court decisions in the Guantanamo Bay and "unlawful combatant" cases in the coming weeks will be a good test of that proposition.

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