The Right to Resist Questioning During an Investigative Stop After *Hiibel v. Nevada*
Including a discussion of application to local enforcement legislation

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Some Context on the Hiibel Decision

(excerpted from an Associated Press Report by Gina Holland, June 21 2004)

On Monday July 19, a sharply divided Supreme Court ruled Monday that people who refuse to give their names to police can be arrested, even if they've done nothing wrong. The court previously had said police may briefly detain people they suspect of wrongdoing, without any proof. But until now, the justices had never held that during those encounters a person must reveal their identity.

The court's 5-4 decision upholds laws in at least 21 states giving police the right to ask people their name and jail those who don't cooperate. The loser in Monday's decision was Nevada cattle rancher Larry "Dudley" Hiibel, who was arrested and convicted of a misdemeanor after he told a deputy that he didn't have to give out his name or show an ID. The encounter happened after someone called police to report arguing between Hiibel and his daughter in a truck parked along a road. An officer asked him 11 times for his identification or his name. Hiibel repeatedly refused.

The court ruled that forcing someone to give police their name does not violate their Fourth Amendment protection from unreasonable searches. The court also said that, in Hiibel's case, name requests do not violate the Fifth Amendment right against self-incrimination, but that Fifth Amendment rights could be invoked in other occasions where there is a more realistic fear of self-incrimination.

The ruling was a follow up to a 1968 decision (*Terry v. Ohio*) that said police may briefly detain someone on reasonable suspicion of wrongdoing, without the stronger standard of probable cause, to get more information. Justices said that during such brief detentions, known as Terry stops after the 1968 ruling, people must answer questions about their identities.

Summary of the Majority Opinion on *Hiibel v. Nevada*:

During a valid investigative stop (established under *Terry v. Ohio*), a police officer can require persons to identify themselves if they have "reasonable suspicion" that this information is pertinent to an investigation they are conducting in the course of enforcing a clear and specific state law. Individuals who refuse to respond may be detained and arrested by the enforcement officers.

Important Note: the authority to detain and arrest people in the context of an investigative stop distinguishes the *Hiibel v. Nevada* decision from the earlier, *Terry v. Ohio* decision. It is also significant that this expansion of enforcement powers is justified by appealing to the authority of state-level statutes, rather than attempting to modify the federal precedent established under *Terry v. Ohio*. See below for details.

For the complete decision see:
http://wid.ap.org/documents/scotus/040621hiibel.pdf

Limits of the Scope and Consequences of Investigative Stops under Hiibel v. Nevada:

Please note: The goal of this review is to outline civil liberties (e.g. the right to refuse questioning) that remain intact pace the Hiibel decision. In some instances, it refers to relevant legislation (or aspects of relevant legislation) that were not directly addressed by the court in the Hiibel decision but are still consistent with the majority opinion.

- ***Terry v. Ohio* only authorizes police officers to question possible suspects (who do not meet the criterion of "probable cause") within circumscribed limits.** Under *Terry v. Ohio*, the person stopped for investigation "is not obliged to answer, answers cannot be compelled, and refusal to answer furnishes no basis for arrest…" . As a result, *Hiibel v. Nevada* only refers to *Terry v. Ohio* to establish the validity of investigative stops, but it cannot and does not use *Terry v. Ohio* to authorize the detention or arrest of individuals who refuse to respond.

- **There must be at least "reasonable suspicion" for the stop itself** as established under *Terry v. Ohio*. The majority opinion on *Hiibel v. Nevada* concurs that investigative stops that cannot demonstrate reasonable suspicion or that are based on the ambiguous or over-broad enforcement of existing law violate the Fourth Amendment principles affirmed under *Brown v. Texas*.

- **Individuals are only obligated to respond to police officer questions (under threat of detention or arrest for non-cooperation) where there is a "stop and identify" statute in that particular state.** This is the unique "contribution" of *Hiibel v. Nevada*. It authorizes local police to arrest or detain persons who refuse questioning in states that have "stop and identify" laws. These include Alabama, Arkansas, Colorado, Delaware, Florida, Georgia, Illinois, Kansas, Louisiana, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, Nevada, North Dakota, Rhode Island, Utah, Vermont, and Wisconsin.

- **The information that police officers are authorized to obtain under "stop and identify" statutes varies from state to state.** It is important to note that many "stop and identify" statutes place limitations on the kinds of information that police may obtain from private persons. In Nevada, for example, local police were only authorized to obtain an individual's name but not personal or official identification (i.e. drivers license, social security number, passport, credit cards, misc. proof of local residence or picture I.D. etc.).

Summary

Police only have the authority to arrest or detain non-cooperating persons in the context of a valid investigative stop where 1) there is at least reasonable suspicion for the stop 2) where there is an existing "stop and identify" statute in the state and 3) where the police are asking for information that they are authorized to obtain under the "stop and identity" statute.

