

## CHAPTER 9

### SELF-INCRIMINATION, CONFESSIONS, AND IMMUNITY

#### Introduction

The Fifth Amendment protects a person from self-incrimination. To enforce this right enjoyed by all Americans, the Supreme Court decided in 1966 that before the police could talk to a suspect who was in custody, they had to advise him of his right to remain silent and that he could have a lawyer present during questioning. This was the case of Miranda v. Arizona.

A commander may ask - why do I need to know about rights warnings? There are a variety of situations where a commander may be required by law to warn an individual about their privilege against self-incrimination. In our military justice system, the commander plays a key law enforcement role. They frequently conduct investigations and regularly interview people as part of their investigation. In fact, Rule of Court-Martial 303 requires the commander to make a preliminary inquiry when a member of the command is accused or suspected of an offense triable by court-martial. Additionally, during the nonjudicial punishment process, the commander is required by AR 27-10 personally to determine whether the soldier committed an offense. Commanders also can appoint or be appointed to either formal or informal boards or investigations under AR 15-6. Finally, situations triggering a warning requirement may arise in the course of daily events, outside a structured investigatory proceeding.

In order to properly conduct an investigation or a nonjudicial punishment proceeding, the commander must talk to the persons involved in the incident. Those persons can be classified as witnesses or suspects. Witnesses are persons who have information about the incident, but did not do anything criminally wrong. You are not required to read rights warnings to witnesses before questioning them. Suspects are those persons you reasonably believe (or should believe) committed a criminal offense. A soldier may initially be a witness, but during the interview may reveal information that makes you suspect the soldier of involvement in a crime. At that point, the soldier should be treated as a suspect. The soldier-suspect has the same privilege against self-incrimination and right to counsel that other citizens have. You must, therefore, read rights warnings before questioning a soldier suspected of committing an offense. The suspect may waive the rights and choose to make a statement or may invoke his or her rights. If a soldier invokes his or her rights, the questioning must immediately stop. At that point, the commander should consult with their trial counsel to determine how best to proceed.

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FY 2004 Senior Officers Legal Orientation Course  
FY 2004

If the suspect talks to you, it may be a statement, an admission, or a confession. A statement is a report of facts or opinions. An admission is a self-incriminating statement falling short of an acknowledgment of guilt. A confession is an acknowledgment of guilt. Mil. R. Evid. 304(c). If proper rights warnings have been given, admissions and confessions are admissible at trial against an accused and frequently will constitute the key evidence in the case. One further rule governs confessions - before being admitted, there must be independent evidence which corroborates the essential facts of the confession. Mil. R. Evid. 304(g). This protects the system from people who admit to crimes for publicity, because of mental imbalance, or because of improper police conduct.

## **A. Sources of the Rights**

A soldier's privilege against self-incrimination and right to counsel come from four sources:

1. The Fifth Amendment.

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

2. Uniform Code of Military Justice.

a. Article 31(a), UCMJ.

"No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him."

b. Article 31(b).

"No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him . . ."

3. The Sixth Amendment.

"In all criminal prosecutions, the accused shall . . . enjoy the right to have the Assistance of Counsel for his defense."

4. Army Regulations.

a. AR 15-6 - Investigations

(1) No military witness or respondent will be compelled to incriminate himself (see Article 31, UCMJ).

(2) No witness or respondent not subject to the UCMJ will be deprived of his rights under the Fifth Amendment.

- b. AR 27-10 - Nonjudicial Punishment.

The imposing commander will ensure that the soldier is notified of his right to remain silent and his right to consult with counsel.

- c. AR 635-200 - Enlisted Personnel Separations.

Article 31, UCMJ will apply to board procedures.

- d. This list of regulations is not exhaustive; other regulations also impose a rights warning requirement. Always review regulations governing a specific type of investigation or proceeding to decide if rights warnings are required.

## **B. Due Process Voluntariness**

Any confession used as evidence must be voluntary. This is a fundamental requirement of the due process clause to the Constitution. Additionally, Article 31(d), UCMJ, prohibits the use of any statement obtained through the use of "coercion, unlawful influence, or unlawful inducement." These protections are separate from the protections of rights warnings.

