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Constitutional Law - Self-Incrimination: The United State Supreme Court Upholds Requirement to Provide Identification during a Lawful Search and Seizure - Hiibel v. Sixth Judicial District Court of Nevada

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CONSTITUTIONAL LAW—SELF-INCRIMINATION: THE UNITED STATES SUPREME COURT UPHOLDS REQUIREMENT TO PROVIDE IDENTIFICATION DURING A LAWFUL SEARCH AND SEIZURE

Hiibel v. Sixth Judicial District Court of Nevada, 542 U.S. 177 (2004)

I. FACTS

While investigating a report of an assault, a deputy sheriff for Humboldt County, Nevada, encountered a man and woman stopped along the road.[1] The report indicated that a man was assaulting a woman in a truck on that road.[2] The deputy observed skid marks behind the truck, causing him to conclude that the vehicle had come to an abrupt stop.[3] The unknown man was standing next to the truck and appeared intoxicated.[4] Acting under authority given by Nevada statute, often referred to as a "stop and identify" statute, the deputy requested the man's identification.[5] The man refused to identify himself and became agitated.[6] The deputy's request was refused eleven times before the deputy warned the unknown man that he would be arrested if he continued to refuse to identify himself.[7] When the unknown man still refused to comply, the deputy placed him under arrest.[8]

After being arrested, the authorities identified the unknown man as Larry Dudley Hiibel.[9] Mr. Hiibel was charged with preventing the deputy from carrying out his duties under Nevada's "stop and identify" statute.[10] The statute provides that "[a]ny peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime."[11] The detention must be only for the purpose of identifying the individual and

1. Hiibel v. Sixth Jud. Dist. Ct. *ex rel.* County 59 P.3d 1201, 1203 (Nev. 2002).
2. *Id.* at 1203.
3. *Id.*
4. *Id.*
5. *Id.* (citing NEV. REV. STAT. § 171.123 (2003)).
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. NEV. REV. STAT. § 171.123 (2003).

there is no requirement that any other questions be answered by the person being temporarily detained.[12]

Mr. Hiibel was convicted for failing to comply with Nevada Revised Statute (NRS) Section 171.123.[13] In a four-to-three opinion, the Nevada Supreme Court rejected Hiibel's Fourth Amendment claim on the basis that the Nevada statute sufficiently balanced the privacy rights of individuals against the safety needs of law enforcement.[14] The Nevada court stated that the Fourth Amendment only protected against unreasonable searches and seizures.[15] The court held that it was reasonable to suspect Mr. Hiibel of criminal conduct given the report of domestic violence in the vicinity.[16] As a result, the court believed the interest of law enforcement in investigating criminal conduct outweighed the Fourth Amendment concerns.[17] However, the court did not address the question of whether there was a Fifth Amendment violation.[18] The defendant appealed the decision on Fourth and Fifth Amendment grounds.[19]

The United States Supreme Court granted certiorari.[20] The first issue before the Court was whether requiring an individual to identify themselves during an investigatory stop was an unreasonable search and seizure.[21] The Court held that Nevada's "stop and identify" statute met the requirements of the Fourth Amendment because the request for identification was directly related to the reason for the stop.[22] The second issue before the Court was whether compelled self-identification during the course of a valid investigatory stop amounted to self-incrimination.[23] The Court *held* that Nevada's "stop and identify" statute did not violate Hiibel's Fifth Amendment rights because there was no reasonable basis for him to fear that criminal prosecution would be a result of him providing his identification.[24]

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12. *Id.*
13. *Hiibel*, 59 P.3d at 1203.
14. *Id.* at 1203-07.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*; *see also* U.S. CONST. amend. V (stating "[n]o person . . . shall be compelled in any criminal case to be a witness against himself").
19. Hiibel v. Sixth Jud. Dist. Ct. of Nev., 124 S. Ct. 2451, 2456 (2004).
20. Hiibel v. Sixth Jud. Dist. Ct. of Nev., 540 U.S. 965 (2003).
21. *Hiibel*, 124 S. Ct. at 2457.
22. *Id.* at 2458.
23. *Id.* at 2460.
24. *Id.* at 2461.

II. LEGAL BACKGROUND

The Fourth Amendment prohibits unreasonable searches and seizures.[25] The Supreme Court has held that police stops made because of a reasonable belief of criminal activity are not in violation of the Fourth Amendment.[26] The Supreme Court determines the reasonableness of the intrusion by balancing the interests of the government against the Fourth Amendment rights of the individual.[27] Statements made to law enforcement officers are another aspect of investigatory stops.[28] To be in compliance with the Fifth Amendment's prohibition against self-incrimination, testimonial statements made during a detention must not be compelled or incriminating.[29]

Nevada's "stop and identify" law calls for an individual stopped under reasonable suspicion of criminal activity to identify themselves upon the request of a police officer.[30] Further, Nevada's statute allows the officer to detain the individual until they comply with the request, but no longer than sixty minutes.[31] However, the "stop and identify" statutes of other states vary in their identification requirements, ranging from demanding to see a driver's license[32] to requiring a recitation of the individual's name and

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25. U.S. CONST. amend. IV. The Fourth Amendment states, "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . but upon probable cause." *Id.*

26. Terry v. Ohio, 392 U.S. 1, 21-22 (1968).

27. Delaware v. Prouse, 440 U.S. 648, 654 (1979).

28. United States v. Hubbell, 530 U.S. 27, 34-38 (2000).

29. *Id.*

30. Hiibel v. Sixth Jud. Dist. Ct. *ex rel.* County, 59 P.3d 1201, 1203 (Nev. 2002) (citing NEV. REV. STAT. § 171.123 (2003)). The statute reads:

> 1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime . . .
>
> 3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.
>
> 4. A person must not be detained longer than is reasonably necessary to effect the purposes of this section, and in no event longer than 60 minutes. The detention must not extend beyond the place or the immediate vicinity of the place where the detention was first effected, unless the person is arrested.

NEV. REV. STAT. § 171.123(1)(3)(4) (2003).

