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The Sound of Silence Is Not Music to the Ears of the Supreme Court: More Is Needed to Invoke Fifth Amendment Rights

"You have the right to remain silent. Anything you say can be used against you in a court of law." Most of us are familiar with these famous words of the Miranda warnings that typically are provided when a person is arrested for a crime and taken into police custody.

But a recent U.S. Supreme Court decision held that you really do not have a right to just remain silent during a voluntary interview with authorities. Rather, one must expressly invoke his Fifth Amendment right against self-incrimination (from which the right to remain silent emanates) when refusing to answer questions of law enforcement.

The decision issued last month, *Salinas v. Texas*, 133 S. Ct. 2174 (2013), found that prosecutors could argue that a person's silence in the face of certain questions posed by police during a voluntary interview is evidence of the person's guilt. This decision has significant implications for general counsel advising company executives and employees who may be interviewed in connection with government enforcement actions involving the company and for lawyers advising clients in white collar matters where most direct client communication with authorities involves a non-custodial setting.

Case Background: Salinas v. Texas

Genovevo Salinas, the petitioner, was visited at his home by police who were investigating a double murder. Salinas agreed to provide his shotgun to police for ballistics testing, which could show whether the shell casings found at the scene came from the shotgun. He also agreed to come to the police station for an interview relating to the murders.

Because Salinas went to the station voluntarily and was free to leave at any time, he was not provided the Miranda warnings that would have advised him of his right to counsel and his right to remain silent. Salinas also did not seek representation by an attorney during the interview.

During the hour-long interview, Salinas answered most of the investigator's

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questions, but fell silent when he was asked if the results of ballistics testing would tie Salinas's shotgun to the shell casings found at the crime scene. Shortly after the interview, he was arrested and charged with the double homicide.

At trial (and over Salinas's objection), the court allowed the prosecution to use his silence during the pre-custodial interview as evidence of his guilt. A jury ultimately found Salinas guilty; the conviction was upheld twice on appeal, once by the Court of Appeals of Texas and once by the Texas Court of Criminal Appeals. The Supreme Court granted *certiorari* "to resolve a division of authority in the lower courts over 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." *Id.* at 2179.

The Court did not reach that issue though. Instead, it held that Salinas failed to assert his Fifth Amendment privilege against self-incrimination in the first place because he simply remained silent rather than expressly invoking his rights. *Id.* at 2184. The Court reasoned that the Fifth Amendment was intended to protect a person's ability to invoke the privilege against self-incrimination, and not to protect a person who has failed to affirmatively do so. *Id.* at 2179. The Court noted that despite Salinas's arguments to the contrary, the Fifth Amendment does not establish an "unqualified right to remain silent." *Id.* at 2183.

Implications on White-Collar Crime Investigations

The Salinas decision marks a departure from the usual understanding that, in the words of the dissent, there is "no ritualistic formula … necessary in order to invoke the privilege." It highlights the disconnect between the popular conception of what the Fifth Amendment protects—that the authorities cannot hold someone's refusal to speak against them in court. And it sets forth what appears to be a new requirement that the person speak in order to invoke the right.

Because criminal investigations in the corporate world are conducted almost entirely through pre-arrest investigations, the *Salinas* requirement that a person expressly invoke his rights has a heightened impact in white collar matters.

In light of *Salinas*, it is more important than ever for company executives and even lower-level employees to expressly invoke their rights if they are approached by government investigators to talk about potential wrongdoing that may implicate themselves or the company. Because it may be difficult or impossible for the executive or employee to determine if the company is a target of a criminal

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investigation or the individual has exposure, the safest course of action is to politely decline to speak to the authorities until you can have your attorney present. While one always may choose to speak with investigators, one cannot be compelled to do so unless subpoenaed by a court or investigative body such as a grand jury. Even in that event, it may be appropriate to seek immunity before testifying.

If you decide not to speak to the authorities, invoking the right to an attorney, rather than the Fifth Amendment right, is important. Invoking your right to remain silent because the answer may tend to incriminate you may cause the investigators to focus upon you as a target of the investigation. Indeed, in some circumstances even targets of investigations should speak to law enforcement, but only after consulting with counsel.

Companies, particularly companies in highly regulated industries such as financial services or government contracting, should have in place a policy that sets forth the procedure to be employed if personnel are approached by authorities or if government representatives arrive at the company for routine books and records examinations or, worse, to execute a search warrant.

After *Salinas*, it is critical to appreciate that the onus is on the person giving the interview, and not law enforcement, to invoke the Fifth Amendment's privilege against self-incrimination. Simply remaining silent is not enough to invoke the right to remain silent.

If you have any questions regarding the above please your Reinhart attorney, Mark Cameli or Ryan Stippich of Reinhart's White Collar Litigation and Corporate Compliance Team.

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