Liberty Tree

Vol. 22, No. 10 — October 2020

Your Name or Your Liberty?

If you give up the one attempting to preserve the other, you have already lost.

Don't talk to the police. That's the advice of James Duane, a professor of law at Regent Law School in Virginia Beach, Va., considered an expert on the Fifth Amendment. A YouTube video of his presentation on this issue, uploaded in 2012, has been viewed around 9 million times since then.[1] As Duane says, "Too many people mistakenly assume that anyone who asserts his right to remain silent must have 'something to hide' or must be guilty of something." But the truth is that an innocent person can, through ignorance of the law and the fact that the police are allowed to lie, find themselves in a situation where innocent statements are used to convict them of crimes they did not commit.

In 2015, however, Duane, in response to an inquiry from a newspaper reporter, claimed that the one thing you must give the police is your name. In an email to Maryland's *Carroll County Times,* he stated:

James Duane.

> The Constitutional right to remain silent is vast, and it gives you a right to refuse to answer any request for information that carries a reasonable probability that it could be used to convict you, but the right is limited. ... [E]leven years ago, the Supreme Court of the United States specifically ruled that a request from the police for a suspect to identify himself, assuming that the request was otherwise proper under state law, would not be a violation of the Fifth Amendment, because there is so little chance that such information, by itself, would pose any reasonable probability that it could lead to a conviction of that person.[2]

The Supreme Court ruling to which Duane referred is *Hiibel v. Sixth Judicial District of Nevada*, 542 U.S. 177 (2004). That court ruled that "suspects" are supposed to identify themselves to police, according to Duane. This is so, because there is "so little chance" that a name could lead to a conviction.

Duane, who published a book entitled *You Have the Right to Remain Innocent* in 2016, failed in the above cited quote to explain the *full extent* of the Supreme Court's ruling. Contrary to his statement, people *do* have a right to remain silent on their name or "identity." Further, note that Duane stated that a person is required to give a name if the "request was otherwise proper under state law." Twenty-seven states have *no* state law requiring anyone to give their name or any other identifying information to the police.[3]

But even in the States that do have such a stat-

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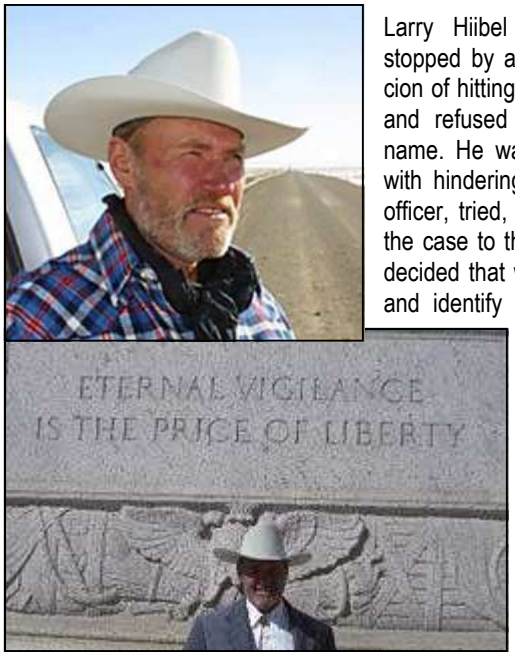

Larry Hiibel (L, circa 2004),, was stopped by a deputy sheriff on suspicion of hitting a woman (his daughter), and refused to give the deputy his name. He was arrested and charged with hindering or obstructing a police officer, tried, and fined $250. He took the case to the Supreme Court, which decided that where a state has a stop and identify law, such law does not contravene the Fourth Amendment. However, the Supreme Court decided that the law could contravene the Fifth Amendment if the person who was asked their name had a "real and appreciable" danger of incriminating themselves.

1. If Google's reported metrics can be believed.
2. "Jane Doe released from jail," *Carroll County Times,* Sept. 2, 2015.
3. Missouri, one of the 27, does have such a statute effective in Kansas City.

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ute, do you have to give your name to the police or suffer arrest? The Supreme Court did not decide that question, but instead stated that the Fifth Amendment does allow a person to refuse if disclosure of his name presented a reasonable danger of incrimination. We will explore why this reasoning is faulty below.