31. *Id.*

32. MONT. CODE ANN. § 46-5-401 (2003). The statute provides, "A peace officer who has lawfully stopped a person or vehicle under this section may: (a) request the person's name and present address and an explanation of the person's actions and, if the person is the driver of a vehicle, demand the person's driver's license . . . " *Id.* § 46-5-401(2)(a).

address.[33] The consequences of non-compliance vary by state but can be as severe as jail time[34] or as minimal as a fine.[35]

A. THE REQUIREMENTS OF THE FOURTH AMENDMENT

The Fourth Amendment states,

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable search and seizures, shall not be violated, and no [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[36]

Current "stop and identify" laws find constitutional footing in *Terry v. Ohio*.[37] In *Terry*, a police officer on patrol observed two men taking turns walking past a store window.[38] The men each walked past the window nearly a dozen times, briefly conferring with each other after each trip.[39] The officer followed the men on the belief that they were planning a robbery.[40] The officer walked up to the men and asked them to provide their names.[41] When their responses were unintelligible, the officer patted down one of the men and located a pistol in the overcoat.[42] After a search of the other man, the officer located another pistol and charged both men with carrying a concealed weapon.[43]

The *Terry* Court upheld the conviction on the grounds that the search and seizure of the pistols was protective, and the officer had reasonable grounds to believe the men were carrying weapons.[44] The Court allowed

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33. COLO. REV. STAT. § 16-3-103 (2004). The statute provides, "A peace officer may stop any person who he reasonably suspects is committing, has committed, or is about to commit a crime and may require him to give his name and address . . . ." *Id.* at § 16-3-103(1).

34. FLA. STAT. ANN. § 856.021 (West 2003). The statute provides, "Any person violating the provisions of this section shall be guilty of a misdemeanor of the second degree, punishable as provided in [§] 775.082 . . . ." *Id.* § 856.021(3). The sentencing guideline provides "a misdemeanor of the second degree, by a definite term of imprisonment not exceeding 60 days." *Id.* § 775.082(4)(b) (West 2003).

35. VT. STAT. ANN. tit. 24, § 1983 (2004). The statute provides, "A person who refuses to identify himself or herself to the court on request shall immediately and without service of an order on the person be subject to civil contempt proceedings . . . ." *Id.* § 1983(b).

36. U.S. Const. amend. IV.

37. 392 U.S. 1 (1968).

38. *Terry*, 392 U.S. at 6.

39. *Id.*

40. *Id.*

41. *Id.* at 6-7.

42. *Id.* at 7.

43. *Id.*

44. *Id.* at 27.

the detention of an individual for further investigation out of concern for police efficacy, but required the detention to arise out of a reasonable suspicion of involvement in criminal activity.[45]

The Supreme Court defined what behavior that could form the basis for reasonable suspicion of criminal activity in *United States v. Brignoni-Ponce*,[46] by listing behaviors or situations that do not qualify as a basis for reasonably suspicious activity.[47] In *Brignoni-Ponce*, Border Patrol officers stopped a car because the occupants appeared to be of Mexican heritage.[48] Upon questioning, the officers discerned that two of the occupants were illegal aliens; the driver was charged with transporting illegal aliens.[49] The Court affirmed the lower court's decision to suppress the evidence regarding the illegal aliens because the information was gained from an illegal seizure.[50] The Court held that the Border Patrol has the power to detain people without a warrant in situations where the officer has reasonable grounds to believe the persons in question are illegal immigrants.[51] However, the Court determined that merely being of Mexican descent was not a basis for reasonable suspicion of criminal activity; therefore, the inquiry into the passenger's citizenship status was in violation of the Fourth Amendment.[52]

Avoiding unjustified detentions was a key concern of the Supreme Court's invalidation of a Texas statute in 1979.[53] In *Brown v. Texas*,[54] police officers stopped an unknown man when they observed him leaving an alley in a high crime area in the opposite direction of another man.[55] The Court held that Texas's "stop and identify" statute was in violation of the Fourth Amendment as applied to Mr. Brown since there was no basis for reasonably suspecting Mr. Brown of criminal activity at the time of his

45. *Id.* at 22; *see also* United States v. Hensley, 469 U.S. 221, 227 (1985) (stating that because criminal activity is not limited to current or ongoing conduct, past criminal activity can be used as a basis for detention under reasonable suspicion of criminal activity).

46. 422 U.S. 873 (1975)

47. *Brignoni-Ponce*, 422 U.S. at 883.

48. *Id.* at 875.

49. *Id.*

50. *Id.* at 875-76.

51. *Id.* at 877.

52. *Id.* at 886.

53. Brown v. Texas, 443 U.S. 47, 51-53 (1979); *see* TEX. PENAL CODE ANN. § 38.02(a) (Vernon 1974) (stating "[a] person commits an offense if he intentionally refuses to give his name, residence address, or date of birth to a peace officer who has lawfully arrested the person and requested the information").

54. 443 U.S. 47 (1979).

55. *Brown*, 443 U.S. at 48-49.

arrest.[56] The State argued the stop was valid because there were reasonable grounds to believe that the appellant was involved in criminal activity.[57] The Court found this claim unpersuasive, pointing to the lack of "any facts supporting that conclusion."[58] The Court held that when "a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits."[59] Later Supreme Courts have used the need for a factual basis in the creation of reasonable suspicion.[60]

Just as there must be a standard for stopping an individual, there must be a standard for actions an individual must take to be in compliance with a request for identification.[61] In *Kolender v. Lawson*,[62] a California statute provided that a person stopped on reasonable suspicion of criminal conduct must provide "credible and reliable" identification; however, the statute failed to articulate what form of proof met that requirement.[63] The Court held that the lack of a standard "for determining what a suspect has to do in order to satisfy the requirement" rendered the law void for vagueness.[64] The *Kolender* Court again expressed concern that the enforcement of the law not be on an arbitrary basis.[65]

Having established the requirements for the production of identification,[66] as well as the need for standards of compliance,[67] the Court addressed the parameters of the applicability of the Fourth Amendment in *INS v. Delgado*.[68] In *Delgado,* the Immigration and Naturalization Service

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56. *Id.* at 53; *see also* TEX. PENAL CODE ANN. § 38.02(b) (stating a person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information).

57. *Brown*, 443 U.S. at 51.

58. *Id.* at 52.

59. *Id.*; *see* Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (holding the city's vagrancy statute unconstitutional because the ordinance did not provide fair notice of prohibited conduct). In *Papachristou*, the Court determined that the Jacksonville ordinance "encourage[d] arbitrary and erratic arrests and convictions." *Id.*

60. Hayes v. Florida, 470 U.S. 811, 816 (1985). In *Hayes*, the Court held that the presence of "articulable facts supporting a reasonable suspicion that a person has committed a criminal offense" creates a situation where the police may briefly detain and question a person to ascertain their identity. *Id.*

61. Kolender v. Lawson, 461 U.S. 352, 353-54 (1983); *see also* CAL. PENAL CODE § 647(e) (West 1970) (stating that a person "who refuses to identify himself and to account for his presence when requested by any peace officer[,] . . . if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification[,]" is guilty of a misdemeanor).

62. 461 U.S. 352 (1983).

63. *Kolender*, 461 U.S. at 353-54.

64. *Id.* at 358.

65. *Id.*

66. Terry v Ohio, 392 U.S. 1, 27 (1968).

67. *Kolender*, 461 U.S. at 361.

68. 466 U.S. 210 (1984).

