# Chapter 8 - Administrative Information Collection

## Distinguishing the administrative law world from the criminal law world.

### Think back to Chapter 4 and *Goldberg*.

### What criminal due process rights did the court refuse to extend to administrative proceedings?

### I briefly discussed a list of cases where the court distinguished administrative law from criminal standards for due process. These include *Addington, Bell, Barefoot, Schall*, etc.

#### What is the critical factor that runs through these cases that the court used to determine that they were administrative and thus did not warrant full criminal due process protections?

### From criminal due process you know that someone can be denied bail and then held until trial. What minimum due process must be provided between the arrest and the pre-trial detention?

#### Is this minimum due process constitutionally required before someone is administratively detained? (The time of the hearing problem.)

### Thinking back to criminal/constitutional law – what do you file if you think your client is being illegally detained on an administrative order?

#### How would you justify the Guantanamo detentions if you were the DOJ when the ACLU used this device to claim that that these detainees were being held unconstitutionally?

## Review of criminal law searches

### What does the 4th amendment require for a search warrant?

#### What is the justification for the plain view exception?

#### What is the justification for the hot pursuit exception?

#### Do you need a warrant if the person consents to the search?

### What is the remedy if the prosecutor wants to use evidence obtained without a necessary warrant?

#### What is your remedy if you client suffers an illegal search but is not prosecuted?

#### How is this like the remedy problem if your client claims to be improperly listed on a sex offender www site?

### Silver Platter Doctrine

#### (NB – you may have heard in a criminal law class that the SPD is no longer good law. That refers to an older interpretation that allowed state police to give illegally obtained evidence to the feds, who could then use it. That inter-sovereign SPD is no longer good law. The private party version is still good law.)

#### What is the Silver Platter Doctrine in criminal law?

#### What are the limits on the doctrine, i.e., what keeps the police from just asking your neighbor to break into your house and look for evidence?

#### In the context of private data aggregators such as Equifax and Facebook, how does the Silver Platter Doctrine undermine constitutional protections?

##### How might you argue that there are constitutional limits on the use of third party aggregator data in criminal prosecutions?

##### Do you think it matters whether individuals consent to, or even know about third party data aggregation?

#### Should the Silver Platter doctrine be affected if third parties sell data to the police?

#### What if the police say that they will pay for new type of data if Equifax collects it?

## Administrative Searches

### What is the language of the 4th amendment that allows public health and safety inspections without a criminal due process warrant?

### Why did *Frank* say that traditional public health and safety inspections did not trigger 4th Amendment warrant requirements?

#### Why would it be impossible to do routine public health investigation such as inspections for fire code violations if a 4th amendment criminal due process warrant was required?

### What is the key distinction that the courts use to determine whether a search is a criminal law search or an administrative law search?

### What were the *See* and *Camara* Courts concerns that lead to their modifying the Frank rule?

#### What is the area warrant that the *See* Court created to solve this problem?

#### How do area warrants differ from criminal law warrants? (Be specific about how specificity and probable cause differ for these warrants.)

##### Give examples of factors that might be used to justify an area warrant.

#### When did the *See* court tell us that even area warrants would not be necessary?

##### What are examples?

## Criminal convictions based on administrative searches

### What are the *Burger* factors for deciding if a business is pervasively regulated?

### What is the rationale for why warrants are not necessary for pervasively regulated businesses?

#### What is the role of the expectation of privacy in deciding if a warrant is necessary to use evidence in subsequent criminal proceedings?

#### What does the statute/regulation/license have to provide to defeat the expectation of privacy for criminal law searches, i.e., to allow a search without a 4th amendment warrant?

### *Burger* and *Biswell* were prosecutions for crimes related to regulations under which they were searched.

#### What are the issues when an administrative search, such as a restaurant inspection, turns up evidence of an unrelated crime - say the health inspector finds the cook's cocaine stash?

##### If you were the prosecutor, how could you use existing exceptions to the 4th amendment warrant requirement to justify the use of the evidence?

##### How would you rebut this with *Frank*?

#### Why would allowing prosecutions for unrelated crime undermine the rationale for area warrants?

### Administrative exclusionary rule

#### Assume OSHA has a warrant for a limited search of a business, but goes beyond the limits of the warrant.

##### What can the evidence found in the areas beyond the reach of the search warrant be used for?

##### What use did the court exclude for the evidence?

##### How does the basic rational for differentiating criminal and administrative searches undermine the rational for a strict exclusionary rule for administrative searches?

## Reporting

### What is third party reporting?

#### What are common examples?

### What is the basic legal assumption for the expectation of privacy in data held by third parties?

#### Given this assumption, can you assert a constitutional right to require your consent or a 4th amendment criminal warrant before the government can obtain evidence for your criminal prosecution from a third party?

### What are the three traditional legal privileges that prevent obtaining information from third parties for use in criminal prosecutions?

### What is the legal basis for the physician-patient privilege?

#### Can physicians be required to report information about a patient that could be used in criminal actions against the patient?

#### Why or why not, based on the nature of the physician-patient privilege?

### What first party reporting?

#### What are common examples?

### When can a first party reporting law be unconstitutional?

#### What Amendment does it violate and why?

#### What does *Marchetti v. United States*, 390 U.S. 39 (1968) tell us about requiring individual to keep records of illegal activities?

### Why do we have child abuse reporting laws?

#### How could third party child abuse reporting laws raise attorney client privilege issues?

#### When could the legislature constitutionally require attorneys to report child abuse?

## Administrative subpoenas

### How do you distinguish a reporting requirement and a subpoena?

#### Which can require the creation of new records?

### Your client has been served with an administrative subpoena.

#### What are the options for dealing with the subpoena if your client does not want to comply?

#### What are the *Morton Salt* factors for contesting a subpoena?

#### If you are required to keep a record of a legal activity, such as employee wage and hour laws, can you refuse to produce it because it might incriminate you for not paying your withholding taxes?

## Self-incrimination

### What is constitutional self-incrimination?

#### Corporations may be people, but can a corporation take the 5th, i.e., claim the privilege against self-incrimination?

### Is forcing your client to give a blood sample a self-incrimination issue?

#### If not, what is it?

### Why doesn’t self-incrimination apply in administrative proceeding?

#### What is the usual result if your client claims a 5th amendment privilege in an administrative proceeding and refuses to testify?

#### If your client does provide the testimony, may it be used against him in a criminal proceeding?

#### When might a criminal court exclude testimony provided in an administrative proceeding?

### How can the DA or the court cure self-incrimination conflicts?

## What is the purpose of the Paperwork Reduction Act?

### What are the legal consequences if an agency covered by the act does not comply with it in promulgating a data collection form?