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Miranda-Type Warnings for Consent Searches

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"MIRANDA-TYPE WARNINGS FOR CONSENT SEARCHES?"[1]

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In 1966, the Supreme Court issued its monumental decision of *Miranda v. Arizona*,[2] requiring warnings of constitutional rights as to counsel and self-incrimination prior to any custodial interrogation or significant deprivation of freedom of action. While the initial and substantial impact of this has already been felt throughout the country, some of its more far-reaching implications—particularly in the area of consent searches—may soon be coming to the forefront.

Although the designated thrust of *Miranda* is to safeguard and protect the individual from unwarranted invasions of individual freedom as protected by the Fifth and Sixth Amendments to the Constitution, its additional importance lies in its implications for rights secured by the Fourth Amendment, *i.e.*, freedom from unreasonable searches and seizures. This is consistent with the Supreme Court's historic view that "the Fourth and Fifth Amendments run almost into each other"[3] in so far as they protect the individual from the power of the state.

Apart from its traditional exceptions of searches incidental to an arrest and searches in "hot pursuit," the essential thrust of the Fourth Amendment is to prohibit authorities of the state from searching an individual's premises without a warrant based upon probable cause. However, this right traditionally has been subject to waiver,[4] which results in what is commonly called the consent search. It is true that individuals who consent to warrantless searches often act behind facades of feigned innocence or of blind confidence in their

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1. The opinions and conclusions presented herein are solely those of the author and do not necessarily represent the views of The Judge Advocate General, the United States Army, or any other governmental agency.

2. Miranda v. Arizona, 384 U.S. 436 (1966).

3. Boyd v. United States, 116 U.S. 616, 630 (1886).

4. *E.g.*, United States v. Perez, 242 F.2d 867 (2d Cir. 1957), *cert. denied*, 360 U.S. 912 (1959).

concealed niche. In spite of these occasional ploys,[5] courts have been reluctant to approve of consent searches because of the high possibility of coercion exerted by the police. In consent searches, the sole issue is whether the person who consented did so voluntarily. Heretofore, courts have not necessarily required knowledge of the right to refuse as an essential element to a voluntary consent.[6]

In *Miranda*, the Supreme Court clarified previous amorphous standards by mandating that the Fifth Amendment's "self-incrimination" clause required certain warnings as a prerequisite to any interrogation in a custodial or significant-deprivation-of-freedom situation.[7] Although the Court focused on the Fifth Amendment, the underlying theory of the decision established a base upon which the parallel rights of individuals in consent-search situations might also be protected.[8]

In addition to the possibility that the *words of consent* themselves may constitute a *communication* and hence require the warnings directly under the *Miranda* holding, the wider implication of that holding is that a *Miranda-type* warning of the right to refuse the request to search might also be a necessary prerequisite to a valid consent search—under the theory that before a court can rule that a person has waived his constitutional right, it ought first be assured that he had *knowledge of that right*[9] so that he could make an intelligent waiver.[10] Indeed, the realities of life underscore the *Miranda* decision—the fact that too often one is ignorant of his rights and the fact that too often one is intimidated by the inherent pressure of the police.[11] The same realities are applicable to the consent search situation—the fact that too often one is ignorant of his rights and the fact that too often one is intimidated by the policeman's *request* to search. This problem is compounded when it is pointed out that the real victims of each of the situations are not the professional criminal or the organized criminal. These people are well aware of their rights. The real victims are the poor and uneducated, or those who are confronted by the law for the first time. All too often these people are engulfed by frightening visions of what the police might do. Under these circumstances, the poor and the uneducated often believe that they have no real choice but to *consent* to the authorities' request to search their premises.

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5. Channel v. United States, 285 F.2d 217 (9th Cir. 1960).
6. *E.g.*, United States v. Dornblut, 261 F.2d 949 (2d Cir. 1958), *cert. denied*, 360 U.S. 912 (1959).
7. Miranda v. Arizona, 384 U.S. 436, 444 (1966).
8. Note, "Consent Searches: A Reappraisal After Miranda v. Arizona," 67 COL. L. REV. 130 (1967).
9. *See* Johnson v. Zorbst, 304 U.S. 458 (1938).
10. *Quare* whether anyone can *intelligently* waive a constitutional right such as those discussed in this article.
11. *Cf.*, Miranda v. Arizona, 384 U.S. 436, 471-72 (1966).

Given the *Miranda* decision, what is now needed is a requirement which would insure that everyone—not just the organized and knowledgeable criminals—is at least aware of his right to refuse to consent to a search of his premises by the police. This logical extension of *Miranda* is dictated both by the inherent coercive effect of a police *request* and by the otherwise prejudicial effect of an unknowing and unintelligent waiver of one's constitutional rights. Before *Miranda*, an accused, ignorant of his rights to remain silent, often would unwittingly "talk about it" with the police; later, much to his prejudicial consternation, he would find out that not only did he have a constitutional right to remain silent, but also that his utterances would be used against him in court. The same problem attends the consent search: an individual, uninformed of his right to refuse a request to search, ignorantly consents to the police's request to search his home; later, to his pernicious surprise, he discovers that not only did he have a constitutional right to refuse the request to search, but also, and more prejudicial, he discovers that those items seized in that search will be used against him at trial.

