AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era—Criminal Justice/Interrogations

---

Salinas v. Texas, ___ U.S. ___ (2013)

Genovevo Salinas was interviewed for an hour by Houston police officials about several murders that took place on December 18, 1992. He was neither in custody at that time nor was he given Miranda *warnings. Salinas answered most of the questions he was asked, but when questioned about whether his shotgun was the murder weapon, he remained silent. After more evidence came to light, Salinas was arrested and tried for those murders. During his trial, the prosecutor in closing argument asserted, "an innocent person" would respond "What are you talking about? I didn't do that. I wasn't there." The trial judge rejected Salinas's objection to that portion of the closing. Shortly thereafter, the jury found him guilty of murder and Salinas was sentenced to 20 years in prison. The Court of Criminal Appeals in Texas rejected Salinas's claim that this use of his silence during the interrogation/interview violated the Fifth Amendment as incorporated by the due process clause of the Fourteenth Amendment. Salinas appealed to the Supreme Court of the United States.*

The Supreme Court by a 5–4 vote declared that Salinas was constitutionally convicted. Justice Alito's plurality opinion declared that persons must ordinarily explicitly assert their Fifth Amendment rights in order to take advantage of the constitutional privilege. All the opinions in Salinas *discussed at some length the Supreme Court's decision in* Griffin v. California *(1965). In that case, the justices held that a prosecutor could not comment on a defendant's decision to refrain from testifying at trial. How did Justice Alito distinguish* Griffin *and* Salinas*? Why did Justice Breyer dispute that distinction? Who is correct? Why would Justice Scalia overrule* Griffin*? Is he correct? How important a case is* Salinas*? Did the result depend on particular factual conditions likely to be different in the next case before the Court or will Justice Alito's opinion have a significant impact on the interrogation process?*

JUSTICE ALITO announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE and JUSTICE KENNEDY join.

. . . .

The privilege against self-incrimination "is an exception to the general principle that the Government has the right to everyone's testimony." To prevent the privilege from shielding information not properly within its scope, we have long held that a witness who "'desires the protection of the privilege . . . must claim it'" at the time he relies on it.

That requirement ensures that the Government is put on notice when a witness intends to rely on the privilege so that it may either argue that the testimony sought could not be self-incriminating or cure any potential self-incrimination through a grant of immunity. The express invocation requirement also gives courts tasked with evaluating a Fifth Amendment claim a contemporaneous record establishing the witness' reasons for refusing to answer.

We have previously recognized two exceptions to the requirement that witnesses invoke the privilege, but neither applies here. First, we held in *Griffin* v. *California* (1965), that a criminal defendant need not take the stand and assert the privilege at his own trial. That exception reflects the fact that a criminal defendant has an "absolute right not to testify." . . . Because petitioner had no comparable unqualified right during his interview with police, his silence falls outside the *Griffin* exception.

Second, we have held that a witness' failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary. Thus, in *Miranda v. Arizona* (1966), we said that a suspect who is subjected to the "inherently compelling pressures" of an unwarned custodial interrogation need not invoke the privilege. For similar reasons, we have held that threats to withdraw a governmental benefit such as public employment sometimes make exercise of the privilege so costly that it need not be affirmatively asserted. And where assertion of the privilege would itself tend to incriminate, we have allowed witnesses to exercise the privilege through silence.

Petitioner cannot benefit from that principle because it is undisputed that his interview with police was voluntary. As petitioner himself acknowledges, he agreed to accompany the officers to the station and "was free to leave at any time during the interview." That places petitioner's situation outside the scope of *Miranda* and other cases in which we have held that various forms of governmental coercion prevented defendants from voluntarily invoking the privilege. . . .

. . . .

Our cases establish that a defendant normally does not invoke the privilege by remaining silent. In *Roberts* v. *United States* (1980), for example, we rejected the Fifth Amendment claim of a defendant who remained silent throughout a police investigation and received a harsher sentence for his failure to cooperate. In so ruling, we explained that "if [the defendant] believed that his failure to cooperate was privileged, he should have said so at a time when the sentencing court could have determined whether his claim was legitimate." A witness does not expressly invoke the privilege by standing mute.