(INS) executed two warrants at a factory believed to employ illegal immigrants.[69] INS officials walked around the premises, questioned the workers within the factory as to their citizenship, but at no time detained or prevented workers from leaving.[70] The Court ruled that a request for identification, by itself, does not violate the Fourth Amendment except where "the encounter [was] so intimidating . . . that a reasonable person would have believed he was not free to leave."[71] The majority held that the Fourth Amendment does not apply in situations of consensual contact between police and citizens.[72] Fourth Amendment protections are activated when a citizen no longer wishes to respond to questioning and the police employ additional methods, such as detention, to obtain information.[73] *Delgado* defined the threshold inquiry for the protections of the Fourth Amendment to be available to individuals.[74] However, neither *Delgado* nor its predecessor cases provided a means of determining when it is reasonable to stop citizens and question them as to their identity.[75]

1. *Defining Reasonable*

Initially, when addressing cases involving stop and identify laws, the Supreme Court limited its determination of reasonableness to the particular facts of the case.[76] In *Brown v. Texas,* the Court addressed the reasonableness of a Texas statute that permitted the detention of a person who had been lawfully stopped but who refused to provide identification.[77] The Supreme Court held that Mr. Brown's interest in personal security and privacy outweighed the public interest of crime prevention, so his detention was not reasonable in the applicable situation.[78] However, the Court did

69. *Delgado,* 466 U.S. at 212.

70. *Id.* at 212-13.

71. *Id.* at 216.

72. *Id.*

73. *Id.* at 216-17.

74. *See id.* at 216 (discussing *Brown, Terry,* and other cases, but not providing an exact definition of reasonable).

75. *Id.*; *see also* Delaware v. Prouse, 440 U.S. 648, 655-56 (1979) (stating that a stop and detention requires a reasonable suspicion of criminal activity because the police cannot stop drivers at random to check for violations).

76. *See* Brown v. Texas, 443 U.S. 47, 51 (1979) (stating that a seizure must be based on specific, objective facts).

77. *Id.* at 49; *see also* TEX. PENAL CODE ANN § 38.02(a) (1974) (stating that refusing to provide identification or providing false identification to an officer while lawfully detained is an offense).

78. *Brown,* 443 U.S. at 52-53.

not set forth a general test for determining reasonableness beyond the facts of the case.[79]

It was not until *Delaware v. Prouse*[80] that a test for reasonableness was defined.[81] In *Prouse,* a Delaware patrolman stopped a vehicle to verify that the driver was licensed and had proper registration.[82] Upon stopping the vehicle, the officer discovered the driver was in possession of marijuana and arrested him.[83] The State argued that its interest in highway safety outweighed any Fourth Amendment considerations.[84] However, the Court ruled that the State's interest was not sufficient to justify the intrusion upon Prouse's privacy and security interests.[85] In determining the reasonableness of a seizure, the Court set forth a balancing test: weigh the legitimate government interest against the intrusion on the individual's rights under the Fourth Amendment.[86]

The Supreme Court considers the time the criminal activity occurred as one factor in the balancing test between personal rights and law enforcement interests.[87] In balancing the legitimate government interest against the intrusion on the individual's rights, past criminal conduct affects the weight the Court will give to each interest.[88] This is not to say that past criminal activity acts as a barrier in applying the balancing test in terms of reasonableness, but the governmental interest in public safety is lessened in such cases.[89] However, there can remain a strong interest in "solving crimes and bringing [sic] offenders to justice" depending on the circumstances.[90] Whether or not a seizure is reasonable will depend in part on when the criminal activity occurred.[91]

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79. *Id.* at 47-53.
80. 440 U.S. 648 (1979).
81. *Prouse,* 440 U.S. at 654.
82. *Id.* at 650.
83. *Id.*
84. *Id.* at 655.
85. *Id.* at 657.
86. *Id.* at 654.
87. United States v. Hensley, 469 U.S. 221, 228 (1985).
88. *Id.*
89. *Id.*
90. *Id.* at 229. The Court stated that government's interest remains strong "where police have been unable to locate a person suspected of involvement in a past crime . . . [p]articularly in the context of felonies or crimes involving a threat to public safety, it is in the public interest that the crime be solved and the suspect detained as promptly as possible." *Id.*
91. *Id.* at 228.

2. *Scope of Detention*

The Court has found requesting the identity of an individual during a *Terry* stop to be standard police practice.[92] The ability to question an individual's identity is an essential tool used to exercise the law enforcement interest of the government.[93]

Even when the request for identification is valid, there are limits on the scope of the seizure.[94] In *Adams v. Williams*,[95] an officer received information from a known informant that Williams was in the possession of drugs and a firearm.[96] Pursuant to this information, the officer approached William's vehicle and seized the firearm relying on the rule in *Terry*, which permits an officer to conduct a limited search to ensure the officer's safety in the course of an investigation.[97] A significant amount of drugs and a second firearm were found during the additional search.[98] The Court held that the level of information required was different to stop an individual for the purpose of ascertaining their identity than to arrest an individual.[99] The evidence was held permissible because probable cause is evaluated under "the circumstances at the time of the arrest."[100] The majority ruled that an officer's knowledge need not be based upon personal observation at the time the individual is stopped.[101] Therefore, reasonable suspicion can be formed through information gathered from reliable sources.[102] Since the gun was where the informant alleged, the Court ruled that a further search of the vehicle for the purported drugs was justified because the officer's suspicion of criminal activity was based on the informant's statements.[103]

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92. *See id.* at 229 (stating that "the ability [of the police] to stop . . . [a suspect], ask questions, or check identification in the absence of probable cause promotes strong government interest in solving crimes").

93. *Id.*

94. Adams v. Williams, 407 U.S. 143, 146 (1972).

95. 407 U.S. 143 (1972).

96. *Adams*, 407 U.S. at 144-45.

97. *Id.* at 145-46. The *Hiibel* Court stated the *Terry* rule as, "law enforcement officer's reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further."
Hiibel v. Sixth Judicial District Ct. of Nevada, 124 S. Ct. 2451, 2458 (2004).

98. *See Adams*, 407 U.S. at 145-46 (holding that an officer lacking probable cause for an arrest can still detain an individual to ascertain their identity in an attempt to gather enough information to conclude the person is more likely than not involved in criminal conduct).

99. *Id.* at 145.

100. *Id.* at 149.

101. *Id.* at 147.

102. *Id.*

103. *Id.* The fact that the officer knew and had worked with the informant in the past was considered to be important in determining the reasonableness of the officer's reliance. *Id.* at 146. The possible criminal liability of the informant for providing false information was viewed by the Court as significantly increasing the reliability of the information. *Id.* at 146-47.

