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The New Miranda Decision and Souter's Harvard Speech

By Sam Barr

With the predictable 5-4 lineup, the Supreme Court [ruled](#) yesterday that, in order to exclude anything incriminating they might have said to the police, criminal suspects must have unambiguously invoked their right to remain silent. The case essentially asked, what constitutes a waiver of one's Miranda rights? Does sitting silent, unresponsive, for nearly three hours, as did the suspect, Van Chester Thompkins, suffice to indicate unwillingness to talk? Or does there need to be an explicit waiver, written or oral?



Justice Kennedy, writing for the majority, argued that, “Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his ‘right to cut off questioning.’ Here he did neither, so he did not invoke his right to remain silent.”

Justice Sotomayor, in her first major dissent, complained that, under the majority's view, “suspects will be legally presumed to have waived their rights even if they have given no clear expression of their intent to do so. Those results, in my view, find no basis in Miranda or our subsequent cases and are inconsistent with the fair-trial principles on which those precedents are grounded.”

Count me among the dissenters. As Andrew Cohen at PoliticsDaily [writes](#), this decision “is likely to encourage law enforcement officials to continue questioning suspects even where there may be a question about whether that suspect's right to remain silent has been invoked.” The question is whether you think that's a good or a bad thing, i.e. whether you want to “give[] the benefit of the doubt of ambiguity during questioning to the police and to prosecutors and not to the defendant,” as Cohen puts it.

Once we start giving the benefit of the doubt to police and prosecutors, in my view, we call into question not just Miranda but a score of well-established rules that are meant, to put it in the least generous terms I can think of, to protect criminal suspects. This case may not undermine Miranda's legal grounding (although, as the *Times* [points out](#), Miranda held that “a valid waiver will not be presumed simply from the silence of the accused”). But it undermines its moral grounding, that is, its assumption that American values are more endangered by over-aggressive police and prosecutorial work than by over-generous procedural rights for criminal suspects. You may think that's a good assumption or a bad one, but I just want to point out that even these small cases, where

the conservatives merely “refine” and “clarify” liberal precedents, implicate the same values that are at stake in bigger cases.

Andrew Cohen also [gives](#) some positive press to David Souter’s [Commencement address](#) at Harvard last week. I meant to call attention to it last week, but now this Thompkins case has brought it out of me.

Souter’s speech, which I was not lucky enough to hear in person, was an articulate and passionate defense of, for lack of a better phrase, liberal or “living” constitutionalism. Souter made three basic claims about the Constitution:

1. that its provisions are often “open-ended” and “call for more elaborate reasoning to show why very general language applies in some specific cases but not in others.”
2. that “its language grants and guarantees many good things, and good things that compete with each other and can never all be realized, all together, all at once.”
3. that constitutionally relevant facts do not “just lie there waiting for an objective judge to view them,” but rather “judicial perception [of relevant facts] turns on the experience of the judges, and on their ability to think from a point of view different from their own.”

We can see all three ideas reflected in the Court’s Miranda doctrine and its offshoots and relatives.

First, there is the realization that the words of the [Fifth Amendment](#) are open-ended. According to the text, one may not be “compelled” to be a witness against oneself, but just what constitutes “compelling” testimony? Torturing it out of a suspect surely would constitute compelling him. And maybe (I don’t know) that’s all the Fifth Amendment meant to the Framers. But the Framers didn’t write just that you can’t torture testimony out of someone. They codified a broader rule, meant to last for centuries, as constitutions must.

Second, there is a conflict here between legitimate constitutional values, and it cannot be straightforwardly resolved. One of the Constitution’s main purposes is to “insure domestic Tranquility,” and we have long assumed a general “police power” on the part of the state, that is, a power to ensure the public safety and welfare through appropriate legislation. Catching and punishing criminals is obviously an important part of that power. But the Constitution also values the rights of criminal suspects and defendants, and clearly worries about the possibility of abuses of the police power. It shouldn’t surprise us that the Framers tried to have it both ways. They knew that we would have to continue the search for the proper balances between various sets of constitutional values.

Third, there is a set of facts that judges must take notice of, facts that can’t be gleaned either by looking at the Constitution itself or via abstract reasoning. Judges have to look at the real world to decide whether they should worry more about police and prosecutors abusing their powers, or more about criminals getting off on “technicalities.” For starters,

they have to know how often each of those things happens. Nothing in the Constitution is going to tell them whether one or the other is a greater threat to liberty in the here and now. The Constitution just tells them they have to consider this inescapably moral question.

Now, the one missing link in the constitutional vision laid out in Souter's Harvard speech is a clear explanation of why the judiciary needs to be a central player in the search for constitutional meaning. Why can't we trust the legislature to give meaning to the open-ended guarantees of "equal protection" and "due process of law," to balance police powers against suspects' rights, and to see the real-world meaning of "separate but equal"? There have to be two separate arguments on behalf of an active (if not activist) judiciary: first, a historical argument showing that the Framers actually intended to empower the judiciary in such a way; and second, a moral-theoretical argument explaining why, as a general matter, judges will be better trustees of constitutional values than will legislators.

Alas, I won't go into those thorny subjects now, but I wish Souter had given them a nod in his brilliant speech last Thursday.

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