The courts have condemned such practices as beating the suspect, depriving the suspect of food, water, or sleep, threatening the suspect, removing the suspect's clothing, and interrogating the suspect for extremely long periods without a rest or break. Confessions obtained through the use of such tactics are not admissible because they are not voluntary.

## **C. Scope of the Rights**

As originally adopted, Article 31, UCMJ, and the Fifth Amendment to the Constitution applied only to criminal proceedings or where there is a risk of criminal prosecution. Army regulations, however, extend these protections to nonjudicial and administrative proceedings. When conducting an administrative investigation you should always check the governing regulations for provisions that require rights warnings.

Not all evidence provided by a soldier is protected by Article 31, UCMJ, or the Constitution. In order to be protected, the evidence must be both incriminating and "testimonial or communicative." Mil. R. Evid. 301(a). Clearly, oral and written statements fit the definition and are protected by the privileges. So are a soldier's actions that have a commonly understood meaning, such as nodding his or her head in response to a question.

Other evidence is not protected, even though it is gathered from a suspect, because it does not require the suspect to "communicate" or "testify" against himself or herself. Physical characteristics such as fingerprints, scars, tatoos, footprints, or trying on clothing are not protected. This evidence may be incriminating, but its value is in its physical characteristics, not in what the suspect tells you about it. The fingerprint of the suspect may have evidentiary value that is separate and apart from anything the subject may choose to say about the crime. If clothing found at a burglary scene fits the suspect, that may incriminate the suspect, but he or she is not required to say

anything about the burglary. Likewise, body fluids such as blood or urine can incriminate a suspect, but the collection process does not require the suspect to testify or communicate information. Instead, the physical characteristics of the blood and urine are the important element. The same is true for voice and handwriting samples, even though they require the suspect's cooperation. The investigator compares the physical aspects of the suspect's handwriting or voice prints to the physical aspects of the handwriting or voice of the person who committed the crime. The investigator is using the way the words were spoken, not what was spoken, and those physical characteristics are not protected. Finally, identification is not protected even though the soldier provides the information. This is because a person's identity is neutral information that does not tend to prove a crime. Accordingly, the commander can generally require a soldier to identify himself and produce his identification card, even though no rights warnings are given.

#### **D. The Rights Warning Decision**

You now know where rights warnings come from and what kind of evidence is protected, but how do you decide if you must actually read the rights warnings? The answer is: whenever you intend to conduct official questioning of a suspect or accused, you must read rights warning. Let's discuss each element in order.

##### 1. Official.

Article 31 was enacted to protect soldiers from the subtle pressures to respond to questioning by a superior. Soldiers are trained to respond to orders. That training may cause them to respond to a superior's questioning because of rank, duty, or similar relationships, even though the response is incriminating. The warning makes it clear that the soldier is not required to respond.

The first part of the rule, then, is that rights warnings are required when the questioner is acting in an official capacity. Law enforcement personnel and commanders are almost always seen as acting in an official capacity. In contrast, when a soldier brags about criminal conduct in response to a friend's question, those statements may be used against the soldier because the friend is not acting in an "official" capacity and is not required to read rights warnings to the soldier. The soldier's act of bragging indicates that he or she did not feel pressured or coerced into talking about the crime, so the rationale underlying the rights warning requirement does not apply.

There is one exception to the official questioning rule. Undercover agents are not required to read rights warnings even though they are military police acting in an official capacity. Such a requirement would pose an obvious threat to the safety of undercover agents. More importantly, however, since the suspect does not realize he is dealing with a police officer or government agent, there are neither subtle nor coercive pressures that would justify rights warnings. There are, however, limitations on the use of undercover agents. Once a suspect has had charges preferred against him, the suspect is entitled to consult with counsel, to be given rights warnings again, and to have counsel present at any subsequent interrogation. A commander (or the police) cannot circumvent this rule by sending an undercover agent to question the suspect; the commander cannot use the undercover agent to do what the commander cannot do on his own.