The formation of reasonable suspicion of criminal activity based on outside sources is important because it allows the police to respond rapidly to threats posed by criminal activity.[104] The ability to take immediate action aids the police in preventing and solving crimes since evidence can be disposed of in the time it takes the police to gather enough firsthand knowledge to justify detaining an individual.[105]

As seen in the *Adams* decision, the Court does not require the same level of proof for conviction as it does for an arrest.[106] As a result of applying a lowered standard of the proof required to detain an individual, the Court has also held that the detention cannot be similar to a traditional arrest.[107] Thus, statements made during an investigatory stop that resembles a traditional arrest are not admissible.[108]

In *Dunaway v. New York,*[109] the Court held there must be an intervening event breaking the connection between an illegal detention and a statement for the evidence to be admissible.[110] In *Dunaway,* the police received information about a possible suspect in a homicide from a jailed informant.[111] The defendant was placed in custody based on the informant's allegation.[112] Even though the police did not believe they could attain a warrant based on the information, they detained the suspect.[113] After being driven to the police station, the defendant was placed in an interrogation room and questioned after being read his Miranda rights.[114] During questioning, the man made incriminating statements that implicated

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104. *Id.* at 148.

105. *Hensley*, 469 U.S. at 228-29.

106. *Adams*, 407 U.S. at 149. In order to detain an individual, the police need to have probable cause to believe that criminal activity may be occurring. *Id.* at 148. The formation of a reasonable suspicion allows the police to detain an individual to take further investigatory measures to determine whether a crime has or will occur. *Id.* at 149. In order to make an arrest, the police need probable cause formed by facts that indicate a crime has or is being committed. *Id.*

107. *See* Dunaway v. New York, 442 U.S. 200, 212-13 (1979) (holding the statements made while in custody to be inadmissible because they resulted from an improper detention).

108. *Id.* at 219.

109. 442 U.S. 200 (1979).

110. *Dunaway*, 442 U.S. at 219.

111. *Id.* at 202-03.

112. *Id.* The informant, an inmate awaiting burglary charges, alleged that the defendant was involved in a murder and attempted robbery. *Id.*

113. *Id.*

114. *Id.*; Miranda v. Arizona, 384 U.S. 436, 444 (1966). The Miranda rule prohibits the use of statements made during a custodial interrogation in a criminal prosecution unless they have been warned "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney." *Id.* The Court defined a custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom . . . ." *Id.*

him in the murder.[115] The case appeared before the Supreme Court to determine the issue of probable cause.[116] The lack of probable cause led the Court to reject the State's assertion that a balancing test, such as the one in *Brignoni-Ponce*, should apply.[117] The Court held that a balancing test was only applicable in situations where, unlike an arrest, there was minimal intrusion of an individual's Fourth Amendment right against unreasonable searches and seizures.[118] As a result, if a detention is "indistinguishable from a traditional arrest," the Fourth Amendment requires that the detention result from probable cause.[119]

An important factor in determining what constitutes a traditional arrest is the length of the detention.[120] The duration of the stop is considered part of the requirement that the detention not resemble a traditional arrest.[121] The length of the detention must only be as long as is necessary to achieve the law enforcement objective.[122] In *United States v. Place*,[123] drug enforcement officers suspected a passenger of carrying narcotics and seized his bags until a warrant could be issued.[124] The warrant was issued three days later and the search of the bags resulted in the discovery of a substantial quantity of cocaine.[125] The Court ruled that there was no difference in the level of intrusion in the detention of property as compared to personal detention.[126] The police knew the time and destination of the suspect's flight, but failed to take the necessary preparatory steps so the investigation could be completed when he arrived.[127] The Court held that the police must

115. *Dunaway*, 442 U.S. at 203. In overturning the trial court's denial of the defendant's motion to suppress the evidence, the Supreme Court ruled that the Fourth Amendment required that a "causal connection between the statements and the illegal arrest [be] broken sufficiently." *Id.* at 204. The matter was remanded to consider the case given a supervening Supreme Court ruling. *Id.*

116. *Id.* at 206.

117. *Id.* at 212; *see also* United States v. Brignoni-Ponce, 422 U.S. 873, 883-84 (1975) (holding that reasonableness of a Fourth Amendment intrusion is determined by balancing an individual's right to personal security against the public interest).

118. *Dunaway*, 442 U.S. at 212.

119. *Id.* at 212-13.

120. United States v. Place, 462 U.S. 696, 709 (1983).

121. *Id.*

122. *Id.* at 709-10.

123. 462 U.S. 696 (1983).

124. *Place*, 462 U.S. at 699.

125. *Id.*

126. *Id.* at 705. *See cf.* United States v. Sharpe, 470 U.S. 675, 686 (1985) (holding that the reasonableness of the length of personal detention was determined by examining the manner in which the investigating officer sought to confirm or dismiss his suspicions of criminal activity).

127. *Place*, 462 U.S. at 709.

minimize the length of detention when possible so as to lessen the intrusion on the individual's Fourth Amendment rights.[128]

The Court has suggested that *Miranda* rights do not apply in a custodial stop.[129] In *Berkemer v. McCarty*,[130] a car that was weaving back and forth on an interstate was pulled over by the state highway patrol.[131] The driver failed a field sobriety test and was taken into custody.[132] Incriminating statements regarding the consumption of alcohol and marijuana were made by the driver before and after his arrest, but at no time was he read his *Miranda* rights.[133]

In finding the post-arrest statements inadmissible, the Court held that *Miranda* rights apply to persons undergoing custodial interrogation regardless of the gravity of the offense.[134] However, the pre-arrest statements were held to be admissible because a traffic stop does not create pressures on the detained individual that "sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights."[135] The Court noted that the assumed brief and temporary nature of a traffic stop combined with the typical circumstances surrounding such a stop lessen the dangers of an individual being coerced into making self-incriminating statements.[136] The Court compared the non-coercive nature of routine traffic stops to factors inherent in *Terry* stops and concluded that the absence of a recitation of *Miranda* rights requirement in cases regarding *Terry* stops was due to the non-custodial nature of such detentions.[137]

3. *Consequences of Non-Compliance*

The extent to which a state can punish an individual for failing to identify themselves is unclear.[138] Prior to *Hiibel*, the Court had not had the opportunity to decide whether an individual who does not comply with a request for identification during the course of a valid investigatory stop may

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128. *Id.*

129. *See* Berkemer v. McCarty, 468 U.S. 420, 440 (1984) (holding that statements made during a traffic stop are admissible because of the non-coercive nature of such detentions).

130. 468 U.S. 420 (1984).

131. *Berkemer*, 468 U.S. at 423.

132. *Id.*

133. *Id.* at 423-24.

134. *Id.* at 434, 442.

135. *Id.* at 437.

136. *Id.* at 437-38.