When an individual consents to a search, he waives his Fourth Amendment rights against unwarranted searches and seizures. Just as the Supreme Court has ruled that an individual cannot waive his Sixth Amendment right to counsel unless he was made aware of that right,[12] and just as that Court has held that an individual cannot waive his Fifth Amendment right against self-incrimination unless he was made aware of that right,[13] so also is the implication clear that an individual ought not be permitted to waive his Fourth Amendment right to refuse a request to make a warrantless search unless it can be certain that he was aware of that right.

At least one appellate court has recently approved this theory. The Fifth Circuit, in a *per curiam* opinion,[14] held that knowledge of the right to refuse was a prerequisite to a valid consent to a search in *Perkins v. Henderson*.[15] In *Perkins*, the evidence was uncontroverted that the accused was not informed that he could refuse the request to search.[16] The petitioner also testified that "he did not think there was much he could do about the search."[17] The Court held:

12. *Id. See also* Escobedo v. Illinois, 378 U.S. 478 (1964). In the analogous line-up situation, the California Supreme Court has ruled that the accused, in addition to having the right to counsel, must be advised of that right. People v. Fowler, 1 Cal.3d 335, 345, 461 P.2d 643, 651, 82 Cal. Rptr. 363, 371 (1969). *Cf.* Rivers v. U.S., 400 F.2d 935, 940 (5th Cir. 1968); U.S. v. Wade, 388 U.S. 218, 237 (1967).

13. Miranda v. Arizona, 384 U.S. 436, 471-72 (1966).

14. It is interesting to note that one of the three judges sitting on this case was G. Harrold Carswell, the recent nominee to the United States Supreme Court, whose nomination was rejected by the United States Senate.

15. Perkins v. Henderson, 418 F.2d 441 (1969).

16. *Id.* at 442.

17. *Id.*

> Consent may constitute a waiver of Fourth Amendment rights, but, to be valid, a waiver must be an intelligent relinquishment of a known right or privilege. A waiver cannot be valid unless the person knows that his permission may be freely and effectively withheld [citations omitted.][18]

Consistent with *Miranda*, the court agreed that one's constitutional right to refuse a search request could be waived, but said that it must be a knowing and intelligent waiver. It follows, of course, from *Miranda*, that one who consents cannot be presumed to know of his right to refuse; he must first be advised of his right to refuse the request to search.

The path for the future undoubtedly will be a pronouncement by the Supreme Court which will provide a uniform rule in order to determine the constitutional validity of consent searches. To avoid ambiguity as to what constitutes a sufficient apprisal of this right, it is important that the required advice be defined. In formulating a particular type of warning, it is important to prevent a token, ritualistic warning which would provide no meaningful concept to the uneducated individual.

What is essentially required by *Miranda* and its logical extension, as developed herein, is that a minimum of education of the existence of the constitutional right be provided prior to any consent to search. Equally important is the need for a minimal education of the individual to apprise him of the consequences of a waiver of that right. Only with these safeguards built into the warning can it fairly be presumed that the individual has made a "knowing and intelligent" waiver. With these principles in mind, it is clear that any required warning prior to a consent search ought to include the following elements: (1) We desire to search your house without a search warrant and ask your consent; (2) You have a constitutional right to refuse our request to do so; (3) You can require us to secure a search warrant; (4) Any evidence seized in your premises can be used against you in a court of law; (5) You have a right to have present an attorney, either retained or appointed.[19]

It is doubtful that this requirement would impose an oppressive burden upon the police. The incremental duty would be a short, intelligent recital of these rights to the individual. If after this, the individual consents, the authorities have a knowing and intelligent waiver, and they can proceed to conduct a valid consent search.

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18. *Id.*

19. The lawyer's presence would insure that any waiver was made knowingly and intelligently. Moreover, his presence would significantly reduce the possibility of subtle coercion by the police, as well as constituting a limiting factor as to any unconsented expansion of the scope of the search. An argument can be made that this last element is especially needed when the person from whom the consent is sought is a suspect in a crime, under the theory that the search and items found therein will almost certainly provide for some opportunity, albeit subtly perhaps, for custodial interrogation.

On the other hand, if the individual refuses, the authorities cannot legitimately complain because an individual has exercised his constitutional right. If the authorities have probable cause to believe that incriminating evidence is contained on the individual's premises, they can, of course, proceed to the magistrate and obtain a valid search warrant. Under these conditions, an equitable balance is assured between the individual's rights to privacy and the state's power of criminal prosecution.

The necessary result of the development of a required warning would not decrease the effectiveness of justice. Instead, it would merely extend to the poor and the uneducated the rights which the wealthy presume and which the organized criminal sometimes flaunts. Effecting this logical extension is the only method which would equate the real rights of the poor and oppressed to the rights of the rest of society. Finally, it would end the discrimination against the poor and uneducated, who are otherwise more susceptible to the subtle pressures for a *consent* search.