

Your Right to Remain Silent



By Paul Engel

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- If you've ever watched a time procedural, you're familiar with the phrase "You have the right to remain silent..."
- Where does the Miranda Warning come from and is it constitutional?
- "If you have nothing to hide...", do you remain silent?

You have the right to remain silent. Anything you say can and will be used against you in a court of law...

Miranda Warning

If you've ever been taken into custody or simply watched a crime procedural on TV, you're familiar with the Miranda warning, named after the 1966 Supreme Court case [Miranda v. Arizona](#). However, if you're getting your legal advice from television, you may find yourself in serious legal trouble. Where does this right to remain silent come from, how is it protected, and just how constitutional is the Miranda decision?

Almost every attorney I've talked to about the matter agrees you should not talk to law enforcement unless you've called them. You have a right to remain silent, and most attorney's recommend you avail yourself of that right. However, the reasoning behind that right often seems to be misunderstood.

Fifth Amendment

When it comes to the right to remain silent, the most common mistake I hear people make is calling it the right against self-incrimination. However, a quick look at the Fifth Amendment shows that is not what it says.

No person ... shall be compelled in any criminal case to be a witness against himself,

[U.S. Constitution, Amendment V](#)

The first thing we should notice is that this right is protected only in criminal cases. Whenever you are dealing with law enforcement, there is a possibility of criminal charges. This, I believe, is the basis for most attorneys generally telling people not to talk to law enforcement. The most important thing to remember though is that the Fifth Amendment does not protect you from self incrimination, but from self witness.

Testimony; attestation of a fact or event.

[Witness – Webster’s 1828 Dictionary](#)

Yes, self incrimination is a form of self witness, but it is only one form of the right protected by the Fifth Amendment. Why is this distinction so important? Because of the impression it leaves.

For example, a couple of years ago two FBI agents came to my front door to deliver a subpoena. After giving me the pertinent details, one agent started asking me about my farm. I told him that I do not get chatty with law enforcement. In a way, I was invoking my right to remain “silent” by not discussing a topic other than the legal duty they were performing: The deliverance of a subpoena. My actions could be taken in two ways. If I was invoking a right against self incrimination, the obvious conclusion would be that I was guilty of something and did not want to incriminate myself. If, however, I was invoking a right against self witness, then

I did not want to attest to facts related to my farm. In the former, I was guilty and trying to avoid being caught. However, the latter was simply me not wishing to divulge information to law enforcement, for whatever reason I deemed fit.

Miranda v. Arizona

While often misrepresented, and even misused, this right protected by the Fifth Amendment led to the famous case Miranda v. Arizona.

On March 13, 1963, petitioner, Ernesto Miranda, was arrested at his home and taken in custody to a Phoenix police station. He was identified there by the complaining witness. The police then took him to "Interrogation Room No. 2" of the detective bureau. There he was questioned by two police officers. The officers admitted at trial that Miranda was not advised that he had a right to have an attorney present.

[Miranda v. Arizona](#)

Ernesto Miranda was an indigent Mexican and, according to the court, seriously disturbed. After being arrested and identified, Mr. Miranda was interrogated. The two interrogating officers later admitted that Mr. Miranda had not been advised that he had a right to an attorney.

Two hours later, the officers emerged from the interrogation room with a written confession signed by Miranda. At the top of the statement was a typed paragraph stating that the confession was made voluntarily, without threats or promises of immunity and "with full knowledge of my legal rights, understanding any statement I make may be used against me."

[Miranda v. Arizona](#)

Oops! The form upon which Mr. Miranda had written his confession had a statement that was not true. Mr. Miranda did

not have full knowledge of his legal rights, nor did he understand that his statements could be used against him. One could assume that his written confession could be used against him, but did that include anything else he said during his arrest and interrogation? At his trial, Mr. Miranda's attorney objected to the confessions, both oral and written, being entered into evidence. However, these confessions were entered into evidence and Mr. Miranda was found guilty of kidnapping and rape, and sentenced to 20-30 years in prison for each count. Upon appeal, the Supreme Court of Arizona upheld the conviction. In the opinion of the Supreme Court of Arizona, Mr. Miranda's rights were not violated because he never asked for an attorney. The Supreme Court of the United States reversed.

From the testimony of the officers and by the admission of respondent, it is clear that Miranda was not in any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any other manner. Without these warnings, the statements were inadmissible. The mere fact that he signed a statement which contained a typed-in clause stating that he had "full knowledge" of his "legal rights" does not approach the knowing and intelligent waiver required to relinquish constitutional rights.