137. *Id.* at 440; Terry v. Ohio, 392 U.S. 1, 24 (1968); Miranda v. Arizona, 384 U.S. 436, 467 (1966).

138. Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring).

be punished.[139] However, the Court has noted that the ability of a detainee to gain their release from custodial detention by not responding to inquiries, such as to identity, was part of the justification for not requiring the recitation of *Miranda* rights.[140]

B. THE PROTECTIONS OF THE FIFTH AMENDMENT

The Fifth Amendment provides that no one "shall be compelled in any criminal case to be a witness against himself."[141] The Court has held that an individual can assert the Fifth Amendment privilege when: (1) communications are testimonial in nature; (2) the substance of the communication was incriminating; and (3) the production of the communication was compelled.[142] The Court has defined testimonial communications as acts or statements of the accused that convey information used in the prosecution of criminal charges.[143]

In *United States v. Hubbell*,[144] the Court held the Fifth Amendment privilege against self-incrimination covers compelled testimony that may lead to incriminating sources of information.[145] In *Hubbell,* the prosecutor obtained an order requiring the defendant to produce certain financial documents, but the defendant claimed the Fifth Amendment privilege against self-incrimination.[146] In response, the prosecution obtained a subpoena for the documents and the defendant produced the papers he claimed were under the Fifth Amendment privilege.[147] The Court affirmed the dismissal of the indictment stemming from the information contained within the documents on the basis that there was a compelled testimonial aspect in responding to a subpoena.[148] Since the prosecution had no knowledge of the criminal activities revealed by the documents prior to their examination, the Court held that the privilege against self-

139. Brown v. Texas, 443 U.S. 47, 53 n. 3 (1979).

140. *Berkemer*, 468 U.S. at 439-40.

141. U.S. CONST. amend. V.

142. *See* United States v. Hubbell, 530 U.S. 27, 34-38 (2000) (holding that Hubbell could claim the Fifth Amendment privilege because the compelled statements were testimonial in nature and the information contained within the statements formed the basis for the criminal charges).

143. *See* Doe v. United States, 487 U.S. 201, 210 (1988) (holding the compelled disclosure of bank accounts was not a testimonial statement because the disclosure was not being used to prove the factual existence of the bank accounts).

144. 530 U.S. 27 (2000).

145. *Hubbell*, 530 U.S. at 43.

146. *Id.* at 31.

147. *Id.*

148. *Id.* at 36; *see also Doe*, 487 U.S. at 209 (stating "[p]roducing documents in compliance with a subpoena . . . admit[s] that the papers existed . . . and were authentic").

incrimination could be invoked because of the derivative use of the information obtained.[149]

In addition to situations where testimony is compelled, the Court has held the Fifth Amendment privilege can be invoked where evidence is incriminating.[150] However, communications that cause embarrassment or discomfort but hold no incriminating evidence are not covered by the Fifth Amendment.[151] In *Brown v. Walker,*[152] an employee of a railroad company claimed the Fifth Amendment privilege against self-incrimination while testifying about possible violations of the Interstate Commerce Act of 1893.[153] The Court held that the Fifth Amendment privilege could not be invoked because the Interstate Commerce Act provided immunity to those who were compelled to testify.[154] A witness must reasonably believe there is a real and appreciable danger stemming from his testimony in order to invoke the Fifth Amendment privilege against self-incrimination.[155] Therefore, reasonableness in claiming the Fifth Amendment privilege is examined in terms of the nature of the witnesses' belief that criminal prosecution or evidence that might be used against them will result from their testimony.[156]

In *Kastigar v. United States,*[157] the government granted immunity to witnesses in order to compel their testimony under subpoena.[158] The Court found that the grant of immunity was equal to the protection against self-incrimination provided by the Fifth Amendment.[159] The Court has held testimonial statements that may "furnish a link in the chain of evidence needed to prosecute" provide the basis for the reasonable grounds necessary to claim the Fifth Amendment privilege against self-incrimination.[160]

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149. *Hubbell*, 530 U.S. at 41-42.

150. Berkemer v. McCarty, 468 U.S. 420, 428 (1984).

151. Brown v. Walker, 161 U.S. 591, 598 (1896).

152. 161 U.S. 591 (1896).

153. *Brown*, 161 U.S. at 593.

154. *Id.*

155. *Id.* at 599-60 (citing Queen v. Boyes, 1 Best & S. 311, 321 (1861) (Cockburn, C. J.)).

156. Kastigar v. United States, 406 U.S. 441, 445 (1972).

157. 406 U.S. 441 (1972).

158. *Id.* at 442.

159. *Id.* at 453.

160. *See* Hoffman v. United States, 341 U.S. 479, 486 (1951) (holding the Fifth Amendment privilege was available to the defendant because it was reasonable to fear criminal prosecution if he responded to questioning). *See cf.* Pennsylvania v. Muniz, 496 U.S. 582, 601-02 (1990) (holding that questions regarding a person's name and address were ordinary police procedure exempt from the requirements of *Miranda*). In *Muniz*, the Court noted there are questions, such as the identity of a person, which may be asked without Miranda warnings if "reasonably related to the police's administrative concerns." *Id.* The Court held that questions that are intended to illicit a response outside the custodial concerns of police procedure are considered to be part of a

When there is no danger of prosecution, such as in *Kastigar*, it is not reasonable for a person to believe their testimonial statements can be used against them in a criminal prosecution.[161]

In evaluating the basis for fearing criminal liability, the Court has suggested the production of certain information may be insufficiently incriminating to allow the invocation of the privilege against self-incrimination.[162] In *Baltimore City Department of Social Services v. Bouknight*,[163] an allegedly abusive mother argued that surrendering her child to protective care in compliance with a court order would be an act of self-incrimination because "the act of production would amount to testimony regarding her control over, and possession of, [her child]."[164] The Court decided the case on other grounds, but left open the possibility that there may be situations where a person would not qualify for the Fifth Amendment privilege because the government could readily establish evidence by other means and thereby render the information insufficiently incriminating.[165]

C. SUMMARY OF LEGAL BACKGROUND

The Supreme Court has held the detention must be based on a reasonable belief of criminal activity[166] formed from specific facts to avoid arbitrary police decisions in order for the detention of an individual to comply with the Fourth Amendment requirements.[167] To avoid arbitrary arrests, the Court requires fair notice of the standard of compliance to requests for identification.[168] The reasonableness of the detention is determined by balancing a legitimate government interest against the Fourth

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custodial interrogation and subject to the requirements of *Miranda* if the answers to such questions are to be admitted as evidence in criminal proceedings. *Id.*

161. *Kastigar*, 406 U.S. at 462.

