# Physical Searches by Agencies

# Learning Objectives for this Module.

## Learn the limits of the 4th Amendment.

## Learn when a warrantless search can be reasonable.

## Learn the difference between a probable cause warrant and an area warrant.

## Learn the standards for a pervasively regulated business.

## Learn how the expectation of privacy affects warrant requirements.

# Reading Assignment

## Chapter 8 to IV. OBTAINING DOCUMENTS AND TESTIMONY, Camara v. Municipal Court City and County, 387 U.S. 523 (1967) par. 23-56, and the lecture on the history of warrantless searches.

# Issues to be addressed

## Fourth Amendment

### "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

## Criminal Law Review

### What does the 4th Amendment require for searches to find evidence in criminal prosecutions?

#### Warrant that specifically describes the premises to be searched and what is being sought

#### Probable cause based on reliable information

#### Independent magistrate approval

### History of the Exclusionary Rule

#### Before the exclusionary rule, the defendant could the sue the police for trespass, but this is not very effective if you have been convicted of a crime.

#### Exclusionary rule applied to the federal government in 1914 – Weeks v. US, 232 U.S. 383 (1914)

#### It was not until 1961 that the exclusionary rule was fully applied to the states - Mapp v. Ohio, 367 U.S. 643, 661 (1961).

#### Thus it is not surprising that the United States Supreme Court did not require warrants for public health inspections until after it imposed the exclusionary rule on the states.

### What are examples of traditional exceptions?

#### No expectation of privacy

##### Telephoto lenses?

##### Space cameras?

##### Infrared?

#### Special circumstances

##### Border check points

##### Securing the scene to prevent injuries

### Anticipatory Warrants

#### An anticipatory warrant is a warrant that is triggered by a future event, such as the delivery of a drug shipment.

#### It requires specific probable cause, i.e., the warrant must spell out the triggering event in detail, meaning that the police cannot use these unless they know about the crime.

#### United States v. Grubbs, 547 U.S. 90 (2006)

### Sneak and Peek Warrants - Delayed Notice Warrant

#### Traditional criminal law search warrants require the police to “knock and announce” that they are searching.

#### This allows the target to get a lawyer and attack the search and it also puts the target on notice of the purpose of the search.

#### Sneak and peek warrants allow secret searches. The target must be notified eventually, unless there is good reason not to.

#### Originally limited to FISA (Foreign Intelligence Surveillance Act) warrants, but now generally available.

### Silver Platter Doctrine

#### This is a special case of the general principle that the Constitution does not bind private persons. So the 4th Amendment should really say:

##### "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures BY STATE ACTORS...

#### A private individual, not a state actor, can collect evidence without a warrant, or even illegally, and give to the police without triggering the exclusionary rule under the U.S. Constitution. Congress and states can modify this by statute, but in the absence of statutory modification, third parties are not subject to constitutional limitations.

#### Elkins v. United States, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960)

##### (This is right before the exclusionary rule applied to the states.)

##### State police illegally obtain evidence and hand it to federal police

##### No silver platter doctrine, both are state actors

#### This means that any private entity that you give data to – your bank, Facebook, your cell phone or internet carrier, Google – can give your information to the government, or anyone else, unless limited by state or federal law or by contract. But even if the private entity violates the contract and gives the police your data, you still do not get the exclusionary rule, and contractual privacy does not limit the power of the agency or the courts to force the third party to hand over the data.

## Warrantless entry on property – a history

### This is a lecture based on slides available here:

#### <http://biotech.law.lsu.edu/blog/adlaw-2015s-admin-search.pptx>

#### These notes are the take-away issues.

### Frank v. Maryland, 359 U.S. 360 (1959) - The First 158 Years of Administrative Searches

#### <http://biotech.law.lsu.edu/cases/searches/frank_v_maryland.htm>

#### Background

##### This is a criminal fine for refusing to allow a health inspector to enter a private home to carry out a health and safety inspection of a private home without a warrant. The homeowner refused entry, was fined, and appealed. This is the first United States Supreme Court case on administrative searches of property. From the colonial period until this case, the right of public health inspectors (the archetypical administrative inspectors) to enter private property without a warrant was unquestioned.

##### This is at the beginning of the Warren’s court’s creation of criminal due process rights: Mapp v. Ohio, 1961; Terry v. Ohio 1968; Escobedo v. Illinois, 1964; Miranda v. Arizona, 1965; and Chimel v. California, 1969.

#### The Enabling Act – this is an example of the broad discretion given to the public officials in traditional public health and safety laws. In later cases, the court will become concerned about cabining this discretion.

##### "Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, cellar or enclosure, he may demand entry therein in the day time, and if the owner or occupier shall refuse or delay to open the same and admit a free examination, he shall forfeit and pay for every such refusal the sum of Twenty Dollars."

