Silence as Evidence: U.S. Supreme Court Holds That the Fifth Amendment Does Not Bar Using a Suspect’s Silence as Evidence of Guilt

On June 17, 2013, the U.S. Supreme Court issued a fragmented 5-4 decision in Salinas v. Texas. In Salinas, five Justices agreed, on narrow grounds, that prosecutors may use the pre-arrest silence of a cooperating suspect as evidence of his guilt without implicating the Fifth Amendment privilege against self-incrimination. The plurality opinion, written by Justice Alito and joined only by Chief Justice Roberts and Justice Kennedy, concluded that an individual who voluntarily cooperates with law enforcement officials must “expressly invoke the privilege against self-incrimination in response to [an] officer’s question” “in order to benefit from it.” In other words, the plurality concluded that in a noncustodial interview, if an individual does not assert his or her Fifth Amendment rights when refusing to answer an investigator’s question, the government is free to draw an adverse inference from that silence at trial.

The decision speaks volumes about the risks of talking to government agents without the assistance of counsel. In light of the holding, potential subjects and targets of investigations must give serious consideration to the costs of cooperating with the government without consulting an attorney. When approached by the government, most people are not equipped to discern whether agreeing to answer questions is in their best interest, and fewer still would believe that their silence in response to a question could be affirmatively introduced as evidence of their guilt.

I. BACKGROUND

A police investigation into the December 1992 murder of two brothers led officers to the home of Genovevo Salinas. Mr. Salinas cooperated with officers, providing them with his shotgun and agreeing to accompany them to the police station for questioning. At the police station, officers interviewed him for approximately an hour. Prosecutors and Mr. Salinas apparently agreed that this interview was “noncustodial” and, therefore, that the police were not required to read any Miranda warnings before questioning Mr. Salinas.

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1. No. 12-246, 2013 WL 2922119 (June 17, 2013).
2. Salinas v. Texas, No. 12-246, slip op. at 1-2 (plurality op.).
3. Id. at 2.
4. Id.
5. Id. (citing Miranda v. Arizona, 384 U.S. 436 (1966)).
During the interview, officers asked Mr. Salinas “whether his shotgun would match the shells recovered at the scene of the murder.”

Mr. Salinas did not answer. Instead, he “looked down at the floor, shuffled his feet, bit his bottom lip, clenched his hands in his lap, and began to tighten up.” Then, “[a]fter a few moments of silence,” the interviewing officer moved on and “asked additional questions, which [Mr. Salinas] answered.” Eventually, the officers released him—and by the time that the police had collected enough evidence to charge him with the murders, he had gone into hiding.

Approximately fourteen years later, in 2007, police caught Mr. Salinas and he was charged with murder.

During Mr. Salinas’ trial, and over his objection, prosecutors used his reaction to the question about the shotgun shells—namely, his silence and awkwardness—to convince the jury of his guilt. He was convicted and sentenced to twenty years’ imprisonment.

Mr. Salinas appealed, “argu[ing] that prosecutors’ use of his silence as part of their case in chief violated the Fifth Amendment.” After the Texas courts rejected Mr. Salinas’ arguments, the U.S. Supreme Court granted certiorari.

II. THE U.S. SUPREME COURT’S DECISION

In affirming the state court’s judgment, the Supreme Court did not reach the question for which it granted certiorari: “whether the prosecution may use a defendant’s assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief.” Instead, the Court concluded that the Fifth Amendment did not protect Mr. Salinas, although the Justices in the majority split as to the rationale.

A. Justice Alito’s Plurality Opinion

Justice Alito’s three-member plurality opinion concluded that the Fifth Amendment did not apply at all because Mr. Salinas did not “expressly invoke” his rights during his interview. The plurality explained that “[t]he privilege against self-incrimination is an exception to the general principle that the Government has the right to everyone’s testimony.” Because this Fifth Amendment right is not “self-executing,” “a witness who desires its protection must claim it.”