162. *See* Baltimore City Dep't of Social Servs. v. Bouknight, 493 U.S. 549, 555-56 (1990) (holding that the Fifth Amendment privilege could not be claimed because defendant voluntarily assumed custody of a child in whom the state has an interest). *See cf.* California v. Beyers, 402 U.S. 424, 433-34 (1971) (requiring drivers who are involved in an accident to stop and identify themselves violates the Fifth Amendment privilege against self-incrimination). In *Beyers*, the Court held a person's identity "does not by itself implicate anyone in criminal conduct." *Id.* The Court acknowledged that stopping and providing one's identity may allow prosecution but the criminal charges would result from other factors and evidence not dependent on identity. *Id.* The Court distinguished between ascertaining an individual's identity and obtaining the facts necessary for the filing of criminal charges. *Id.*

163. 493 U.S. 549 (1990).

164. *Bouknight*, 493 U.S. at 555.

165. *Id.*

166. Terry v. Ohio, 392 U.S. 1, 22 (1968).

167. Brown v, Texas, 443 U.S. 47, 52 (1979).

168. Kolender v. Lawson, 461 U.S. 352, 353-54 (1983).

Amendment rights of the individual.[169] However, a detention must not resemble a traditional arrest.[170] The circumstances surrounding questioning and the length of the detention are among the factors examined in whether a detention resembles a traditional arrest.[171] In terms of the Fifth Amendment, there must be a reasonable belief that a response to a request for identification will result in criminal prosecution in order to claim the privilege against self-incrimination.[172]

III. ANALYSIS

Justice Kennedy wrote the opinion in *Hiibel v. Sixth Judicial District Court,*[173] which was joined by Chief Justice Rehnquist, Justice O'Connor, Justice Scalia, and Justice Thomas.[174] Justice Breyer wrote a dissenting opinion in which Justice Souter and Justice Ginsburg joined.[175] Justice Stevens wrote a separate dissenting opinion.[176]

A. MAJORITY OPINION

The first issue before the Supreme Court in *Hiibel* was whether requiring an individual to identify themselves under a "stop and identify" statute violated the Fourth Amendment's protection against unreasonable searches and seizures.[177] The Court held there was no violation of the Fourth Amendment if a person stopped under reasonable suspicion of criminal activity was detained only long enough to ascertain their identity.[178]

The second issue before the *Hiibel* Court was whether compelling a person to identify themselves under a "stop and identify" law violated the Fifth Amendment's prohibition against self-incrimination.[179] The Court held there was no Fifth Amendment violation because it was not reasonable to believe the production of a name would result in criminal liability where an individual has not committed any criminal offense.[180] The Court

169. Delaware v. Prouse, 440 U.S. 648, 654 (1979).
170. Dunaway v. New York, 442 U.S. 200, 212-13 (1979).
171. Berkemer v. McCarty, 468 U.S. 420, 437-38 (1984).
172. Kastigar v. United States, 406 U.S. 441, 445 (1972).
173. 124 S. Ct. 2451 (2004).
174. *Hiibel*, 124 S. Ct. at 2454.
175. *Id.* at 2461.
176. *Id.* at 2464 (Stevens, J., dissenting).
177. *Id.* at 2457.
178. *Id.* at 2459.
179. *Id.* at 2460.
180. *Id.* at 2461.

declined to decide the constitutionality of compelling identification in a situation where identity provides a link to a separate offense.[181]

1. *Application of the Balancing Test to Nevada's "Stop and Identify" Statute*

The Court defined reasonableness by balancing Mr. Hiibel's individual interests against the government's interest in effective law enforcement and found the law to be in compliance with the Fourth Amendment's protections against unreasonable searches and seizures.[182] In determining the extent of the governmental interest involved, the Court noted that the ability of the police to identify a suspect was a crucial part of investigating crimes.[183] The Court found that knowing the identity of a detainee allowed the government to check for outstanding warrants and a record of violence.[184] The Court further determined that ascertaining an individual's identity may also help clear them of a particular crime, allowing police to focus limited resources in other areas.[185] The Court noted that police often face volatile situations with incomplete facts where identification of the parties involved can aid in threat assessment.[186] As a result, the Court held that the ability to ascertain an individual's identity was an important governmental interest.[187]

Another factor the Court considered important under Nevada's "stop and identify" statute was that the request for identification did not alter the length of the detention or its location.[188] The Court found the detention of Mr. Hiibel to be in compliance with the Fourth Amendment limits, noting that the inquiry never went beyond Mr. Hiibel's identity, nor did it extended beyond the time necessary to ascertain his name.[189] The Court found the intrusion upon the individual was minimal because the scope of the questioning was limited to the person's identity and the detention only lasted long enough to accomplish identification.[190] As such, the Court held that the identification request under the Nevada law "has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop."[191]

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181. *Id.*
182. *Id.* at 2459.
183. *Id.* at 2458.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.* at 2459.
189. *Id.*
190. *Id.*
191. *Id.*

Additionally, the Court stated that the threat of punishment was necessary for the request for identification to be effective.[192]

Hiibel argued that the Court had previously determined that the Fourth Amendment does not compel a person to respond to a request for identification.[193] The Court distinguished between the present case and previous concurrences and dicta cited by Hiibel concerning the inability to compel a person to respond to questioning during a *Terry* stop because those cases defined an individual's rights under the Fourth Amendment.[194] The Court held previous concurrences and dicta were not controlling in this case, noting that the requirement to provide identification in this case derived from Nevada law, not the United States Constitution.[195]

2. *Nevada's "Stop and Identify" Statute was in Compliance with* Terry *Stop Standards*

The Court held that a request for identification during an investigatory detention must be reasonably related to the justification for the stop.[196] Mr. Hiibel argued that the Nevada law allowed arbitrary arrests and abuses by police officers.[197] The Court disagreed, noting that the law requires the request for identification to arise out of the purpose for the initial detention of the individual.[198] The Court determined that the request for identification flowed from the investigation of the assault report, not from an attempt by the police to make an arrest for failure to provide identification.[199] Therefore, the Court found the request for identification was a "common sense inquiry" in the course of a valid *Terry* stop.[200]

3. *The Availability of the Fifth Amendment Privilege did not Rely on Whether Statements were Testimonial*

The Court did not decide whether Mr. Hiibel's statements were outside the limits of the Fifth Amendment privilege, despite the assertion by respondent that the Nevada law requires only non-testimonial statements.[201]

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192. *Id.*
193. *Id.* at 2458-59.
194. *Id.* at 2459.
195. *Id.*
196. *Id.*; *see also Terry v. Ohio*, 392 U.S. 1, 20 (1968) (stating an investigatory detention must be "justified at its inception, and . . . reasonably related in scope to the circumstances which justified the interference in the first place").
197. *Hiibel*, 124 S. Ct. at 2459.
198. *Id.* at 2459-60.
199. *Id.* at 2460.
200. *Id.*
201. *Id.* at 2460-61.

