Blowing Holes in the Fifth Amendment

By Paul Engel

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- You have the right to remain silent, correct?
- SCOTUS says you don't have the right to remain silent unless you say so.
- Do you find it ironic that you have to speak to remain silent?

Everyone knows we have a right to remain silent, correct? What if I told you that in 2013 the Supreme Court upheld a decision basically stating that is not true. You only have the right to remain silent if you verbally claim the right in the first place, otherwise, according to SCOTUS, your silence can be used against you. Let's take a look at this case and some of the history behind this violation of your rights.

Your Right to Remain Silent

Anyone who has watched a crime drama, or has been arrested, knows about the Miranda Warning.

the requirement set by the U. S. Supreme Court in Miranda v. Alabama (1966) that prior to the time of arrest and any interrogation of a person suspected of a crime, he/she must be told that he/she has: "the right to remain silent, the right to legal counsel, and the right to be told that anything he/she says can be used in court against" him/her.

Miranda warning – The Free Legal Dictionary

There's more to the Miranda decision, but this is what every American "knows": They have a right to remain silent. But where does that come from?

No person shall … be compelled in any criminal case to be a witness against himself

U.S. Constitution, Amendment V

Technically, you have the right not to be compelled to be a witness against yourself in a criminal case. Since anything you say could be used against you, you generally did not have to talk to law enforcement, or any government agent for that matter. However, as is so often the case, the right to not be compelled to self-witness was relabeled the right to remain silent. While at first that sounds like the same thing, we'll soon found out it is not.

Berghuis v. Thompkins, 560 U.S. 370 (2010)

In the Berghuis v. Thompkins case, Mr. Thompkins had been arrested and advised of his right in accordance with Miranda, at which point two officers interrogated him about a shooting where one victim died. As recorded in the case:

At no point did Thompkins say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney. He was largely silent during the 3-hour interrogation, but near the end, he answered "yes" when asked if he prayed to God to forgive him for the shooting.

Berghuis v. Thompkins, 560 U.S. 370 (2010)

At trial, Mr. Thompson moved to suppress his statement, claiming he had invoked his Fifth Amendment right to remain silent and that his statements were involuntary. The question of Mr. Thompson's motion made it all the way to the Supreme Court, which held that the state court's decision to deny the motion was correct.

Thompkins' silence during the interrogation did not invoke his right to remain silent. A suspect's Miranda right to counsel must be invoked "unambiguously." … If the accused makes an "ambiguous or equivocal" statement or no statement, the police are not required to end the interrogation, ibid., or ask questions to clarify the accused's intent.

Berghuis v. Thompkins, 560 U.S. 370 (2010)

The Berghuis court relied on the case Davis v. United States. However, while the case did involve Miranda rights, it did not involve the right to remain silent.

Petitioner, a member of the United States Navy, initially waived his rights to remain silent and to counsel when he was interviewed by Naval Investigative Service agents in connection with the murder of a sailor. About an hour and a half into the interview, he said, "Maybe I should talk to a lawyer." However, when the agents inquired if he was asking for a lawyer, he replied that he was not. They took a short break, he was reminded of his rights, and the interview continued for another hour, until he asked to have a lawyer present before saying anything more. A military judge denied his motion to suppress statements made at the interview, holding that his mention of a lawyer during the interrogation was not a request for counsel. He was convicted of murder, and, ultimately, the Court of Military Appeals affirmed.

Davis v. United States, 512 U.S. 452 (1994)

I contend that there is a fundamental problem with the decision in Berghuis. Miranda does not protect a single right, but multiple rights, as the Miranda court stated:

The police did not effectively advise him of his right to remain silent or of his right to consult with his attorney.

Miranda v. Arizona, 384 U.S. 436 (1966)

The Miranda court clearly identified two separate rights that the police need to advise someone upon arrest: The right to remain silent and the right to an attorney. These rights are different not only in form, but in function. The right to an attorney is a positive right; it identifies something the government must provide to the accused. This right is protected by the Sixth Amendment.

In all criminal prosecutions, the accused shall enjoy the right …to have the Assistance of Counsel for his defence.

U.S. Constitution, Amendment VI

The right to remain silent, more accurately the right not to witness against yourself, is a negative right because it's what the government cannot do to you: Compel you to witness against yourself. This is protected by the Fifth Amendment.

No person … shall be compelled in any criminal case to be a witness against himself,

U.S. Constitution, Amendment V

So when the Berghuis court found:

Thompkins waived his right to remain silent when he knowingly and voluntarily made a statement to police. A waiver must be "the product of a free and deliberate choice rather than intimidation, coercion, or deception" and "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."

Berghuis v. Thompkins, 560 U.S. 370 (2010)

The court was partially correct in that, by voluntarily making a statement to the police, he was waiving his "right to remain silent" under Miranda. However, the court made an egregious mistake when they held:

Such a waiver may be "implied" through a "defendant's silence,

coupled with an understanding of his rights and a course of conduct indicating waiver."

Berghuis v. Thompkins, 560 U.S. 370 (2010)

No, Thompkins did not waive his right to remain silent, he simply did not exercise it for a time. Later, he did exercise it, recognizing that the police could not compel him to witness against himself. Which leads us to Salinas v. Texas and the hole the court claims to have punched through the Fifth Amendment.