The plurality explained that the Supreme Court has identified two exceptions to the usual rule that a witness must expressly assert his Fifth Amendment rights: (1) “a criminal defendant need not take the stand and assert the privilege at his own trial,” and (2) “a witness’ failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary,” such as during an “unwarned custodial interrogation.” The plurality determined that neither of these specific exceptions is applicable where, as in Salinas, a defendant voluntarily submits to an interview with the police and is “free to leave at any time during the interview.” Mr. Salinas’ interview was “noncustodial” and thus not coercive, so the plurality reasoned that “it would have been a simple matter for him to say that he was not answering the officer’s question on Fifth Amendment grounds.”

B. Justice Thomas’ Concurrence in the Judgment

Justice Thomas, joined by Justice Scalia, concurred in the judgment only and rejected the plurality’s concern for whether or not Mr. Salinas had asserted his Fifth Amendment rights. According to Justice Thomas, even if Mr. Salinas had expressly invoked his rights, prosecutors would still have been entitled to use Mr. Salinas’ silence as evidence of his guilt.

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6  Id. (internal quotation marks omitted).
7  Id. (alterations and internal quotation marks omitted).
8  Id.
9  Id. at 2-3.
10  Id. at 3.
11  Id.
12  Id.
13  Id.
14  Id.
15  Id.
16  Id. at 1.
17  Id. at 3-4 (internal quotation marks omitted).
18  Id. at 1 (internal quotation marks omitted).
19  Id. at 4-5 (citing Miranda v. Arizona, 384 U.S. 436 (1966)).
20  Id. at 6 (internal quotation marks omitted).
21  Id.
22  Id.
23  Salinas, No. 12-246, slip op. at 1 (Thomas, J. concurring).
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Griffin v. California—The Supreme Court’s decision that articulated the constitutional prohibition against drawing adverse inferences from a criminal defendant’s refusal to testify—incorrectly interpreted the Fifth Amendment and should not be extended.25 Thus, at the very least, Justice Thomas concluded, courts ought to be able to draw adverse inferences from “a defendant’s silence during a precustodial interview.”26 He therefore concurred only in the judgment that “[Mr.] Salinas’ Fifth Amendment claim fails.”27

C. Justice Breyer’s Dissenting Opinion

Justice Breyer dissented, taking the view that the Fifth Amendment prohibited the prosecution from “commenting on [Mr. Salinas’] silence in response to police questioning.”28 Joined by Justices Ginsburg, Sotomayor, and Kagan, Justice Breyer explained that “[i]t permit a prosecutor to comment on a defendant’s constitutionally protected silence would put that defendant in an impossible predicament”29:

[The defendant] must either answer the question or remain silent. If he answers the question, he may well reveal, for example, prejudicial facts, disreputable associates, or suspicious circumstances—even if he is innocent. If he remains silent, the prosecutor may well use that silence to suggest a consciousness of guilt.30

Justice Breyer contended that the relevant question is not, as the plurality would have it, whether a suspect expressly invokes the privilege against self-incrimination, but rather, whether one can “fairly infer from an individual’s silence and surrounding circumstances an exercise of the Fifth Amendment’s privilege.”31

As applied to Mr. Salinas’ decision not to respond to police questioning, Justice Breyer contended that the circumstances “g[a]ve rise to a reasonable inference that [Mr.] Salinas’ silence derived from an exercise of his Fifth Amendment rights.”32 Among other factors, Justice Breyer cited the fact that Mr. Salinas was not represented by counsel, that there was an ongoing criminal investigation, that the police had made clear that Mr. Salinas was a suspect, and that the police had switched subject matter during their questioning.33 In light of these circumstances, “it was obvious that the new question sought to ferret out whether [Mr.] Salinas was guilty of murder.”34 Thus, the dissent concluded, Mr. Salinas’ silence “amount[ed] to an effort to avoid becoming a witness against himself,” he had implicitly invoked his Fifth Amendment rights, and prosecutors should have been “prohibit[ed] … from commenting on [his] silence.”35

D. The Relevance of a Fragmented Court

Under the analytical framework established by Marks v. United States, “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”36 Here, the Salinas plurality and concurrence agreed only on the basic holding that the rule against adverse inferences did not apply, as Justice Thomas put it, to “a defendant’s silence during a precustodial interview.”37 However, the plurality and concurrence diverged as to the rationale for why that rule did not apply. Further, no five Justices expressed a view about what exact words—or, perhaps, what combination of words, conduct, and circumstances—would have been sufficient for Mr. Salinas to have invoked his Fifth Amendment privilege in the first instance. There was also no majority view on what might have happened if Mr. Salinas had sufficiently invoked the Fifth Amendment, thus leaving unresolved the question of whether a prosecutor can draw an adverse inference about the assertion of the privilege during a noncustodial interview.