##### 2. Questioning.

Questioning is a broad term and includes any formal or informal words or actions that are designed to elicit (or reasonably likely to result in) an incriminating response. Mil. R. Evid. 305. If, in your official capacity, you are trying to get the soldier to tell you something that you can use against him or her, you are questioning the soldier. It is questioning, for example, if you bring a soldier suspected of stealing a rifle into your office and attempt to get a response by showing the soldier the recently recovered stolen weapon.

It is not questioning when a soldier volunteers information or spontaneously gives information without any "words or actions reasonably likely to elicit an incriminating response" from the commander. If you simply listen to the soldier, there is no requirement to stop the soldier and advise him or her of their rights. If you want to question the soldier after the volunteered information, then you must give rights warnings.

3. Suspect or accused.

You do not have to advise all soldiers of their rights before questioning them. Witnesses, who are not suspected or accused of offenses, need not be advised of any privilege against self-incrimination, even though you are conducting official questioning. A soldier is a suspect when you believe, or have enough information such that you reasonably should believe that the soldier committed an offense. The questioner cannot avoid rights warnings by simply saying that he did not suspect the soldier being questioned. A soldier is the "accused" after court-martial charges have been preferred against him.

4. Summary.

When you officially question a suspect or accused, you must read the rights warnings prior to the questioning. If you must re-interview the suspect, you should complete another rights advisement before beginning your questioning and, if necessary, ensure defense counsel is present.

**E. Rights Warnings**

Rights warnings should be read verbatim from DA Form 3881, Rights Warning Procedure/Waiver Certificate (Appendix A, page 8-13) or GTA 19-6-5, How To Inform Suspect/Accused Persons of Their Rights (Rights Warning Card) (Appendix B, page 8-15).

**F. Voluntary Waiver of Rights**

After reading the rights warnings to the suspect, ask these questions:

1. Do you understand your rights? (Yes)
2. Do you want a lawyer? (No)
3. Are you willing to make a statement? (Yes)

If the answers in the parentheses are given, the suspect has waived his or her rights and you may proceed with your interview. If the suspect doesn't understand his or her rights, explain them

further; if he or she wants to remain silent or see an attorney, stop the interview, make a note of the request, and call your trial counsel. Be sure to specifically note whether the suspect wants to remain silent, have an attorney, or both. Different rules apply to each request.

In order to use a suspect's statement in a later court-martial, the trial counsel must prove that the suspect voluntarily waived his or her rights. If you obtained the statement, you may be called to testify about the rights warnings you gave and the suspect's waiver of those rights. This may be a long time after you actually took the statement, so it's important that you make a record of what occurred. If possible, use the DA Form 3881 because it provides not only a written record of the rights warning, but also the suspect's signature which indicates the suspect waived his or her rights. If you use GTA 19-6-6 (rights warning card), you may wish to write the date and time of the rights advisement on the card and have the suspect place his initials by each of the rights warnings. A written memo can be prepared later. Although these steps are not required, they will assist you when testifying under oath about what happened during the rights warning process.

One final note: it is not permissible to use trickery to obtain a suspect's waiver of rights, e.g., telling a suspect his accomplice confessed, but laid the blame completely on him; or telling a suspect his fingerprints were found at the crime scene when none was found. If the suspect is tricked or misled into waiving his or her rights, the waiver will be considered involuntary and the admission or confession will be ruled inadmissible at trial. The courts have allowed law enforcement agents to use some trickery in obtaining a confession, but only after the suspect freely and voluntarily agreed to talk. This is an area fraught with danger and should be avoided by commanders.

#### **G. Presence of Counsel**

Depending on the circumstances, defense counsel must be present before questioning a soldier about misconduct. If, for example, charges have been preferred against a soldier, defense counsel must be present before questioning the soldier about the charged offenses. If, however, the questioning focuses on uncharged misconduct, defense counsel may not have to be present. Even if no charges are preferred, if the soldier in a previous custodial interrogation requests to consult with a lawyer, under certain situations, a defense counsel must be present before conducting a subsequent interrogation. As illustrated, this area can be very complicated; therefore, contact your trial counsel before questioning a soldier who faces preferred charges or has asked for a lawyer.