Application to Issues Concerning Local Enforcement of Immigration Laws

The Hiibel decision appears to set a precedent that favors proponents of local enforcement legislation, but it still sets definite limits on the scope of police authority to detain or arrest individuals for non-response.

Most significant, the decision affirms that police officers only have a right to investigate individuals in the course of a clearly defined criminal investigation and that there must be at least reasonable suspicion for the investigation.

These parameters are much narrower in scope than the broad authority proposed by local enforcement legislation (namely CLEAR and HSEA) which would give local police authority to detain anyone suspected of violating criminal or civil immigration law.

See http://www.nationalimmigrationproject.org/GetInvolved/Get%20Involved.htm for details.

Hiibel v. Nevada, in contrast, only gives police the authority to detain suspects under existing state legislation (rather than providing a wide-ranging federal mandate for this enforcement practice). Furthermore, the reliance on state legislation to authorize the arrest of non-cooperating suspects, also implies that police officers are investigating violations of state not federal law—which gives them much less ground to question "suspected noncitizens" about violations of federal immigration laws (civil or criminal).

Some possible exceptions to this are occasions when information concerning immigration violations are directly relevant to an investigation of a violation of state law or if the police are operating under an MOU allowing collaboration between federal and state agencies (as exists in Alabama and Florida).

The majority opinion in *Hiibel v. Nevada* also recognizes that, in certain circumstances, individuals may have the right to resist questioning on 5th amendment grounds, if answering a question might incriminate them in a matter that is unrelated to the specific focus of the investigation.

[Excerpt from the Supreme Court decision] *"Still, a case may arise where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense. In that case, the court can then consider whether the privilege applies, and, if the Fifth Amendment has been violated, what remedy must follow."*

Since the scope of these 5th amendment rights is speculative at present, it is difficult to determine how they might apply to the disclosure of immigration status as it pertains to local enforcement. Most significant, it appears that the right to resist questioning on 5th amendment grounds does not disqualify the suspect from being arrested under state-level "stop and identity" statutes.

As a result, it is likely that a person may have to risk arrest in order to assert their 5th amendment rights to avoid self-incrimination. This means that a noncitizen who does not want to identify themselves for immigration reasons may have to choose being arrested under state-level "stop and identify" statutes, rather than risk disclosing information that could lead to their deportation.

Precedent set by the *Matter of Guevarra* and existing federal immigration law (8 USC 1375) indicates that a person can choose to remain silent on questions concerning their nationality or legal status without incriminating themselves. Furthermore, persons should be able to give a non-specific explanation for why they are refusing to cooperate on 5th amendment grounds without providing information that could lead them to be prosecuted for the offense.

It also bears noting that Hiibel's 5th amendment argument was denied by the court because the majority found that Hiibel had no practical reason to believe that disclosing his name would be self-incriminating (in this regard, Hiibel's refusal was based on an abstract assertion of his 5th amendment rights rather than a motivation to avoid prosecution for a specific offense).

On the otherhand, a noncitizen who fears that compulsory identification could trigger deportation proceedings could have a much stronger argument on 5th amendment grounds (assuming that this information is not pertinent to the specific investigation the police are conducting). Similar legal strategies were recently used by participants in the Immigrant Workers Freedom Ride to avoid divulging self-incriminating information about their legal status at internal border

checkpoints. For details on this legal strategy, see the following article which originally appeared in the December 2003 edition of the National Immigration Project Newsbulletin. http://www.nationalimmigrationproject.org/PRFreedomRide.htm

It bears emphasizing, however, that a noncitizen is in a much better position to avoid adverse immigration consequences by remaining silent, rather than divulging details of their immigration status and attempting to contest how this information is used "after the fact". Although DHS officers are not authorized to use information that they have illegally obtained, there is currently no precedent which challenges their capacity to use information gathered by local police which violates 5th amendment rights. Although this can certainly be contested, it is likely that if self-incriminating information is divulged, the DHS will likely take action (regardless of whether the noncitizen attempts to seek redress for the violation in the criminal or civil court system).

In conclusion, *Hiibel v. Nevada* does not appear to broaden the existing authority of police officers to question or detain persons suspected of civil immigration violations (and implicitly limits such questioning only to matters where this information is pertinent to an ongoing criminal investigation). It also provides a window of opportunity for noncitizens to avoid disclosing their identity on 5th amendment grounds. This does not protect them from the expanded power to arrest and detain that has been authorized by the decision. It can, however, be used to protect them from facing the prospect of deportation if they find themselves being compelled to (either directly or indirectly) provide information about their legal status in the context of an investigative stop.