The Court previously defined testimonial statements as communications that "explicitly or implicitly, relate a factual assertion or disclose information."[202] The Court did not determine whether the compelled production of an individual's name was a testimonial statement.[203] Instead, the Court held the lack of reasonable grounds to fear criminal liability prevented an inquiry into the nature of the statements mandated by the Nevada law.[204]

4. *No Reasonable Grounds to Fear Prosecution*

In addition to the Fourth Amendment challenges, Mr. Hiibel argued the Nevada law violated the Fifth Amendment's prohibition against self-incrimination.[205] The Court noted that the Fifth Amendment does not provide an absolute right to remain silent when faced with questioning from the government.[206] In order to qualify for the privilege, the Court reasoned that testimony, even if compelled, must be incriminating.[207] The Court did not view the knowledge of an individual's name as likely to be incriminating.[208] The Court stated that Mr. Hiibel lacked reasonable grounds to fear prosecution because he failed to articulate how providing his name would have resulted in criminal liability.[209] The Court held that the lack of possible criminal prosecution eliminated any claim to the Fifth Amendment privilege against self-incrimination.[210]

5. *Narrow Scope of Law*

After *Terry*, the Court required that investigatory detentions not resemble a traditional arrest in scope or duration.[211] The Nevada law, as interpreted by the Court, was in compliance with these requirements because the inquires are confined to the name of the individual and the detention itself can only last as long as necessary to determine the person's identity.[212] In finding no Fifth Amendment violation, the Court emphasized the fact that Nevada's "stop and identify" statute only required an individual to state their name.[213] As a result, the Court did not decide the issue of

202. *Id.* at 2460 (citing Doe v. United States, 487 U.S. 201, 210 (1988)).
203. *Id.* at 2460-61.
204. *Id.* at 2461.
205. *Id.* at 2460.
206. *Id.* at 2460-61.
207. *Id.*
208. *Id.* at 2461.
209. *Id.*
210. *Id.*
211. *See, e.g., id.* at 2458 (citing Dunaway v. New York, 442 U.S. 200, 212 (1979)).
212. *Id.* at 2459-60.
213. *Id.* at 2457, 2461.

whether a statute that required the production of a driver's license or other form of identification would be in contravention of the Fifth Amendment.[214] However, the Court noted that even a witness called to the stand who claims the Fifth Amendment privilege must acknowledge their identity.[215] The Court reasoned that in order to violate the Fifth Amendment, self-identification needed to provide evidence connecting the person to a separate offense.[216]

6. *Summary of Majority Opinion*

The Court determined that the government's interest in effective law enforcement contained within Nevada's "stop and identify" statute outweighed the Fourth Amendment concerns.[217] The request for identification was constitutional because it was reasonably related to the justification for the initial detention.[218] The Court did not base the unavailability of the Fifth Amendment privilege against self-incrimination on whether providing identification was a testimonial statement.[219] Additionally, the Court held that Nevada's "stop and identify" statute was not in violation of the Fourth Amendment because detentions under the statute did not resemble traditional arrests.[220] The Court found that requiring a person to comply with the identification request by stating their name was not in contravention of the Fifth Amendment prohibition against self-incrimination.[221]

B. JUSTICE STEVENS' DISSENT

Justice Stevens disagreed with the Court's holding that the Fifth Amendment privilege was unavailable to Mr. Hiibel since he believed the Nevada law impermissibly singles out a narrow class of people.[222] He stated that the Nevada law focused on individuals under criminal investigation, a group Justice Stevens believed to be the intended beneficiary of the Fifth Amendment privilege.[223]

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214. *Id.* at 2461.
215. *Id.*
216. *Id.*
217. *Id.* at 2459.
218. *Id.* at 2459-60.
219. *Id.* at 2460-61.
220. *Id.* at 2458 (citing Dunaway v. New York, 442 U.S. 200, 212 (1979)).
221. *Id.* at 2461.
222. *Id.* (Stevens, J., dissenting) (quoting Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 79 (1965)). Justice Stevens stated "[t]he statute . . . is directed not at the public at large, but rather at a highly selective group inherently suspect of criminal activities." *Id.*
223. *Id.* at 2462.

Justice Stevens agreed with the majority's holding that the police have the ability to ask individuals questions during the course of a valid *Terry* stop.[224] However, he stated that detained persons should have broad rights to refuse to answer any questions asked by the authorities.[225]

Justice Stevens disagreed with the majority's determination that the communication required under the Nevada law was not testimonial in nature.[226] Instead, Justice Stevens recommended a broader definition to what can be considered incriminating.[227] He would have included communications that "lead to the discovery of incriminating evidence even though the statements themselves are not incriminating."[228] Justice Stevens stated that an officer should only ask for a person's identification if the officer believed such information may "furnish a link in a chain of evidence needed to prosecute [the individual]."[229] Therefore, he believed that compelling an individual to identify themselves is prohibited by the Fifth Amendment.[230]

C. JUSTICE BREYER'S DISSENT

Justice Breyer argued that the Nevada law went beyond the limits of *Terry* because it compelled answers to police inquiries.[231] Justice Breyer agreed with the majority that there was a governmental interest in preventing crime, but found no legitimate governmental interest in compelling a person to identify themselves.[232]

Like Justice Stevens, Justice Breyer reasoned that the Fifth Amendment's protection against self-incrimination granted Mr. Hiibel the right to refuse to identify himself in the course of a valid *Terry* stop.[233] Justice Breyer asserted that the legal system has come to rely on two decades of concurring opinions as the basis of the right of an individual to refuse to respond to questioning in the course of a valid *Terry* stop.[234] Given this tradition of reliance, Justice Breyer disagreed with the majority's decision because it would cause confusion in both law enforcement and legislative

224. *Id.*
225. *Id.*
226. *Id.* at 2463-64.
227. *Id.*
228. *Id.* (citing United States v. Hubbell, 530 U.S. 27, 37 (2000)).
229. *Id.* (citing Hoffman v. United States, 341 U.S. 479, 486 (1951)).
230. *Id.*
231. *Id.* at 2464 (Breyer, J., dissenting).
232. *Id.* at 2465-66.
233. *Id.*
234. *Id.*

enactment as to the extent a person may be compelled to respond to questioning during a valid Terry stop.[235]

IV. IMPACT

A. ENFORCEMENT

In preparation for the 2004 Republican National Convention, potential protestors received differing advice on whether to provide identification to questioning police officers.[236] The New York City chapter of the National Lawyers Guild advised would-be protestors not to respond to officers when approached.[237] The National Lawyers Guild suggested protestors walk away from the police and only provide identification if arrested.[238] A spokesperson for the New York Police Department said that an officer would only ask for identification if there was reasonable suspicion of a crime, the same policy the department followed prior to the *Hiibel* decision.[239] Thus, the initial effect of *Hiibel* on law enforcement appeared to have been an increased awareness of the choices individuals face when the police ask for identification.