We have also repeatedly held that the express invocation requirement applies even when an official has reason to suspect that the answer to his question would incriminate the witness. Thus, in *Minnesota v. Murphy* (1984) we held that the defendant's self-incriminating answers to his probation officer were properly admitted at trial because he failed to invoke the privilege. In reaching that conclusion, we rejected the notion "that a witness must 'put the Government on notice by formally availing himself of the privilege' only when he alone 'is reasonably aware of the incriminating tendency of the questions.'"

Petitioner's proposed exception would also be very difficult to reconcile with *Berghuis* v. *Thompkins* (2010). There, we held in the closely related context of post-*Miranda* silence that a defendant failed to invoke the privilege when he refused to respond to police questioning for 2 hours and 45 minutes. If the extended custodial silence in that case did not invoke the privilege, then surely the momentary silence in this case did not do so either.

Petitioner and the dissent attempt to distinguish *Berghuis* by observing that it did not concern the admissibility of the defendant's silence but instead involved the admissibility of his subsequent statements. But regardless of whether prosecutors seek to use silence or a confession that follows, the logic of *Berghuis* applies with equal force: A suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege.

. . . . [C]ounsel for petitioner suggested that it would be unfair to require a suspect unschooled in the particulars of legal doctrine to do anything more than remain silent in order to invoke his "right to remain silent." But popular misconceptions notwithstanding, the Fifth Amendment guarantees that no one may be "compelled in any criminal case to be a witness against himself"; it does not establish an unqualified "right to remain silent." A witness' constitutional right to refuse to answer questions depends on his reasons for doing so, and courts need to know those reasons to evaluate the merits of a Fifth Amendment claim.

. . . .

Before petitioner could rely on the privilege against self-incrimination, he was required to invoke it. Because he failed to do so, the judgment of the Texas Court of Criminal Appeals is affirmed.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in the judgment.

In *Griffin* v. *California*, this Court held that the Fifth Amendment prohibits a prosecutor or judge from commenting on a defendant's failure to testify. . . . Salinas argues that we should extend *Griffin's* no-adverse-inference rule to a defendant's silence during a precustodial interview. I have previously

explained that the Court's decision in *Griffin* "lacks foundation in the Constitution's text, history, or logic" and should not be extended. I adhere to that view today.

Griffin is impossible to square with the text of the Fifth Amendment, which provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." 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. Nor does the history of the Fifth Amendment support *Griffin*. At the time of the founding, English and American courts strongly encouraged defendants to give unsworn statements and drew adverse inferences when they failed to do so. Given *Griffin*'s indefensible foundation, I would not extend it to a defendant's silence during a precustodial interview. . . .

JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

. . . .

The Fifth Amendment prohibits prosecutors from commenting on an individual's silence where that silence amounts to an effort to avoid becoming "a witness against himself." . . . And, since "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation," the "prosecution may not . . . use at trial *the fact that he stood mute* or claimed his privilege in the face of accusation."

Particularly in the context of police interrogation, a contrary rule would undermine the basic protection that the Fifth Amendment provides. To permit a prosecutor to comment on a defendant's constitutionally protected silence would put that defendant in an impossible predicament. He 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. And if the defendant then takes the witness stand in order to explain either his speech or his silence, the prosecution may introduce, say for impeachment purposes, a prior conviction that the law would otherwise make inadmissible. Thus, where the Fifth Amendment is at issue, to allow comment on silence directly or indirectly can compel an individual to act as "a witness against himself"—very much what the Fifth Amendment forbids. . . .

It is consequently not surprising that this Court, more than half a century ago, explained that "no ritualistic formula is necessary in order to invoke the privilege." . . . The cases in which this Court has insisted that a defendant expressly mention the Fifth Amendment by name in order to rely on its privilege to protect silence are cases where (1) the circumstances surrounding the silence (unlike the present case) did not give rise to an inference that the defendant intended, by his silence, to exercise his Fifth Amendment rights; *and* (2) the questioner greeted by the silence (again unlike the present case) had a special need to know whether the defendant sought to rely on the protections of the Fifth Amendment. . . .

