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Supreme Court Bombshell: No Right to Remain Silent

The Supreme Court handed down a decision on June 17 that has been ignored by most media outlets, despite its devastating effect on one of the most fundamental rights protected by the Constitution.

In a 5-4 ruling, the justices ruled that a person no longer has the right to remain silent as guaranteed by the Fifth Amendment. In relevant part, the Fifth Amendment mandates that no one "shall be compelled in any criminal case to be a witness against himself."

Thanks to the Supreme Court's decision in *Salinas v. Texas*, that part of the Bill of Rights has been excised — and has joined the list of so many other fundamental liberties that now lie on the scrap heap of history.

Here's a little background of the circumstances of the *Salinas* case, as told by Slate:

> Two brothers were shot at home in Houston. There were no witnesses — only shotgun shell casings left at the scene. Genovevo Salinas had been at a party at that house the night before the shooting, and police invited him down to the station, where they talked for an hour. They did not arrest him or read him his Miranda warnings. Salinas agreed to give the police his shotgun for testing. Then the cops asked whether the gun would match the shells from the scene of the murder. According to the police, Salinas stopped talking, shuffled his feet, bit his lip, and started to tighten up.

> At trial, Salinas did not testify, but prosecutors described his reportedly uncomfortable reaction to the question about his shotgun. Salinas argued this violated his Fifth Amendment rights: He had remained silent, and the Supreme Court had previously made clear that prosecutors can't bring up a defendant's refusal to answer the state's questions. This time around, however, Justice Samuel Alito blithely responded that Salinas was "free to leave" and did not assert his right to remain silent. He was silent. But somehow, without a lawyer, and without being told his rights, he should have affirmatively "invoked" his right to not answer questions. Two other justices signed on to Alito's opinion. Justice Clarence Thomas and Justice Antonin Scalia joined the judgment, but for a different reason; they think Salinas had no rights at all to invoke before his arrest (they also object to Miranda itself). The upshot is another terrible Roberts Court ruling on confessions. In 2010 the court held that a suspect did not sufficiently invoke the right to remain silent when he stubbornly refused to talk, after receiving his Miranda warnings, during two hours of questioning.

Consider the ripple effect of the Salinas decision. Specifically, imagine how this ruling will alter the entire landscape of rights — including *Miranda* — and how they are applied (or not applied) to those accused of serious crimes. Here's one potential application singled out by the *Atlantic*:

> You know what's a much more recent wrinkle to the potential precedent effect of today's ruling? A case like that of the younger Boston Marathon suspect, Dzhokhar Tsarnaev, who reportedly sat

> through 16 hours of questioning before he was read his Miranda rights. Had Tsarnaev, who was recovering from serious injuries at the time, remained silent during questioning without explicitly invoking his Fifth Amendment, prosecutors could, under the Salinas ruling, now use that silence to their advantage.

Guilty or not, suspects in the United States no longer have the right to remain silent. If they remain silent, moreover, that silence will now be interpreted as guilt and will indeed — despite what you see on television court and cop dramas — be used against that person in a court of law. Even, in fact, the highest court in the land.

Another terrifying twist to the *Salinas* decision is that it imposes on a suspect the necessity of invoking specific language before law enforcement will honor the basic civil liberties of a person who is (or historically, was) innocent until proven guilty.

Justice Breyer recognized how this novel necessity places a nearly insuperable barrier to invoking one's right to remain silent. Writing for the dissent, Justice Breyer asked, "How can an individual who is not a lawyer know that these particular words ["I expressly invoke the privilege against self incrimination"] are legally magic?"

Breyer goes on to propose a "far better" way to protect a person's right to not incriminate himself.

> Can one fairly infer from an individual's silence and surrounding circumstances an exercise of the Fifth Amendment's privilege? The need for simplicity, the constitutional importance of applying the Fifth Amendment to those who seek its protections, and this Court's case law all suggest that this is the right question to ask here. And the answer to that question in the circumstances of today's case is clearly: yes.

In the black-is-white-up-is-down world that we live in, it is no longer surprising to see constitutionally protected liberties being championed by the "liberal" bloc of justices, while the so-called "conservatives" chisel away at the bedrock of freedom.

Our Founding Fathers understood how vital the right against self-incrimination was to the pursuit of justice. Consider the following defense of that right offered by imminent Founding Era jurist Joseph Story:

> This also is but an affirmance of a common law privilege. But it is of inestimable value. It is well known, that in some countries, not only are criminals compelled to give evidence against themselves, but are subjected to the rack or torture in order to procure a confession of guilt. And what is worse, it has been (as if in mockery or scorn) attempted to excuse, or justify it, upon the score of mercy and humanity to the accused. It has been contrived, (it is pretended,) that innocence should manifest itself by a stout resistance, or guilt by a plain confession; as if a man's innocence were to be tried by the hardness of his constitution, and his guilt by the sensibility of his nerves. Cicero, many ages ago, though he lived in a state, wherein it was usual to put slaves to the torture, in order to furnish evidence, has denounced the absurdity and wickedness of the measure in terms of glowing eloquence, as striking, as they are brief. They are conceived in the spirit of Tacitus, and breathe all his pregnant and indignant sarcasm. Ulpian, also, at a still later period in Roman jurisprudence, stamped the practice with severe reproof.

In one day the Supreme Court of the United States now dispenses with a right defended by Cicero over 2,000 years ago.

Finally, read the warning issued by Abraham Holmes during the Massachusetts ratifying convention in January 1788:

> There is nothing to prevent Congress from passing laws which shall compel a man, who is accused or suspected of a crime, to furnish evidence against himself, and even from establishing laws which shall order the court to take the charge exhibited against a man for truth, unless he can furnish evidence of his innocence.
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> I do not pretend to say Congress will do this; but, sir, I undertake to say that Congress (according to the powers proposed to be given them by the Constitution) may do it; and if they do not, it will be owing entirely — I repeat it, it will be owing entirely — to the goodness of the men, and not in the least degree owing to the goodness of the Constitution.

In the *Salinas* case, it was as Holmes wisely predicted: The goodness of the Constitution was not enough to protect one of our most fundamental and cherished liberties from the assault by an almost all-powerful federal government.

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