B. LEGISLATION

The *Hiibel* decision could play a role in determining the constitutionality of a national identity card.[240] Important to this debate is whether the Court will uphold a law that requires the physical production of a driver's license.[241] A key element to the *Hiibel* Court was that the Nevada law specified that a verbal statement of an individual's name satisfied the identification requirement.[242] Whether the Court would extend the government's ability to ascertain a person's identity through physical documents is a major factor in the creation of a national identity card.[243]

Presumably, a national identity card would be linked to a national database containing outstanding warrants and criminal records.[244] This

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235. *Id.*
236. Mike McIntire, *Preparing for the Convention: The Law*, N.Y. TIMES Aug. 26, 2004, at 1.
237. *Id.*
238. *Id.*
239. *Id.*
240. Daniel J. Steinbock, *National Identity Cards: Fourth and Fifth Amendment Issues*, 56 FLA. L. REV. 697, 717 (2004).
241. *Id.* at 718.
242. *Id.*
243. *Id.*
244. *Id.* at 718.

creates another issue of whether requiring the production of an identity card and the subsequent background check significantly alters the nature of the stop enough so that it is deemed to resemble a traditional arrest.[245] The length of time necessary to check a person's identity against the database may sufficiently prolong the detention enough to remove the stop from permissible limits under the Fourth Amendment's protection against unreasonable searches and seizures.[246]

C. NORTH DAKOTA

North Dakota has a similar statute to Nevada's, but is broader in terms of the production requirement.[247] Nevada's "stop and identify" statute requires only that the name of the individual be provided.[248] However, North Dakota's statute also requires the name, address, and an explanation of what the person is doing.[249] Previously, the *Kolender* Court found a law unconstitutional because it failed to provide the public with notice of how they are to comply with the request for identification.[250] The narrow scope of the obligation of a detainee under the Nevada statute was a key reason the Court held that the law was in accordance with the Fourth Amendment.[251] The North Dakota statute does not specify how an individual may satisfy the request for identification, such as showing a driver's license or simply stating their name.[252] The impact of *Hiibel* on North Dakota is unclear since any challenge to North Dakota's "stop and identify" statute would appear to rely on the Court's holding in *Kolender* because the statute lacks notice of how individuals comply with a request for identification.[253]

In *State v. Mathre*,[254] the North Dakota Supreme Court addressed the issue of resisting arrest.[255] The court did not utilize *Hiibel* in deciding the case but discussed a previous decision where the court determined a man

245. *See e.g.*, *id.* at 718-19 (explaining that possible delays or computer glitches in searching a database for someone's identity could alter the nature of an investigatory stop).

246. *Id.* at 719.

247. *Compare* N.D. CENT. CODE § 29-29-21 (2003), *with* NEV. REV. STAT. § 171.123(3) (2004).

248. NEV. REV. STAT. § 171.123(3).

249. N.D. CENT. CODE § 29-29-21.

250. Kolender v. Lawson, 461 U.S. 352, 353-54 (1983) (citing CAL. PENAL CODE ANN. § 647(e) (West 1970)).

251. Hiibel v. Sixth Jud. Dist. Ct. of Nev., 124 S. Ct. 2451, 2457 (2004).

252. N.D. CENT. CODE § 29-29-21.

253. *Compare* N.D. CENT. CODE § 29-29-21 (2003) *with* Kolender v. Lawson, 461 U.S. 352, 361-62 (1983).

254. 683 N.W.2d 918 (N.D. 2004).

255. *Mathre*, 683 N.W.2d at 921.

was wrongfully detained by police.[256] The court appeared to signal its intention to use *Hiibel* as authority in upholding convictions for refusing to provide identification during a lawful investigatory stop.[257]

D. ADJUDICATION

In cases outside North Dakota, the *Hiibel* decision has had varying impacts. In *United States v. Jackson*,[258] a man was arrested after failing to provide a driver's license upon being stopped for a traffic offense.[259] The court held that the request for identification was reasonable since *Hiibel* established that an officer may require a detainee to provide identification during an investigatory stop.[260] The Supreme Court denied certiorari.[261]

Conversely, *Hiibel* has been utilized by dissenting judges to argue against compelled identification.[262] In *United States v. Kincade*,[263] the court faced the issue of whether DNA profiling of conditionally released prisoners without individualized suspicion of continued criminal conduct was permissible under the Fourth Amendment.[264] The majority determined that there was no violation because the government's interest in effective crime prevention outweighed the privacy concerns involved.[265] However, the dissent argued that *Hiibel* stood for the proposition that individualized suspicion must be present for a search and seizure to be reasonable.[266] The long-term impact of *Hiibel* will ultimately depend on how the Supreme Court rules on the interpretation of *Hiibel* by lower courts.

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256. *Id.* at 924; *see also* State v. Ritter, 472 N.W.2d 444, 448-49 (N.D. 1991) (holding that officers may ask questions of detainees but they are not allowed to compel a response to a request for identification)).

257. *Id.* The court noted that *Hiibel* held that Nevada's stop and identify law did not violate either the Fourth or Fifth Amendment. *Id.*

258. 377 F.3d 715 (7th Cir. 2004).

259. *Jackson*, 377 F.3d at 716.

260. *Id.* at 717; *see also* Martiszus v. Wash. County, 325 F. Supp. 2d 1160, 1168 n.2 (2004) (stating in dicta that *Hiibel* alters Ninth Circuit precedent that does not allow an officer to compel an individual to provide identification even in cases where there is reasonable suspicion of criminal activity).

261. Jackson v. United States, 125 S. Ct. 649 (2004).

262. United States v. Kincade, 379 F.3d 813, 865 (9th Cir. 2004).

263. 379 F.3d 813 (9th Cir. 2004).

264. *Kincade*, 379 F.3d at 816.

265. *Id.* at 839-40.

266. *Id.* at 853-54 n.10 (Reinhardt, J., dissenting).

V. CONCLUSION

In *Hiibel*, the Supreme Court ruled that Nevada's "stop and identify" statute was constitutional.[267] The Court held that the law was narrowly drafted to avoid unreasonable searches and seizures as prohibited by the Fourth Amendment.[268] Further, the Court found that the Fifth Amendment privilege could not be invoked by Mr. Hiibel since he lacked reasonable grounds to believe the production of his name could lead to criminal liability.[269]

Matthew Schmidt

267. Hiibel v. Sixth Judicial District Ct. of Nevada, 124 S. Ct. 2451, 2461 (2004).
268. *Id.* at 2459.
269. *Id.* at 2461.

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