#### **H. Remedy: Exclusion**

If a questioner violates the requirements of the voluntariness doctrine, warnings, waiver, or notice to counsel, any statement obtained from a suspect which might have been used against the suspect at trial is excluded from evidence. Also, any evidence derived from the statement must be excluded. This may not, however, be the end of the government's case. If the trial counsel can prove the case with evidence that is independent of the inadmissible statement, the prosecution may go forward.

#### **I. Immunity**

When a soldier refuses to testify because of the privilege against self-incrimination, the soldier can be compelled to testify by immunizing the soldier from the incriminating results of his testimony. Immunity is the government's promise that the soldier's testimony will not be used against the soldier. Because the grant of immunity removes the criminal consequences of talking, the soldier must talk with authorities.

Rule of Court-Martial 704 sets out the procedures for granting immunity and specifies that only the General Court-Martial Convening Authority may grant immunity. There are two types of immunity:

1. Transactional immunity - the witness cannot be prosecuted at all for the criminal transaction that he or she testifies about. This is seldom used.

2. Testimonial immunity - the witness's testimony and derivative evidence cannot be used against him or her. Prosecution is possible if the government can show that all evidence is from an independent source, but this is very difficult for the government to do.

A soldier with a grant of immunity is not free from all subsequent prosecution. If the soldier lies or refuses to talk with government authorities, the soldier may be prosecuted for perjury, false swearing, making a false official statement, or failure to comply with an order to testify.

Appendix A

<b>RIGHTS WARNING PROCEDURE/WAIVER CERTIFICATE</b> <small>For use of this form, see AR 190-30; the proponent agency is ODCSOPS</small>			
DATA REQUIRED BY THE PRIVACY ACT			
<b>AUTHORITY:</b> Title 10, United States Code, Section 3012(g)			
<b>PRINCIPAL PURPOSE:</b> To provide commanders and law enforcement officials with means by which information may be accurately identified.			
<b>ROUTINE USES:</b> Your Social Security Number is used as an additional/alternate means of identification to facilitate filing and retrieval.			
<b>DISCLOSURE:</b> Disclosure of your Social Security Number is voluntary.			
1. LOCATION	2. DATE	3. TIME	4. FILE NO.
5. NAME (Last, First, MI)		8. ORGANIZATION OR ADDRESS	
6. SSN	7. GRADE/STATUS		
PART I - RIGHTS WAIVER/NON-WAIVER CERTIFICATE			
<b>Section A. Rights</b>			
The investigator whose name appears below told me that he/she is with the United States Army _____ and wanted to question me about the following offense(s) of which I am suspected/accused: _____ Before he/she asked me any questions about the offense(s), however, he/she made it clear to me that I have the following rights:			
1. I do not have to answer any question or say anything. 2. Anything I say or do can be used as evidence against me in a criminal trial. 3. (For personnel subject to the UCMJ) I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. This lawyer can be a civilian lawyer I arrange for at no expense to the Government or a military lawyer detailed for me at no expense to me, or both. - or - (For civilians not subject to the UCMJ) I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. I understand that this lawyer can be one that I arrange for at my own expense, or if I cannot afford a lawyer and want one, a lawyer will be appointed for me before any questioning begins. 4. If I am now willing to discuss the offense(s) under investigation, with or without a lawyer present, I have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if I sign the waiver below.			
5. COMMENTS (Continue on reverse side)			
<b>Section B. Waiver</b>			
I understand my rights as stated above. I am now willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer first and without having a lawyer present with me.			
WITNESSES (If available)		3. SIGNATURE OF INTERVIEWEE	
1a. NAME (Type or Print)	b. ORGANIZATION OR ADDRESS AND PHONE	4. SIGNATURE OF INVESTIGATOR	
2a. NAME (Type or Print)			
5. TYPED NAME OF INVESTIGATOR		6. ORGANIZATION OF INVESTIGATOR	
b. ORGANIZATION OR ADDRESS AND PHONE			
<b>Section C. Non-waiver</b>			
1. I do not want to give up my rights <input type="checkbox"/> I want a lawyer <span style="margin-left: 150px;"><input type="checkbox"/> I do not want to be questioned or say anything</span>			
2. SIGNATURE OF INTERVIEWEE			
ATTACH THIS WAIVER CERTIFICATE TO ANY SWORN STATEMENT (DA FORM 2823) SUBSEQUENTLY EXECUTED BY THE SUSPECT/ACCUSED			