Meanwhile, those states which have so-called "stop and identify" statutes with varying penalties -- from arrest to fines for failure to give a name when asked by police, -- are violating the Fifth Amendment rights of persons every day. As the Fifth Circuit stated in *Miller v. U.S.,* 230 F.2d 486 (1956): "The claim and exercise of a constitutional right cannot ... be converted into a crime." Yet this is just what those states are doing.

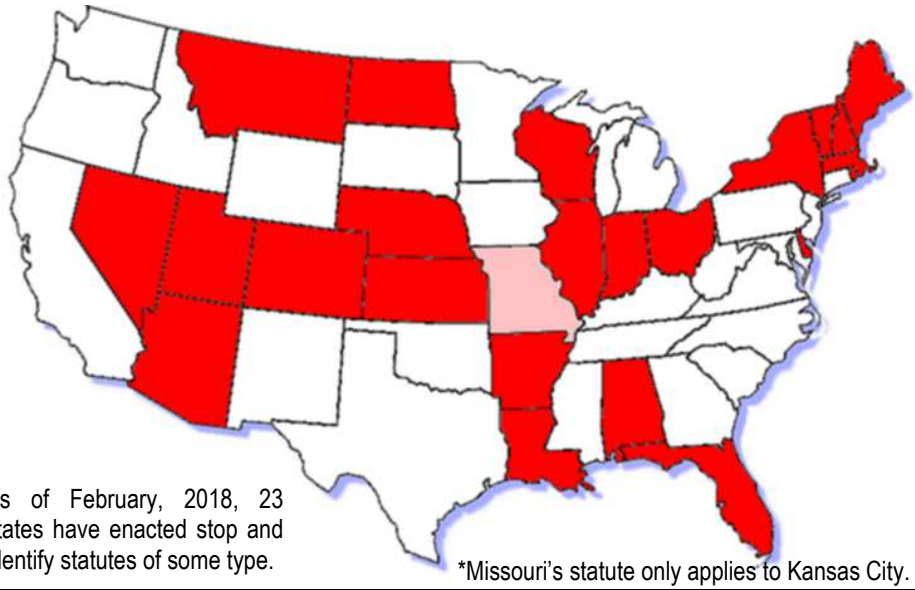
Many legal experts, and judges, have taken the *Hiibel* ruling to mean that no person anywhere at any time has a right to refuse to give a name or otherwise "identify" themselves by giving up information such as an address or birth date. By deliberately misreading the Supreme Court's ruling, such tyros justify their own efforts to compel citizens to testify against themselves. The Supreme Court, however, has never said that it is allowable to compel persons to give up such information.

The *Hiibel* case

In 2000, Larry Hiibel was arrested by a sheriff's deputy in Humboldt County, Nevada because he refused to give his name to the deputy. The sheriff's office had received a report that a man had assaulted a woman in a GMC truck on Grass Valley Road. The deputy found the parked truck, and approached Hiibel, who was smoking a cigarette beside the truck. Hiibel's daughter was inside the truck. The deputy asked Hiibel for identification, and Hiibel refused eleven times, asking him what crime he was being accused of. The deputy arrested him, charged him with "willfully resist[ing], delay [ing], or obstruct[ing] a public officer in discharging or attempting to discharge any legal duty of his office."

Hiibel was convicted of this bogus charge, and fined $250. He fought the case all the way to the Supreme Court. Numerous parties filed amicus, *i.e.,* "friend of the court," briefs in support of Hiibel's right to remain silent, and amicus briefs filed on the side of law enforcement naturally endorsed increased tyrannical powers for police. The government side justified itself, of course, by stating that knowing a name was essential to officer's safety -- a person they accosted might be wanted or violent! -- and a name would allow them to search databases for the "identity" of the person. Of course, such checks require entering a name into a database search and waiting for a result, something that takes time and requires the officer to take his attention *off* a "suspect," during which time the police officer might well be attacked. Clearly, requiring a name does little to enhance an officer's safety; his training and observational skills should be enough. In Hiibel's case, he repeatedly told the officer just to arrest him if he had grounds for an arrest, hardly the response of a dangerous criminal. Yet the Supreme Court, with the tyrant Justice Kennedy authoring the opinion, found this justification useful in declaring such state laws did not involve any violation of the Fourth Amendment.

States with "stop and identify" statutes



As of February, 2018, 23 states have enacted stop and identify statutes of some type.

*Missouri's statute only applies to Kansas City.