25 Salinas, No. 12-246, slip op. at 1-2 (Thomas, J. concurring).
26 Id. at 2.
27 Id.
28 Salinas, No. 12-246, slip op. at 1 (Breyer, J., dissenting).
29 Id. at 3.
30 Id. (citations omitted).
31 Id. at 12.
32 Id. at 9-10.
33 Id. at 9.
34 Id.
35 Id. at 2, 3-4, 12.
36 430 U.S. 188, 193 (1977) (ellipsis and internal quotation marks omitted).
37 Salinas, No. 12-246, slip op. at 1 (Thomas, J. concurring).
Ill. Implications

A. Generally

The Salinas dissent offers a glimpse into the questions and dangers that the decision presents for potential criminal suspects who speak to investigators without the assistance of counsel. As an initial matter, the plurality opinion suggests it is “a simple matter” to “expressly invoke the privilege against self-incrimination.”38 But despite acknowledging “popular misconceptions” that there is “an unqualified ‘right to remain silent,’”39 the plurality did not suggest how a layperson, “unschooled in the particulars of legal doctrine”40 and voluntarily speaking to government agents without counsel, might recognize the need to expressly invoke any constitutional rights at all. Moreover, nowhere did the plurality specify what “legally magic” words would be necessary to assert the Fifth Amendment privilege.41 As the dissent asked: “[D]oes it really mean that the suspect must use the exact words ‘Fifth Amendment’?”42 By assuming that laypersons will be able to adequately invoke their rights, the plurality opinion ignores what the Court itself has repeatedly recognized, most notably fifty years ago in Gideon v. Wainright: “Even the intelligent and educated layman has small and sometimes no skill in the science of law.”43

Potential suspects who cooperate with law enforcement will also face what the dissent called an “impossible predicament”: they can speak and risk incriminating themselves, or they can remain silent and risk having that silence used as evidence of their guilt. Silence can reflect one’s shock at being accused of a crime instead of being probative of guilt. Yet the only evidence at trial about the meaning of that silence would likely come from the interviewing agent, because criminal defendants often do not testify. As a result, when interpreting a defendant’s prior silence, the jury would have to rely solely on the inherently subjective eyes and ears of the agent seeking the conviction. Salinas thus emphasizes the potentially significant costs of voluntary cooperation with government agents. Yet prosecutors and courts alike formally account for cooperation when making charging and sentencing decisions.44 If its implications are fully understood, Salinas could deter witnesses from speaking with the government, and thus could unsettle the prospects of some cooperative criminal investigations.

B. White Collar Investigations

The holding in Salinas was not limited to a particular type or location of government interview, or to a particular criminal offense. Indeed, even the Salinas dissent suggested that its criticisms of the plurality opinion rested on the particular “facts and circumstances surrounding [Mr. Salinas’] silence,” because “other cases” may “present a closer question.”45 Accordingly, after Salinas, potential targets of white collar investigations should be especially sensitive to the risks of cooperating with any government inquiry without counsel, because the prospect of criminal charges is not always immediately apparent, particularly where liability rests on a complex statutory or regulatory analysis.