DA FORM 3881, NOV 89

EDITION OF NOV 84 IS OBSOLETE

USAPPC V1.00

PART II - RIGHTS WARNING PROCEDURE	
THE WARNING	
<p>1. WARNING - Inform the suspect/accused of:</p> <p>a. Your official position.</p> <p>b. Nature of offense(s).</p> <p>c. The fact that he/she is a suspect/accused.</p> <p>2. RIGHTS - Advise the suspect/accused of his/her rights as follows:</p> <p>"Before I ask you any questions, you must understand your rights."</p> <p>a. "You do not have to answer my questions or say anything."</p> <p>b. "Anything you say or do can be used as evidence against you in a criminal trial."</p> <p>c. (For personnel subject to the UCMJ) "You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer</p>	<p>can be a civilian you arrange for at no expense to the Government or a military lawyer detailed for you at no expense to you, or both."</p> <p style="text-align: center;">- or -</p> <p><i>(For civilians not subject to the UCMJ)</i> You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer can be one you arrange for at your own expense, or if you cannot afford a lawyer and want one, a lawyer will be appointed for you before any questioning begins."</p> <p>d. "If you are now willing to discuss the offense(s) under investigation, with or without a lawyer present, you have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if you sign a waiver certificate."</p> <p>Make certain the suspect/accused fully understands his/her rights.</p>
THE WAIVER	
<p>"Do you understand your rights?" (If the suspect/accused says "no," determine what is not understood, and if necessary repeat the appropriate rights advisement. If the suspect/accused says "yes," ask the following question.)</p> <p>"Have you ever requested a lawyer after being read your rights?" (If the suspect/accused says "yes," find out when and where. If the request was recent <i>(i.e., fewer than 30 days ago)</i>, obtain legal advice whether to continue the interrogation. If the suspect/accused says "no," or if the prior request was not recent, ask him/her the following question.)</p>	<p>"Do you want a lawyer at this time?" (If the suspect/accused says "yes," stop the questioning until he/she has a lawyer. If the suspect/accused says "no," ask him/her the following question.)</p> <p>"At this time, are you willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer and without having a lawyer present with you?" <i>(If the suspect/accused says "no," stop the interview and have him/her read and sign the non-waiver section of the waiver certificate on the other side of this form. If the suspect/accused says "yes," have him/her read and sign the waiver section of the waiver certificate on the other side of this form.)</i></p>
SPECIAL INSTRUCTIONS	
<p>WHEN SUSPECT/ACCUSED REFUSES TO SIGN WAIVER CERTIFICATE: If the suspect/accused orally waives his/her rights but refuses to sign the waiver certificate, you may proceed with the questioning. Make notations on the waiver certificate to the effect that he/she has stated that he/she understands his/her rights, does not want a lawyer, wants to discuss the offense(s) under investigation, and refuses to sign the waiver certificate.</p> <p>IF WAIVER CERTIFICATE CANNOT BE COMPLETED IMMEDIATELY: In all cases the waiver certificate must be completed as soon as possible. Every effort should be made to complete the waiver certificate before any questioning begins. If the waiver certificate cannot be completed at once, as in the case of street interrogation, completion may be temporarily postponed. Notes should be kept on the circumstances.</p> <p>PRIOR INCRIMINATING STATEMENTS:</p> <p>1. If the suspect/accused has made spontaneous incriminating statements before being properly advised of his/her rights he/she should be told that such statements do not obligate him/her to answer further questions.</p>	<p>2. If the suspect/accused was questioned as such either without being advised of his/her rights or some question exists as to the propriety of the first statement, the accused must be so advised. The office of the serving Staff Judge Advocate should be contacted for assistance in drafting the proper rights advisal.</p> <p>NOTE: If 1 or 2 applies, the fact that the suspect/accused was advised accordingly should be noted in the comment section on the waiver certificate and initialed by the suspect/accused.</p> <p>WHEN SUSPECT/ACCUSED DISPLAYS INDECISION ON EXERCISING HIS OR HER RIGHTS DURING THE INTERROGATION PROCESS: If during the interrogation, the suspect displays indecision about requesting counsel (for example, "Maybe I should get a lawyer."), further questioning must cease immediately. At that point, you may question the suspect/accused only concerning whether he or she desires to waive counsel. The questioning may not be utilized to discourage a suspect/accused from exercising his/her rights. (For example, do not make such comments as "If you didn't do anything wrong, you shouldn't need an attorney.")</p>
COMMENTS <i>(Continued)</i>	

