

# Book Review



Reviewed by Richard A. Forsten, Esquire

## Is Silence Golden?: *Is There A Right To Remain Silent?*

by Alan M. Dershowitz (Oxford Univ. Press, 2008)

As anyone who has ever watched a police drama on TV knows, you have the right to remain silent. But do you? Although we call it the “right” “to remain silent,” the Fifth Amendment reads: “nor shall [any person] be compelled in any criminal case to be a witness against himself.” In *Is There A Right To Remain Silent? Coercive Interrogation and the Fifth Amendment After 9/11*, Professor Alan M. Dershowitz takes a new look at this old right in order to determine what it means in today’s struggle against terrorism. In particular, Dershowitz asks how far the state can go in trying to compel you to speak when all you want to do is remain silent.

Dershowitz begins his analysis with the 2003 Supreme Court decision in *Chavez v. Martinez*, a civil case in which a suspect sued a police officer for violating his constitutional right to remain silent. In the case, a criminal suspect had pointed a gun at a police officer before being shot by another officer. The suspect, Martinez, was left permanently blinded and paralyzed from the waist down. Before and while Martinez was treated in the emergency room, he was questioned by police officer Chavez.

All of the justices agreed that the interrogation was improper. It was “compelled,” “coerced,” “involuntary,” and obtained without the necessary *Miranda* warnings. All agreed that none of the information obtained during the interrogation could be used in a criminal trial (in fact, Martinez was never tried).

But, while all of the justices agreed that the interrogation was improper and the information gained could not be used at trial, that is where the agreement ended and the

questions for the Court began: chiefly, is the right to remain silent a procedural right not to have coerced statements used in a trial? Or, is the right to remain silent a substantive right that prevents coercion? Put another way, if the Fifth Amendment only prevents the use of coerced statements in a criminal trial against the defendant, then the Fifth Amendment does not, in and of itself, prevent the government from compelling a person to speak, and there is no absolute “right” to remain silent.

The Court fractured with six opinions in the case, but a majority of six justices all concluded that there was no violation of the Fifth Amendment because none of the statements obtained were used against Martinez in a criminal trial. However, while ruling that the Fifth Amendment itself was not violated, five of the justices held that a remand was appropriate for a determination of whether Martinez “may pursue a claim of liability for a substantive due process violation.” Thus, Martinez was not left without any remedy, he just couldn’t pursue a claim under the Fifth Amendment. Substantive due process still has a role to play in constitutional jurisprudence.

With *Chavez v. Martinez* as his jumping off point, Dershowitz goes on to review a history of the right to remain silent. The constitutional text may be short, but the history of the right is a labyrinth of twists and turns, and ebbs and flows.

Dershowitz’s concern, though, is not really with the history of the Fifth Amendment, nor its application to criminal procedure. Rather, he is concerned that, in light of the Supreme Court’s ruling in *Martinez*, there is no constitutional pro-

tection against coercive interrogation and torture. As he writes in his conclusion:

“Pursuant to the Supreme Court’s holding and reasoning in *Martinez*, the privilege against self-incrimination now has nothing to say about coercive interrogation, even that which entails torturous methods, so long as its fruits are not introduced into evidence at the criminal trial of the coerced person. The privilege, as interpreted by the Court, gives a green light to all preventive intelligence interrogation methods. The due process clause may impose some constraints on the most extreme forms of coercion, but even that is uncertain, especially in the context of preventing mass-casualty attacks.”

It is, of course, the last line of the quoted passage above which gives Dershowitz (and, one suspects, courts in general) pause. In an age where the concern is not the use of coerced statements in a criminal trial, but obtaining information to prevent “mass-casualty attacks,” it becomes difficult to suggest where an exact line can be drawn or what the precise standard should be. Dershowitz himself, while calling for some constitutional protection, never addresses exactly what those protections should be or where the line should be drawn (or if it can be drawn with certainty). In his last paragraph he simply concludes:

“I end this book with a challenge. We need to develop a jurisprudence for the emerging preventive state. This jurisprudence should contain both substantive and procedural rules governing *all* actions—‘acts of state’ as well as ‘acts of law’—taken by government officials to prevent harmful conduct, such as terrorism. Black holes in the law are anathema to democracy, ac-

countability, human rights, and the rule of law. I urge citizens, legislators, judges, and scholars to take up this important agenda.”

For now, we are left with the protection afforded in *Martinez*: substantive due process. In many cases, that means the complained of conduct must “shock the conscience” of the Court in order for the plaintiff to prevail. Such a standard may not be the clearest, but until someone comes along with a more workable standard, it will have to do and, indeed, may do just fine. 