#### What does the 4th Amendment really bar?

##### "Certainly it is not necessary to accept any particular theory of the interrelationship of the Fourth and Fifth Amendments to realize what history makes plain, that it was on the issue of *the right to be secure from searches for evidence to be used in criminal prosecutions or for forfeitures* that the great battle for fundamental liberty was fought. "

#### History matters – remember that continuous practice from the early constitutional period is taken as strong evidence of the founders intent.

##### "The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it, . . . ." Jackman v. Rosenbaum Co., 260 U.S. 22, 31. (Holmes)

#### The key question when history is being used as an indication of constitutionality is whether times have changed. In Camera, we will see that court find a different answer to this question.

##### The power here challenged rests not only on a long history of its exercise. It is a power which was continually strengthened and applied to wider concerns through those very years when the right of individuals to be free from peremptory official invasion received increasing legislative and judicial protection. Nor is this a situation where a new body of knowledge displaces previous premises of action. There is a total want of important modification in the circumstances or the structure of society which calls for a disregard of so much history.

##### "The need for preventive action is great, and city after city has seen this need and granted the power of inspection to its health officials; and these inspections are apparently welcomed by all but an insignificant few. Certainly, the nature of our society has not vitiated the need for inspections first thought necessary 158 years ago, nor has experience revealed any abuse or inroad on freedom in meeting this need by means that history and dominant public opinion have sanctioned."

#### The Court finds that if it requires a search warrant, then the 4th Amendment would constrain how it could accommodate the agency’s need for a flexible approach. This notion was echoed in Brown and Williamson, were the court was concerned that it read the Food and Drug Act as allowing the regulation of tobacco, the FDA would have be driven other provisions of the law to ban tobacco.

##### "If a search warrant be constitutionally required, the requirement cannot be flexibly interpreted to dispense with the rigorous constitutional restrictions for its issue. A loose basis for granting a search warrant for the situation before us is to enter by way of the back door to a recognition of the fact that by reason of their intrinsic elements, their historic sanctions, and their safeguards, the Maryland proceedings requesting permission to make a search without intruding when permission is denied, do not offend the protection of the Fourteenth Amendment."

### Camara v. Municipal Court, 387 U.S. 523 (1967) – 8 years later, the Warren Court returns to administrative searches.

#### Background

##### In basic terms, this is the same situation as Frank. A private home owner refused entry to a health inspector who did not have a warrant and was fined. The statute equivalent to the one in Frank:

###### "Sec. 503 RIGHT TO ENTER BUILDING. Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code."

##### The times they are a-changin’.

###### Since Frank, the Court has created modern criminal due process. The hippie and anti-war movements were beginning to tear the country apart and distrust of authority that cumulates in Watergate has begun. The court is concerned that the broad authority of the enabling law could lead to abuses.

##### The Court still recognizes the limited purpose of the search rationale from Frank:

###### Since the inspector does not ask that the property owner open his doors to a search for "evidence of criminal action" which may be used to secure the owner's criminal conviction, historic interests of "self-protection" jointly protected by the Fourth and Fifth Amendments are said not to be involved, but only the less intense "right to be secure from intrusion into personal privacy." (Camara)

##### In a shadowing of Matthews, the court recognizes the problem of a warrant would make enforcement impossible.

###### In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. (Camara)

##### The court now turns to the core problem from Frank: will the 4th Amendment allow something less than a classic probable cause warrant to meet constitutional standards? The court recognizes the irony of the answer to the inconvenience of a warrant is to require no warrant at all. But it also recognized that searches for potential risks or violations can never satisfy the 4th Amendment standards which assume that an identified crime has already been committed:

###### There is unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures.

###### It is here that the probable cause debate is focused, for the agency's decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building.

##### The Court first reminds us of the limited nature of the intrusion:

###### First, such programs have a long history of judicial and public acceptance.

###### Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results.

###### Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy.

###### "The need for preventive action is great, and city after city has seen this need and granted the power of inspection to its health officials; and these inspections are apparently welcomed by all but an insignificant few. Certainly, the nature of our society has not vitiated the need for inspections first thought necessary 158 years ago, nor has experience revealed any abuse or inroad on freedom in meeting this need by means that history and dominant public opinion have sanctioned."

##### The Court creates a general or area warrant, which does not depend on individualized probable cause. One can either see this as a weakening of the 4th Amendment standards or as the creation of a new, Court created right that is not the same as the 4th Amendment.

###### Such standards, which will vary with the municipal program being enforced, may be based upon:

the passage of time

the nature of the building (e. g., a multi-family apartment house)

the condition of the entire area

###### [T]hey will not necessarily depend upon specific knowledge of the condition of the particular dwelling.

###### [N]othing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations

##### Practical Considerations

###### While the court assumes that these warrants will be obtained before all non-emergency inspections, most health departments depend on voluntary cooperation. Warrants will only be obtained if there is significant resistant to warrantless entry.