[Miranda v. Arizona](#)

According to both officers and the state of Arizona, Mr. Miranda was not apprised of his right to an attorney. The Supreme Court did get one thing wrong though, The Fifth Amendment does not protect Mr. Miranda's right against self incrimination as the court states, but his right against self witness, as I've pointed out. How could Mr. Miranda attest in the confession that he had full knowledge of his rights if he had never been advised of them?

Not everyone agreed with the court's opinion. Justice Clark in his dissent, joined by Justices Stewart and White, stated that he would have upheld Mr. Miranda's conviction.

These confessions were obtained during brief daytime questioning conducted by two officers and unmarked by any of the traditional indicia of coercion.

[Miranda v. Arizona](#)

I don't know if I would call a two hour interrogation brief, and I doubt Mr. Miranda would. While there was no evidence of coercion, there is more to Justice Clark's reasoning behind his dissent.

They assured a conviction for a brutal and unsettling crime, for which the police had and quite possibly could obtain little evidence other than the victim's identifications, evidence which is frequently unreliable. There was, in sum, a legitimate purpose, no perceptible unfairness, and certainly little risk of injustice in the interrogation. Yet the resulting confessions, and the responsible course of police practice they represent, are to be sacrificed to the Court's own finespun conception of fairness, which I seriously doubt is shared by many thinking citizens in this country.

[Miranda v. Arizona](#)

Let me get this straight. This officer of the court, this so-called "justice", believes that obtaining a conviction for a crime by violating the rights of the accused is acceptable because the crime is brutal and the police had little evidence? Are the courts more interested in convictions than that the convicted is the guilty party? When Mr. Miranda signed the confession stating he had full knowledge of his legal rights, that was apparently an unintentionally false statement. Remember, Mr. Miranda was an indigent Mexican. How was he supposed to know his rights were protected by the Constitution of the United States? Furthermore, Justice Clark

appears to blame the court for this problem. This ignores the fact that these two officers had most likely used this form many times, and should know that it requires the signer to be in full knowledge of their rights. Why is it the responsibility of the accused to know what he or she does not know, rather than the professional officers representing the government? It seems Justice Clark has forgotten the most fundamental rule in American jurisprudence: People are innocent until proven guilty. As I had mentioned though, Justices Clark, Stewart, and White were dissenting. The Miranda case actually included multiple cases from difference courts. That is why the opinion of the court in *Miranda v. Arizona* was:

Therefore, in accordance with the foregoing, the judgments of the Supreme Court Of Arizona in No. 759, of the New York Court of Appeals in No. 760, and of the Court of Appeals for the Ninth Circuit in No. 761, are reversed. The judgment of the Supreme Court of California in No. 584 is affirmed.

[Miranda v. Arizona](#)

Conclusion

Why do I make such a distinction between self witness and self incrimination? As I've already shown, it starts with the presumption people have when you exercise the right. For example, during the trial in the case of *Wisconsin v. Kyle Rittenhouse*, Assistant District Attorney Thomas Binger twice commented on Mr. Rittenhouse's decision to remain silent after the shooting. Both times he was apparently attempting to instill in the minds of the jury members that Mr. Rittenhouse's silence was an admonition of guilt. Both times the judge had the jury removed from the courtroom to scold Mr. Binger. How many times have you seen actors portraying law enforcement officers claim, "If you have nothing to hide, why not talk to me?" That is the blatant use of someone's right against self witness being considered self incrimination.

According to attorneys I have talked to, this practice is not unique to television, and is in fact widely used by law enforcement today.

This right to remain silent is an excellent example of why John Jay's admonition is so important.

Every member of the State ought diligently to read and to study the constitution of his country, and teach the rising generation to be free. By knowing their rights, they will sooner perceive when they are violated, and be the better prepared to defend and assert them.

John Jay, First Chief Justice of the United States

By knowing your rights, including your right against self witness, you will be better prepared should you one day encounter law enforcement. When I told the FBI agent that I did not get chatty with law enforcement, he told me he understood and both agents returned to their vehicle and left. Thankfully, that's as far as it went, but I was prepared if the FBI tried to push for more.

Some of the best advice I have received from attorneys is to keep my mouth shut. I've been told repeatedly to identify myself, potentially provide needed information regarding others, then inform law enforcement that I am invoking my right to remain silent and shut my mouth. No matter what the officer says, claims, or threatens, I'm supposed to keep my mouth shut until I've consulted with my attorney. I believe that is advice you should follow as well. Remember, anything you say not only can, but **will** be used against you.

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