Appendix B

**HOW TO INFORM SUSPECT/ACCUSED PERSONS OF THEIR RIGHTS**  
*(Use this card only when DA Form 3887, Rights Warning Procedure Waiver Certificate, cannot be used. Complete DA Form 3887 as soon as possible.)*

**VERBAL RIGHTS WARNING**  
*Inform the person of your official position, the nature of the offense(s), and the fact that he/she is a suspect/accused. Then read verbatim the following - do not paraphrase. Read verbatim:*

**"BEFORE I ASK YOU ANY QUESTIONS, YOU MUST UNDERSTAND YOUR RIGHTS."**

- 1 YOU DO NOT HAVE TO ANSWER MY QUESTIONS OR SAY ANYTHING.
- 2 ANYTHING YOU SAY OR DO CAN BE USED AS EVIDENCE AGAINST YOU IN A CRIMINAL TRIAL.
- 3 *(For personnel subject to the UCMJ.)* YOU HAVE THE RIGHT TO TALK PRIVATELY TO A LAWYER BEFORE, DURING, AND AFTER QUESTIONING AND TO HAVE A LAWYER PRESENT WITH YOU DURING QUESTIONING. THIS LAWYER CAN BE A CIVILIAN YOU ARRANGE FOR AT NO EXPENSE TO THE GOVERNMENT OR A MILITARY LAWYER DETACHED FOR YOU AT NO EXPENSE TO YOU OR BOTH.  
*(For citizens not subject to the UCMJ.)* YOU HAVE THE RIGHT TO TALK PRIVATELY TO A LAWYER BEFORE, DURING, AND AFTER QUESTIONING AND TO HAVE A LAWYER PRESENT WITH YOU DURING QUESTIONING. THIS LAWYER CAN BE ONE YOU ARRANGE FOR AT YOUR OWN EXPENSE, OR IF YOU CANNOT AFFORD A LAWYER AND WANT ONE, A LAWYER WILL BE APPOINTED FOR YOU BEFORE ANY QUESTIONING BEGINS.
- 4 IF YOU ARE NOW WILLING TO DISCUSS THE OFFENSE(S) UNDER INVESTIGATION, WITH OR WITHOUT A LAWYER PRESENT, YOU HAVE A RIGHT TO STOP ANSWERING QUESTIONS AT ANY TIME OR SPEAK PRIVATELY WITH A LAWYER BEFORE ANSWERING FURTHER, EVEN IF YOU SIGN A WAIVER CERTIFICATE.

*Make certain the suspect/accused fully understands his/her rights, then say:*

**DO YOU WANT A LAWYER AT THIS TIME?**  
**"AT THIS TIME, ARE YOU WILLING TO DISCUSS THE OFFENSE(S) UNDER INVESTIGATION AND MAKE A STATEMENT WITHOUT TALKING TO A LAWYER AND WITHOUT HAVING A LAWYER PRESENT WITH YOU?"**

(See DA Form 3887 for more detailed instructions.)  
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