Salinas v. Texas

The case of Salinas v. Texas starts with Mr. Salinas being questioned by police.

Petitioner, without being placed in custody or receiving Miranda warnings, voluntarily answered some of a police officer's questions about a murder, but fell silent when asked whether ballistics testing would match his shotgun to shell casings found at the scene of the crime. At petitioner's murder trial in Texas state court, and over his objection, the prosecution used his failure to answer the question as evidence of guilt. He was convicted, and both the State Court of Appeals and Court of Criminal Appeals affirmed, rejecting his claim that the prosecution's use of his silence in its case in chief violated the Fifth Amendment.

Salinas v. Texas, 570 U.S. 178 (2013)

In Salinas' case, it wasn't a question of whether or not what he said could be admitted as evidence in a court of law, rather than whether his silence was evidence of his guilt. This abuse of the Fifth Amendment was upheld by a 5-4 decision by the Supreme Court, the opinion for which was written by Justice Alito.

To prevent the privilege against self-incrimination from

shielding information not properly within its scope, a witness who " 'desires the protection of the privilege . . . must claim it' " at the time he relies on it.

Salinas v. Texas, 570 U.S. 178 (2013)

Here again we see the illiteracy often demonstrated by the courts. First, what's at issue is not a "privilege," it's a right to immunity. The government is not required to give you silence, they just cannot force you to speak. Second, this right has nothing to do with self-incrimination, but with self-witness. If you don't wish to divulge information about yourself that has no incriminating value, that is your right, protected by the Fifth Amendment to the Constitution of the United States. Apparently this fact is lost on at least five of the nine justices on the Supreme Court. The court compounded this error when Justice Alito wrote:

Petitioner's silence falls outside this exception because he had no comparable unqualified right not to speak during his police interview.

Salinas v. Texas, 570 U.S. 178 (2013)

Apparently these justices were absent in law school when they taught about the First Amendment. Oh, wait, law schools do not teach the actual Constitution anymore. Otherwise the justices would have remembered the First Amendment.

Congress shall make no law … abridging the freedom of speech

U.S. Constitution, Amendment I

You see, Freedom of Speech is not only the right to speak, but the right to refrain from speaking. So, contrary to Mr. Alito's opinion, Mr. Salinas retained the rights not to speak and not to abase himself during his police interview. I don't know if Congress has passed legislation requiring people to speak to law enforcement, but if they did, it's

unconstitutional and therefore void, and the courts are bound to ignore it.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument.

Marbury v. Madison, 5 U.S. 137 (1803)

If Congress has not passed such legislation, then Justices Alito, Roberts, Kennedy, Thomas, and Scalia violated their oaths of office by placing their own opinions above the law of the land.

Biasing the Jury

The courts, from Texas all the way to the Supreme Court, not only violated Mr. Salina's rights protected by the Fifth Amendment, but the Sixth Amendment as well.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,

U.S. Constitution, Amendment VI

By claiming that a lack of evidence is itself evidence, the courts effectively biased the jury against the accused. Mr. Salinas was asked if the ballistics of his shotgun would match those of the casings found at the murder scene. By not answering that question, and only that question, everyone assumed it was because he knew the ballistics would match because he had committed the murder. That's not evidence, that's an assumption. Perhaps Mr. Salinas did not know if the ballistics would match? If I assume Mr. Salinas is not guilty of the crime, there are several reasonable explanations for

his silence. Maybe someone else had access to his shotgun, and may have committed the murder. Perhaps someone collected spent casing from his shotgun and either planted them at the scene or had previously dropped them. Mr. Salinas may have been shooting with the victim at another time, accidentally leaving his spent casings behind. Perhaps the ballistics tests were just not that reliable. All of those assumptions would be reasonably valid reasons why Mr. Salinas did not wish to witness against himself, only to later be accused of lying to the police. And let's face it, if Mr. Salinas had invoked his right to remain silent when asked that question, would the assumption of guilt by the police and prosecution be any less likely?

Conclusion

Name one other right where you are required to announce that you are exercising it before you are allowed to do so? If the police come to your home, should you be required to invoke your right against unreasonable searches before you deny them consent to search your home? When the FBI attempts to intimidate you into censoring "misinformation," should you be required to invoke Freedom of Speech and Press before saying no? In either case, should your refusal to allow entry or to comply with censorship demands be considered evidence of your guilt? The answer to all of these questions should be a hearty and forceful NO!

I do not know if Mr. Salinas is guilty or not, or even if the egregious violation of this rights and biasing of the jury was the turning point in his conviction, but I know that the courts abused their position not only against Mr. Salinas, but against all of us. The opinions in Salinas v. Texas, from the state court on up, has blown a hole in the Fifth Amendment as surely as if the court had used Mr. Salinas' shotgun.

Based on this case, and the advice of several attorneys, we know the courts will not protect our right against self-

witness. Therefore, it has been recommended to me to not merely to exercise my right to remain silent, but to clearly state that I am doing so beforehand. And if you find it ironic that you have to speak before you can safely remain silent, then you are apparently smarter than a Supreme Court justice.

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