You May NOT Have The Right To Remain Silent!

June 28, 2013 | by Matheu Nunn

On June 17, 2013, the Supreme Court of the United States decided Salinas v. Texas, a case involving the Fifth Amendment and "Miranda" rights that has sent ripples across the internet, albeit, because many people simply do not understand what Miranda is – and what is it not. For example, a Slate Magazine article mentions "the Supreme Court held that you remain silent at your peril." A Cato Institute article calls the decision a "bad day for the Bill of Rights". These articles are, in a word, overreactions.

In reality, your Miranda rights are not greatly impacted or deteriorated by the decision – so long as you pay close attention to what the carefully worded decision means. To understand the nuances, you need to know what your Miranda rights are and when they arise.

What are they? Well, if you watch Law & Order, NCIS, (or watched LA Law, NYPD Blue), etc., you have heard them:

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have the right to an attorney.
4. If you cannot afford an attorney, one will be appointed for you.

However, many people do not understand that they come from a 1966 decision of the Supreme Court, Miranda v. Arizona, and, more importantly, that police have no obligation to advise you of those rights unless you are (1) in custody and (2) being interrogated/questioned about a crime. Meaning, if you are dumb enough to give the police "the goods" (i.e. you confessed to a crime) in response to police questioning and you are not in custody, your statements can and will be used against you. Similarly, if you are in "custody" and decide to spontaneously utter without being questioned "I did it send me to the chair," those statements can also be used against you (because although you were in custody, you were not being questioned). In a more practical setting, assume that you are arrested (handcuffed) for DWI. The police put you in the back of the patrol car, do not advise you of your Miranda rights, but do not ask you any questions. However, you decide to tell them: "I just got banged up on 12 shots of Tequila – what a night." I assure you, the Prosecutor will enjoy admitting those statements into evidence against you.

So what did Salinas do to alter this landscape? Opinions vary, but I actually think that the Salinas decision did very little to Miranda.

The relevant facts from Salinas are as follows: Police in Houston, Texas, questioned Genovevo Salinas in 1992 during a murder investigation. He was not in custody at the time of the questioning – meaning, he was free to leave. Salinas answered all of their questions until the police asked whether he thought that casings found at the murder scene would match the shotgun the police found in his house. In response, Salinas remained silent, but did not "invoke" his Fifth Amendment Right to remain silent. Later, he was charged with murder, tried, and convicted partially on the basis of evidence that he had remained silent during police questioning before he was arrested and given his Miranda warnings. Salinas claimed that the Texas trial court should not have admitted evidence of his silence because of the Fifth Amendment privilege against self-incrimination. He argued that allowing evidence of his

silence would violate the Fifth Amendment by forcing him to speak or have his silence used against him.

In Salinas, a divided Supreme Court held that because Salinas did not unequivocally invoke his privilege against self-incrimination during the non-custodial police interview, he had no Fifth Amendment right to have his silence in response excluded from evidence at his trial. The Court further explained that the Fifth Amendment guarantees that no one may be "compelled in any criminal case to be a witness against himself." The Court added that the Fifth Amendment does not establish an unqualified "right to remain silent." Since Salinas was not deprived of his ability to voluntarily invoke the privilege the prosecution's use of his pre-arrest, noncustodial "silence" did not violate the Fifth Amendment.

So, taken to its logical conclusion – here is where you must pay attention – if investigators show up unannounced at your house, and you decline to speak to them, or even worse, your start to speak and then stop, you must expressly refer to the Fifth Amendment. If not, Salinas would leave open the opportunity for the government to argue at a later trial that the refusal by you to answer questions was an indication of guilt.