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LITIGATION

# Corporate officers must speak to remain silent, too

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In a recent opinion, *Salinas v. Texas,* 2013 DJDAR 7669 (June 17, 2013), the U.S. Supreme Court held that if an individual does not "expressly" invoke the Fifth Amendment privilege against self-incrimination in refusing to answer particular questions during a voluntary police interview, a prosecutor can use the individual's silence in the face of those questions as evidence of the individual's guilt. Although the case arose from a murder investigation, the decision has significant implications for a company's officers or employees who are approached by government investigators and agree to be interviewed, as well as for the company itself.

In *Salinas*, police were investigating the deaths of two victims killed with shotgun bullets and suspected Salinas of the murders. Salinas agreed to provide his shotgun for ballistics testing and to voluntarily accompany the police to the station ("to take photographs and to clear him as [a] suspect," as the dissent noted). Salinas was not taken into custody or offered *Miranda* warnings. During questioning at the police station, police asked Salinas whether his shotgun "would match the shells found at the murder scene." Salinas fell silent and did not answer the question. After a period of silence, the police asked additional questions, which Salinas answered. Salinas was later charged with the murders. At trial, the prosecutor argued to the jury that Salinas' silence during the questioning was evidence of his guilt. The jury found Salinas guilty and Salinas appealed, arguing that the use of his silence as evidence of guilt violated his Fifth Amendment rights. The Texas state courts affirmed the conviction.

The Supreme Court granted certiorari and affirmed the conviction in a plurality opinion written by Justice Samuel Alito and joined by Chief Justice John Roberts and Justice Anthony Kennedy. In the opinion, the court explained that "[a]lthough 'no ritualistic formula is necessary in order to invoke'" the Fifth Amendment privilege against self-incrimination, an individual "does not do so by simply standing mute." According to the court, remaining silent when asked a question does not sufficiently place the government on notice that an individual is asserting the Fifth Amendment privilege. The court noted there could be other reasons for an individual's silence: for example, the individual might simply be "trying to think of a good lie" or refusing to incriminate a friend. Thus, the court reasoned, requiring an "express" invocation of the Fifth Amendment (e.g., "I am refusing to answer that question based on my Fifth Amendment rights") ensures a court can evaluate whether the individual is, in fact, entitled to the Fifth Amendment's protection.

> The court's holding suggests that if a corporate officer agrees to a voluntary interview and, thereafter, declines to answer a question or falls silent without "expressly" invoking the Fifth Amendment, that silence may be used as evidence.

Two justices who concurred in the judgment, Justices Clarence Thomas and Antonin Scalia, would have gone even further — arguing that even if an individual has expressly invoked the privilege against self-incrimination, the Fifth Amendment would not preclude a jury from drawing an adverse inference from the invocation of such right. The concurring justices reasoned that the threat of the adverse inference does not "compel" an individual to be a witness against himself, in the parlance of the Fifth Amendment. The justices also noted that "[a]t 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."

The four dissenters, Justices Stephen Breyer, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan, wrote that allowing a prosecutor to use a defendant's silence during a voluntary police interview as evidence of guilt would "undermine the basic protection that the Fifth Amendment provides." The dissent reasoned that under the circumstances in *Salinas* — a criminal investigation was taking place, the interview occurred at a police station, Salinas was not represented by counsel during the questioning, and the question that led to the silence was obviously intended to determine whether Salinas was guilty of murder — it was reasonable to infer that Salinas was exercising his Fifth Amendment privilege against self-incrimination. The dissent expressed concern that the plurality's position would place an individual in the "impossible predicament" of being forced to choose between "incrimination through speech and incrimination through silence." The dissent also expressed concern that the court's result would lead to confusion, especially for suspects who are not lawyers and thus do not know that the phrase "Fifth Amendment" is "legally magic."

Although Salinas arose from a murder investigation, the court's reasoning applies equally in all noncustodial settings, including to a corporate officer or other company employee who is approached by government investigators and agrees to be interviewed. The court's holding suggests that if a corporate officer agrees to a voluntary interview and, thereafter, declines to answer a question or falls silent without "expressly" invoking the Fifth Amendment, that silence may be used as evidence in future proceedings, both against the individual and, possibly, against the corporation itself. Although the court did not specify what language would properly invoke the privilege against self-incrimination, caution suggests it would be wise to include the words "Fifth Amendment" when relying on the privilege in refusing to answer a question.

It is common for in-house counsel to advise company officers that if a government investigator unexpectedly approaches the officer to ask questions, the officer should decline to answer those questions and instead direct the investigator to speak to counsel. This appears to remain a sound approach. However, if an officer or employee begins to answer questions, and thereafter refuses to answer particular questions without either requesting the assistance of an attorney or expressly invoking Fifth Amendment rights, that refusal may be deemed admissible against both the individual and the company. As a result, in-house counsel may wish to address this scenario and the consequences that could flow from it with relevant officers and employees.

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