For a quick reference to the law in your state — which may require giving up even more information than just a name, visit www.ilrc.org/sites/default/files/resources/stop_ identify_statutes_in_us-lg-20180201v3.pdf. This provides a summary of the laws and identifies the exact laws at issue (convenient for doing more extensive research).

An absurd requirement

While stating that the Fourth Amendment was not implicated in a stop-and-identify statute, since requiring a name was not part of a search or seizure forbidden under the Fourth Amendment, the Kennedy opinion punted on the Fifth Amendment question. First, the Court refused to find that a suspect's statement of a name was not testimony. Instead, Kennedy said, "Stating one's name may qualify as an assertion of

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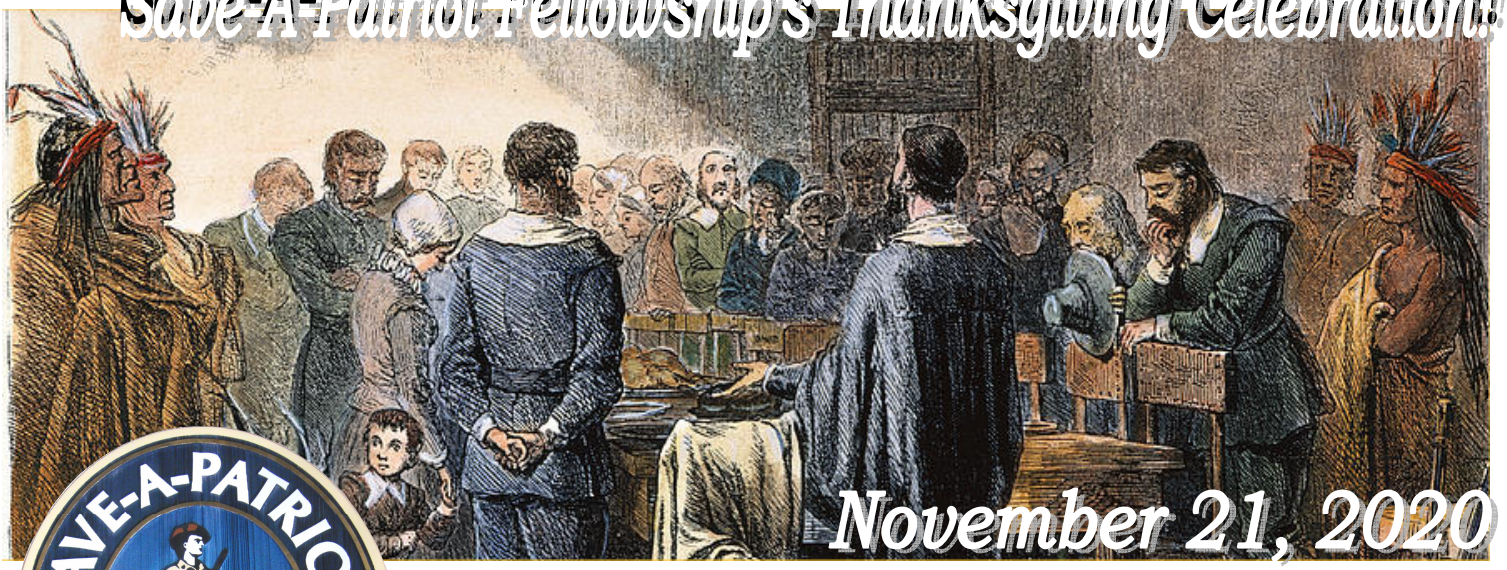

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fact relating to identity ... Production of identity documents might meet the definition as well." *Hiibel,* at 189. Despite acknowledging that stating a name *is* testimony to a fact related to one's own identity, the Supreme Court decided that Hiibel had no right to assert the Fifth Amendment with respect to telling his name because the record did not show that he was worried about self-incrimination. Instead, Kennedy said, "[a]s best we can tell, [he] refused to identify himself only because he thought his name was none of the officer's business. Even today, [Hiibel] does not explain how the disclosure of his name could have been used against him in a criminal case." *Id*., at 190.

