US Supreme Court whittles down right to protection against self-incrimination

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On Monday, the Supreme Court made it more difficult for people suspected of a crime to invoke their Fifth Amendment right against self-incrimination and to remain silent. In the case of *Salinas v. Texas*, the court upheld the murder conviction of a man who became silent when police questioned him in an interview about shell casings found at a crime scene. At trial, the prosecutor was permitted to argue that the jurors hearing the case should interpret that silence as evidence of the defendant's guilt, a fiercely anti-democratic notion that aims to penalize the invocation of constitutional rights.

Houston police officers investigated defendant Genovevo Salinas in 1993 as a suspect in the shooting death of two brothers. A description of a "dark colored" car leaving the scene led police to Salinas's house, where his blue car was parked. Salinas cooperated with the police, giving them his shotgun for use in their investigation, and was not placed under arrest, though he was told he was a suspect.

Officers took Salinas to a police station "to take photographs and to clear him as a suspect." He was questioned in an "interview room." He was still not under arrest at the time of the interview, and therefore no police officer had informed him of his right to an attorney and to remain silent under the landmark case *Miranda v. Arizona*. Salinas reportedly answered all of the questions posed to him, but became silent when asked if the shell casings recovered from the crime scene would match his shotgun when ballistic analysis was completed. Police testified at Salinas's murder trial that he became very nervous at this point, shifting his feet around and biting his lip, but saying nothing.

At the ensuing murder trial, the prosecutor referred to Salinas's silence and "nervous" behavior in closing statements, telling the jury to consider this as evidence of guilt. Over the objection of Salinas's attorney, the prosecutor was allowed to tell the jury, that "an innocent person" would have said, "'What are you talking about? I didn't do that. I wasn't there.'"

Salinas was convicted and is serving a 22-year sentence.

The US Constitution's Fifth Amendment provides that a criminal defendant cannot be forced to provide police or government officials with self-incriminating testimony. It also affords the defendant the right of due process of law. Nowhere does it require that the right against self-incrimination must be verbally invoked in order to take effect, nor has any Supreme Court ruling ever required that a specific formula be recited in order for the protection to apply.

It is also worth noting that a defendant's choice not to testify in his own defense at trial cannot be considered as evidence of guilt, and a standard instruction makes this clear to jurors at trial.

Salinas's attorney argued that the defendant's silence could not be submitted as evidence of guilt because his silence, especially in light of the circumstance of being a suspect in a murder case, was in fact an invocation of his right to protection against self-incrimination.

The Supreme Court rejected this argument in a 5-4 decision.

Justice Samuel Alito wrote the opinion for a plurality of the court, joined by Chief Justice John Roberts and the "moderate" Justice Anthony Kennedy. Specifically, the opinion finds that Salinas failed to invoke his Fifth Amendment right against self-incrimination by simply remaining silent, as such silence is "insolubly ambiguous." In other words, Salinas could have been silent for any number of reasons, so the silence does not necessarily reflect a desire to … remain silent. The plurality opinion also specifically rejected the notion that a defendant's lack of legal education could be taken into account in considering whether silence or some other gesture was intended to invoke the right against self-

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incrimination.

Justice Clarence Thomas wrote a concurring opinion, joined by Justice Antonin Scalia, which went so far as to say that even if Salinas had unambiguously invoked his right against self-incrimination, his doing so, as well as his nervousness, shifting, and lip-biting, would be admissible in court as evidence of guilt. They would even have held that a prosecutor could infer at trial that the defendant's invocation of the Fifth Amendment and refusal to testify was evidence of guilt. If such rules were in effect they would serve to penalize defendants for invoking their constitutional rights.

This seems to be precisely the reason the court granted review of the case. By simply refusing to hear the case, the high court would have left Salinas's conviction untouched. Instead, the court's right wing took the opportunity to "clarify" the application of the Fifth Amendment, that is, to further erode a basic democratic right.

Justice Stephen Breyer wrote a dissenting opinion, joined by Justices Sonia Sotomayor, Ruth Bader Ginsburg and Elena Kagan, which would have found that the defendant's silence served to invoke the Fifth Amendment's protection. The justices' logic turned largely on the lack of any specifically required way of invoking the right to remain silent, as well as the fair implication, given the circumstances of a criminal investigation, the interview by police, etc., that Salinas intended to invoke his right.

Monday's ruling in this case serves to bolster the legal position of the police, giving deference to their coercive procedures and credibility to their testimony in court.

Two other significant decisions came down on Monday: *Maracich v. Spears* and *Arizona v. Inter Tribal Counsel of Arizona*, which concern class action lawsuits and voting rights, respectively.

In a considerable blow to plaintiffs and their attorneys in class action lawsuits, the court in *Maracich* interpreted a federal statute authorizing the use of state driver license databases as prohibiting lawyers from soliciting prospective class members (clients) by accessing such databases. Attorneys can now be found liable for $2,400 *per instance* when contacting prospective clients by mass mailings based on driver license information.

The ruling will have the immediate effect of making it more difficult for plaintiffs and attorneys to aggregate their claims into class action suits, and will thus amount to a windfall for corporate defendants. Like the Supreme Court's 2011 decision in *Wal-Mart v. Dukes*, this ruling diminishes the right to claim damages for corporate wrongdoing by severely limiting access to the federal courts.

Justice Scalia wrote a carefully worded but nonetheless transparently partisan opinion in *Arizona*. That case concerned a challenge to the state of Arizona's law that forces prospective voters to prove their US citizenship in order to vote or even to register to vote. A federal voter registration form already required prospective voters to affirm their citizenship. Generally, federal law trumps state law when the two both seek to regulate a particular aspect of public policy, such as elections and voting.

In a 7-2 decision, the court found that the state of Arizona could not enforce the law in question, but Scalia's opinion outlined a process by which it could seek permission from the federal government to require proof of citizenship in voting. Scalia insisted that the power to determine who gets to vote rests not with the federal government, but with the states. If a state sought permission from the federal government to require proof of citizenship to vote and was denied, then the case could come back to court, according to Scalia.

This paves the way for further litigation on the matter on terms that are much more favorable to states like Arizona, where suppressing likely democratic voters with modern-day poll taxes has become a normal part of political life. In the run-up to the 2012 presidential election, some 14 states passed "voter ID" laws aimed at limiting the franchise.

Last June, Republican Mike Turzai, the majority leader in Pennsylvania's House of Representatives, boasted at a meeting of the Republican State Committee that the state's new voter ID law would deliver the state to Mitt Romney in the November 2012 presidential elections, at a time when polls of likely voters showed Barack Obama with a double-digit lead.

Monday's ruling in *Arizona*, as well as those in *Salinas* and *Maracich*, must be seen as a judicial green light for the further restriction of democratic rights.

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