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Supreme Court strikes a blow against the right to remain silent

Brandon Garrett, an expert on wrongful convictions, calls it a "wrong and also dangerous" decision. Tim Lynch of the Cato Institute simply says it is a "lousy ruling."

These are just two reasons why you need to read the U.S. Supreme Court's recent decision in *Salinas v. Texas*, No. 12-246, decided June 17. It is a case about the Fifth Amendment's self-incrimination clause that has not received much attention. Yet Orin Kerr on the "Volokh Conspiracy" blog characterized it as "the sleeper criminal procedure case of the term."

The facts are fairly simple. Two brothers were murdered in their home in Houston. Police recovered six shotgun shell casings at the scene. Suspicion fell on Genoveto Salinas, who had been to the brothers' home the night before the murder. The police visited Salinas and he agreed both to accompany police to the station for questioning and to hand over his shotgun for ballistics testing.

Police interviewed Salinas for an hour at the police station. It is conceded that he was never "in custody" — therefore, there was no problem with the police not reading him his *Miranda* rights. He voluntarily answered most of the police questions. But when he was asked whether his shotgun would match the shells recovered at the scene of the murder, the officer testified that Salinas declined to answer. The officer testified that he "looked down at the floor, shuffled his feet, bit his bottom lip, clenched his hands in his lap and began to tighten up."

At his trial for murder, Salinas did not testify. The prosecution, however, used his actions in refusing to answer the question as substantive evidence of his guilt. The jury found him guilty of murder.

The Supreme Court agreed to review the case to resolve a long-simmering division of authority in lower courts: May a prosecutor use a defendant's assertion of his privilege against self-incrimination during a noncustodial police interview as substantive evidence in its case-in-chief?

Yet the Supreme Court found it unnecessary to answer that question. Instead, in a 5-4 decision, it held that the prosecutor could not have violated Salinas' Fifth Amendment right to remain silent for the simple reason that Salinas never invoked it.

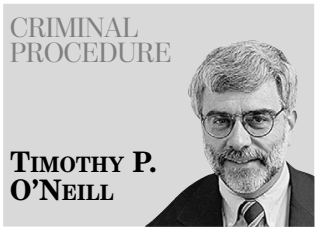
The five members of the majority split 3-2 on their reasoning. Justice Samuel A. Alito, joined by Chief Justice John G. Roberts Jr. and Justice Anthony M. Kennedy, announced the judgment of the court. This opinion contended that the general rule has always been that the Fifth Amendment right against self-incrimination is neither self-executing nor claimed simply by standing mute.

Rather, a person must explicitly assert the right at the time he is exercising it. There are two exceptions to the rule. First, *Griffin v. California*, 380 U.S. 609 (1965), held that a criminal defendant's decision not to testify at trial is tantamount to an express assertion of the right and, therefore, the prosecutor is barred from asking the jury to use this against the defendant.

Second, *Miranda v. Arizona*, 384 U.S. 436 (1966), held that the special circumstances surrounding a custodial interrogation environment automatically provided a suspect with Fifth Amendment protection. Thus, the burden was placed on the prosecution to prove that he properly waived the right before it could introduce any of the suspect's responses.

Alito contended that neither of these exceptions applied here. True, Salinas through his silence might have been asserting his Fifth Amendment right. But he may also have been silent "because he is trying to think of a good lie, because he is embarrassed or because he is protecting someone else." Alito stressed that "[not] every possible explanation [is] protected by the Fifth Amendment." Thus, the case falls outside the protection of the Fifth Amendment.

Justice Clarence Thomas, joined by Justice Antonin G. Scalia, concurred only in the judgment. Thomas disagreed with the plurality's position that it would have been relevant if Salinas had explained his silence by invoking his Fifth Amendment right. Thomas contended that the Fifth Amendment only protects a person from the government's compelling him to give self-incriminating testimony. Thus, "[a] defendant is not 'compelled ... to be a witness against himself' simply because a jury has been told that it may draw an adverse inference from his silence." In the view of Thomas and Scalia, both *Griffin* and *Miranda* were wrongly decided.



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> ***"(P)olice will be free to offer their own interpretations of a suspect's alleged pauses, silences or fidgeting. And there will be no way for judges and juries to draw their own conclusions based on their own observations."***

Compare these parsimonious views of the language of the Fifth Amendment to Justice Stephen G. Breyer's broader interpretation in his dissent (joined by Justices Ruth Bader Ginsburg, Sonia M. Sotomayor and Elena Kagan). He emphasizes the "impossible predicament" a person in Salinas' position was placed. If he answers the question, he may reveal "prejudicial facts, disreputable associates or suspicious circumstances — even if he is innocent."

If he remains silent, the majority says this can be used against him. And if he takes the stand to explain his silence, the prosecutor may then be able to impeach him with prior convictions that would have been otherwise inadmissible. Thus, by allowing comments on his silence, the majority's decision can be seen in the larger sense as "compelling" an individual to act as "a witness against himself."

The crabbed constitutional view of the majority will indeed have ramifications. Certainly, the national trend is to have more custodial interrogations by the police preserved on video, which can then be examined by judges and juries. This allows triers of fact to observe body language to draw their own conclusions about a suspect. And *Miranda*, of course, provides that the suspect be advised of his rights.

Salinas will thus encourage more noncustodial interrogations. Police do not have to provide *Miranda* warnings in these settings. And there is no legal requirement that these interrogations must be taped. Thus, police will be free to offer their own interpretations of a suspect's alleged pauses, silences or fidgeting. And there will be no way for judges and juries to draw their own conclusions based on their own observations.

States, of course, are free to reject *Salinas* and provide more protections to suspects in noncustodial police interrogation. It is an area that cries out for state court remedies.

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