Does this mean that Hiibel was required to tell the officer he was worried that if he gave his name, the name would lead to other information which might incriminate him? It should be obvious how absurd this idea is: it amounts to a requirement to tell the police officer you're afraid of being convicted for a crime you committed. Wouldn't that, in turn, constitute compelled testimony against yourself? And wouldn't the officer likely see this as providing a level of reasonable suspicion to arrest you just to take your fingerprints or DNA to link you to a crime?

Applying the wrong standard

"The Fifth Amendment prohibits only compelled testimony that is incriminating," said Kennedy. "See *Brown v. Walker*, 161 U.S. 591, 598 (1896) (noting that where 'the answer of the witness will not directly show his infamy, but only *tend* to disgrace him, he is bound to answer')." *Hiibel*, at 189-190.

The opinion that a man has no right to remain silent when requested to give a name is based on a line of cases which concern the assertion of the Fifth Amendment when a person *is already a compelled witness* in another case. In such a case, it has been held, a claim of Fifth Amendment privilege must establish "reasonable ground to apprehend danger to the witness from his being compelled to answer ... [T]he danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things ..." *Hiibel,* at 189-190.

Notably, the opinion from *Brown v. Walker* was actually stated, not in an American case, but in an 1861 English case, *Queen v. Boyes*, 1. B.S. 311, 330. In England, subjects are said to owe their testimony to the king, thus a witness compelled to testify in another person's case can be forced to testify only when he is not in 'real danger' of incriminating himself.

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In America, the Sixth Amendment provides that a criminal defendant will have the assistance of the courts in compelling witnesses to appear in his defense. In such a case, the standard announced in *Queen v. Boyes* has been held to apply.[4]

Even then, however, a witness has a right not to furnish a link in a chain of evidence that can be used against him. As Kennedy concluded in his opinion in *Hiibel:*

> 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. *We need not resolve those questions here.*" *Id.,* at 191. (emphasis added)

Thus, where the person refuses to give a name in a stop-and-identify state, he is still subject to arrest, and only a court will determine whether or not such person had a real and appreciable apprehension that his name would be used against him in a criminal matter. Arrest first, determination on compelling your name later.

How is a judge supposed to make the determination that you must give your name? Mustn't they first compel you to confess that your name will lead to incriminating evidence against you? Wouldn't that lead to the very real possibility that they would issue warrants for other kinds of evidence, too, like fingerprints and DNA, on the strength of your confession? Wouldn't that first confession then constitute a "link in a chain of evidence" used against you?

As should be evident by now, the Kennedy opinion in *Hiibel* is terribly flawed and its cavalier treatment of the Fifth Amendment will lead to other ways you can be compelled to confess your guilt.

How the Supreme Court screwed up

The *Hiibel* error results from treating a criminal suspect as if he were a compelled witness in another person's case. This is a fundamental mistake.

The Fifth Amendment has largely been "interpreted" through (a) defendants trying to suppress testimony already confessed in circumstances where defendants were illegally interrogated, and (b) through civil and criminal cases where a witness seeks not to testify on particular matters, as discussed above. Relatively little case law addresses the situation of a person like Hiibel, who simply refuses to answer any questions from the start.

As a result, the Fifth Amendment *right* not to be compelled to be a witness against yourself – that is, to remain silent – has too often been characterized by the courts as a *privilege* against self-incrimination. But there is a critical difference — the right applies only to a criminal defendant, while the latter applies to *all* other witnesses.

Although testifying to a name *may* seem innocuous, it is evident that giving such information constitutes *testimony* and such testimony cannot be compelled from an accused. The proof of this is found in every courtroom, since the first testimony requested of every witness is to state their name for the record. But the right of a criminal suspect or defendant not to testify against themselves, even to a name, is so widely understood and practiced that it is hardly ever mentioned: everyone *knows* a criminal defendant cannot be compelled to take the stand at all. He is "identified" instead by witnesses who, upon request, point him out to the jury

This right not to testify against yourself at all will be lost if we do not assert it in encounters with police. Already, several of the "stop-and-identify" states have laws on the books which require a suspect to confess their address and where they are going, even their birth date. Clearly, this information can be used to search databases available to police to determine if you are driving without a license or with a suspended license, or if you could be linked to another crime. If all of these questions, too, are deemed innocuous and can be compelled, the very thing that James Duane warns of — answers to seemingly innocuous questions can often convict an *innocent* person — will come to pass many times over.

4. For an important discussion on this subject, see "The absolute right to remain silent," *Liberty Tree*, April 2010.

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