Consider a situation where a federal agent makes an unannounced visit to a company’s office and asks to see unannounced records in connection with an unspecified investigation. If the employee who greets the agent invites him inside

372 U.S. 335, 345 (1963) (internal quotation marks omitted).

38 Salinas, No. 12-246, slip op. at 1, 6 (plurality op.).
39 Id. at 6.
40 Id.
41 Salinas, No. 12-246, slip op. at 11 (Breyer, J., dissenting).
42 Id.
43 See Salinas, No. 12-246, slip op. at 11 (Breyer, J., dissenting).
44 See, e.g., U.S. Attorneys’ Manual § 9-27.230(B)(6) (“A person’s willingness to cooperate in the investigation or prosecution of others is another appropriate consideration in the determination whether a Federal prosecution should be undertaken.”); id. § 9-27.420(A)(11) (citing “[t]he defendant’s willingness to cooperate in the investigation … of others” as a relevant consideration “[i]n determining whether it would be appropriate to enter into a plea agreement”); id. § 9-27.600(A) (authorizing government attorneys to “enter into a non-prosecution agreement in exchange for a person’s cooperation when … the person’s timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective”); id. § 9-28.700(A) (“In determining whether to charge a corporation and how to resolve corporate criminal cases, the corporation’s timely and voluntary disclosure of wrongdoing and its cooperation with the government’s investigation may be relevant factors.”); 2012 U.S. Sentencing Guidelines Manual §B1.8(a) (providing that self-incriminating information will not be used for sentencing purposes if provided pursuant to certain cooperation agreements); id. § 8C2.5(g) (reducing “culpability score” for organizational defendants upon timely cooperation).
45 See Salinas, No. 12-246, slip op. at 11 (Breyer, J., dissenting).
to further discuss the request, Salinas does not appear to prevent the agent from then ambushing the employee, in her own workplace, with intricate and ambiguous questions about company operations that are designed “to ferret out whether [she] was guilty” of some white collar crime.46 The employee might not respond, simply because she fears speaking imprecisely or is concerned that she might inadequately refute the interviewer’s incorrect suspicions. Yet Salinas may extend to allow prosecutors to later use the employee’s inability to respond as evidence that she knew her conduct was unlawful; to leverage a threat of prosecution to encourage her to implicate her employer; and even to try imputing the import of her silence to her employer in any later proceedings.

It could be equally problematic for a company to institute a blanket policy that forbids employees from cooperating with investigators and providing them with any information. In the hypothetical above, if the employee refuses to engage the federal agent at all and slams the office’s front door shut, then, under Salinas, that aggressive refusal to talk might itself be introduced as evidence of the employee’s guilty mind. Similarly, an established company policy of non-cooperation might antagonize investigators into launching formal and contentious proceedings and make the company ineligible for prosecutorial and judicial forbearance.47 Companies might also then suffer the collateral consequences of protracted public investigations, such as negative publicity and reduced business value.

Blanket non-cooperation by suspects could also create an environment where agents in the early stages of their investigation may have to seek search warrants for routine matters. This could introduce significant uncertainty and administrative burdens for the government and hamstring an agency’s ability to efficiently undertake its investigatory and enforcement functions.

Perhaps most troubling about Salinas is that it places into the hands of law enforcement officials the ability to make judgments and draw inferences from silence. The mere shock of hearing accusatory questions from a police officer or federal agent could leave a layperson stunned and wordless. But for law enforcement officials who are interested in making cases, their sensitivities may be conditioned to interpret silence as evidence of “consciousness of guilt.”48 Thus, Salinas may open the door to unreliable evidence being introduced in the government’s case in chief. And once the interpretation of silence becomes admissible evidence, it may effectively compel the accused to testify because only they can speak to their true intentions.

IV. CONCLUSION

At bottom, Salinas has heightened the risks that individuals face when cooperating with criminal investigations, and by extension, the risks that employers also face when allowing their employees to cooperate with investigators during informal encounters without the assistance of counsel. The decision is a stark reminder that individuals and organizations alike should carefully consider, far in advance, whether and how they might try to avoid Salinas’ “impossible predicament.”

46 Salinas, No. 12-246, slip op. at 3 (Breyer, J., dissenting).

47 See supra note 44.

If you have any questions about any of the topics discussed in this advisory, please contact your Arnold & Porter attorney or any of the following attorneys:

Kirk Ogrosky
+1 202.942.5330
Kirk.Ogrosky@aporter.com

Murad Hussain
+1 202.942.6143
Murad.Hussain@aporter.com

Charles B. Weinograd
+1 202.942.5392
Charles.Weinograd@aporter.com

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