##### See v. Seattle, 387 U.S. 541 (1967) expands this abbreviated warrant requirement to businesses.

#### State Law Limitations

##### See and Camara only deal with the US constitutional issues. Some state constitutions have greater protections and the legislatures can enact greater protections, including Washington State, the location of See.

###### City of Seattle v. McCready, 123 Wash. 2d 260, 868 P.2d 134 (Wa. 1994)

## Pervasively Regulated Industries

### See and Camera are general constitutional rights that do not arise from statutory schemes. The pervasively regulated industries exception to the warrant requirements is rooted in the courts core standard for 4th Amendment protections: the reasonable expectation of privacy. If the legislature or the agency puts the license or permit holder on notice that the premises can be inspected without notice and without a warrant, and makes accepting this notice a condition of the permit, then the license or permit holder no longer has a reasonable expectation of privacy.

### There are some limitations to limit abuse, such as inspections limited to business hours, and limited to actual place of business, but beyond these there are few constraints on the regulated industry model. New York v. Burger, 482 U.S. 691 (1987), which you have seen from criminal procedure sets out criteria for a regulated industry.

#### First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made.

##### ("substantial federal interest in improving the health and safety conditions in the Nation's underground and surface mines");

##### (regulation of firearms is "of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders");

##### (federal interest "in protecting the revenue against various types of fraud").

#### Second, it must be "Necessary to further [the] regulatory scheme."

##### "For example, in Dewey we recognized that forcing mine inspectors to obtain a warrant before every inspection might alert mine owners or operators to the impending inspection, thereby frustrating the purposes of the Mine Safety and Health Act -- to detect and thus to deter safety and health violations."

#### Third, there must be a constitutionally adequate substitute for a warrant, “In other words, the regulatory statute must perform the two basic functions of a warrant:

###### it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope,

###### and it must limit the discretion of the inspecting officers.

##### To perform this first function, the statute must be "sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes."

##### In addition, in defining how a statute limits the discretion of the inspectors, we have observed that it must be "carefully limited in time, place, and scope.”

### In practical terms, it is difficult to defeat a claim of pervasively regulation industry where the legislation determines that warrantless entry is allowed and provides through legislation or regulation a clear outline of the search procedure as a condition of the license or permit. Anything found during these searches that is relevant to the licensed or permitted activity can be used in criminal and civil proceedings. Evidence of unrelated crimes can be challenged under the exclusionary rule.

### Congress did not set up OSHA with a pervasively regulated industry model and did not provide for warrantless searches. The court found that OSHA inspectors needed at least an area warrant.

#### Marshall v. Barlow's, 98 S. Ct. 1816, 436 U.S. 307 (1978)

### Is there an administrative law exclusionary rule?

#### OSHA used an employee complaint as the basis for a probable cause warrant for a specific inspection, as provided in the OSHA Act.

##### Inspector also did a general search, claiming it was part of an area warrant type search

##### Court found that a complaint driven search does not meet the neutral selection criteria for an area warrant

#### Court allowed the use of the improperly obtained records for administrative actions to correct risks, but not as a basis for punishing (fining) the employer. This is consistent with the distinction between punishment (criminal law) and prevention/protection (administrative law) – ignoring the violations would have subjected the workers to unnecessary risks.

##### Trinity Industries v. OSHA, 16 F.3d 1455 (6th Cir. 1994)

## What about Evidence of Unrelated Crime?

### What if the housing inspector finds your stash of stolen DVD players?

### What if the restaurant inspector finds the cook's stash of cocaine?

### What did Camara say?

#### Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy.

### The FBI disagrees on this and takes the position that any lawful entry justifies the use of any evidence that is found. The courts have not sorted this out.

## FISA

### Foreign Intelligence Surveillance Act (FISA) uses a secret court to approve warrants and must assume that everything in the warrant is correct.

### These are warrants for pre-crime, so there is limited specificity - They resemble administrative warrants

### If regular crime is found with FISA, the evidence can be used for prosecution.

### This is beyond the scope of this course.

## FISA Foreign Intelligence Surveillance Act (FISA)

### A secret court (FISC) to approve warrants

### Only “4 corners” review

### These are warrants to discover and prevent terrorist activity, thus they are generally not specific.

### They resemble administrative warrants

### If there is specific probable cause a regular 4th amendment warrant could be used.

### If regular crime is found with a FISA warrant, the evidence can be used for prosecution.

### “Lone Wolf” limited foreign threat limitations. Government as Database

# Evaluation Questions

## 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

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

#### Why would requiring a classic 4th Amendment warrant make it impossible to do most agency searches?

#### What is the area warrant that the *See* Court created to solve this problem and how does it differ from a 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

### Using the *Burger* factors, be prepared to analyze a hypothetical to determine if a business meets the standards for being pervasively regulated.

### What is the general constitutional concept of a reasonable expectation of privacy and how does it support the warrantless entry into pervasively regulated businesses?

### 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?

### 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?