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No Right to Remain Silent

by Jacob G. Hornberger

You have the right to remain silent — unless you're asked your name when you aren't even charged with a crime. That's right: it can now be a crime to refuse to tell a policeman your name. What's happening to America?

Nevada and 20 other states have criminalized remaining silent in the face of a policeman's question "What's your name?" By a 5-4 vote the U.S. Supreme Court said that's okay — it's no violation of the Fourth Amendment prohibition against unreasonable searches or the Fifth Amendment prohibition against compulsory self-incrimination.

"Obtaining a suspect's name in the course of a Terry stop serves important government interests," wrote Justice Anthony Kennedy for the majority, referring to an earlier case (*Terry*) that permits the police to detain people on the basis of a suspicion that falls short of the traditional standard of "probable cause" for arrest. It may serve "important government interests." But some of us in the United States still harbor the impression that the rights and interests of individuals trump the interests of state.

The latest case arose out of a rancher's refusal to identify himself while the police were looking for a man in a truck who had been seen beating a woman. The rancher had been spotted by his truck and, after refusing 11 requests to give his name, he was charged with and later convicted of a misdemeanor. He was fined \$250.

It doesn't seem like much of a penalty, but we have to think in principles. It should make the citizens of a putatively free country uncomfortable to know that the police can have the authority to stop and demand identification on the basis of a "reasonable suspicion," which after all is a highly subjective state of mind. A person is looking at a storefront. Is he admiring the window display or casing the joint? It's up to the policeman to decide. Under the *Terry* ruling, which was decided more than three decades ago, the cop can stop, question, and frisk the person without probable cause. The latest ruling simply fills in a missing detail. The policeman can demand that the person identify himself.

Kennedy and his four colleagues rejected the argument that giving one's name can be an act of self-incrimination. Obviously, if the person questioned is wanted for another crime, then being forced to identify himself does violate the right against self-incrimination. Kennedy dismissed this objection all too casually: "Answering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances." But those unusual circumstances involved *persons*. I guess they are insignificant too.

It's tempting and comforting to seek refuge in the notion that only bad people will want to withhold their names from the police. Maybe; maybe not. But even if we grant that, the comfort is false. The rule of law protects us all, even if its most visible effects involve people we suspect of evil. This was best captured in Robert Bolt's play, "A Man for All Seasons," about Sir Thomas More's refusal to sacrifice his integrity to Henry VIII. When another character, William Roper, says he'd abolish the protections of law to nab the Devil, More replies,

"Oh? And when the last law was down, and the Devil turned round on you — where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast — man's laws, not God's — and if you cut them all down — and you're just the man to do it — d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake."

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