In *Roberts* . . . , the individual refused to answer questions that government investigators . . . asked, principally because the individual wanted to avoid incriminating *other persons*. But the Fifth Amendment does not protect someone from incriminating others; it protects against *self*-incrimination. In turn, neither the nature of the questions nor the circumstances of the refusal to answer them provided any basis to infer a tie between the silence and the Fifth Amendment, while knowledge of any such tie would have proved critical to the questioner's determination as to *whether* the defendant had any proper legal basis for claiming Fifth Amendment protection.

. . . . Thus, we have two sets of cases: One where express invocation of the Fifth Amendment was not required to tie one's silence to its protections, and another where something like express invocation was required, because circumstances demanded some explanation for the silence (or the statements) in order to indicate that the Fifth Amendment was at issue.

There is also a third set of cases, cases that may well fit into the second category but where the Court has held that the Fifth Amendment both applies and does not require express invocation *despite*

ambiguous circumstances. The Court in those cases has made clear that an individual, when silent, need not expressly invoke the Fifth Amendment if there are "inherently compelling pressures" not to do so.

The plurality refers to one additional case, namely *Berghuis* v. *Thompkins* (2010). . . . In *Berghuis*, the defendant was in custody, he had been informed of his *Miranda* rights, and he was subsequently silent in the face of 2 hours and 45 minutes of questioning before he offered any substantive answers. The Court held that he had waived his Fifth Amendment rights in respect to his *later speech*. The Court said nothing at all about a prosecutor's right to comment on his preceding silence and no prosecutor sought to do so. Indeed, how could a prosecutor lawfully have tried to do so, given this Court's statement in *Miranda* itself that a prosecutor cannot comment on the fact that, after receiving *Miranda* warnings, the suspect "stood mute"?

We end where we began. "[N]o ritualistic formula is necessary in order to invoke the privilege." Much depends on the circumstances of the particular case, the most important circumstances being: (1) whether one can fairly infer that the individual being questioned is invoking the Amendment's protection; (2) if that is unclear, whether it is particularly important for the questioner to know whether the individual is doing so; and (3) even if it is, whether, in any event, there is a good reason for excusing the individual from referring to the Fifth Amendment, such as inherent penalization simply by answering.

Applying these principles to the present case, I would hold that Salinas need not have expressly invoked the Fifth Amendment. The context was that of a criminal investigation. Police told Salinas that and made clear that he was a suspect. His interrogation took place at the police station. Salinas was not represented by counsel. The relevant question—about whether the shotgun from Salinas' home would incriminate him—amounted to a switch in subject matter. And it was obvious that the new question sought to ferret out whether Salinas was guilty of murder..

These circumstances give rise to a reasonable inference that Salinas' silence derived from an exercise of his Fifth Amendment rights. This Court has recognized repeatedly that many, indeed most, Americans are aware that they have a constitutional right not to incriminate themselves by answering questions posed by the police during an interrogation conducted in order to figure out the perpetrator of a crime. The nature of the surroundings, the switch of topic, the particular question—all suggested that the right we have and generally *know* we have was at issue at the critical moment here. Salinas, not being represented by counsel, would not likely have used the precise words "Fifth Amendment" to invoke his rights because he would not likely have been aware of technical legal requirements, such as a need to identify the Fifth Amendment by name.

. . . .

The plurality says that a suspect must "expressly invoke the privilege against self-incrimination." But does it really mean that the suspect must use the exact words "Fifth Amendment"? How can an individual who is not a lawyer know that these particular words are legally magic? Nor does the Solicitor General help when he adds that the suspect may "mak[e] the claim 'in any language that [the questioner] may reasonably be expected to understand as an attempt to invoke the privilege.'" What counts as "making the claim"? Suppose the individual says, "Let's discuss something else," or "I'm not sure I want to answer that"; or suppose he just gets up and leaves the room. How is simple silence in the present context any different?

The basic problem for the plurality is that an effort to have a simple, clear "explicit statement" rule poses a serious obstacle to those who, like Salinas, seek to assert their basic Fifth Amendment right to remain silent, for they are likely unaware of any such linguistic detail. At the same time, acknowledging that our case law does not require use of specific words, leaves the plurality without the administrative benefits it might hope to find in requiring that detail.

Far better, in my view, to pose the relevant question directly: 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 protection, 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.

. . . .