# Study Guide – Chapter 8

# Learning Objectives for this Chapter.

## 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.

## Learn the difference between first party and third party reporting.

## Learn when a client can claim 4th and 5th Amendment protections and when these are not available.

## Learn about the legal consequences of giving information to third parties.

## Learn the exceptions to the loss of an expectation of privacy in information given to third parties.

## Learn the all-pervasive nature of administrative searches.

# 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? (think traditional exceptions to 4th amendment warrants)

##### What are examples?

## Criminal convictions based on administrative searches

### 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 argument for a strict exclusionary rule for administrative searches?

## What is the third-party doctrine as regards access to information given to a third party?

### How does this destroy your expectation of privacy in the information?

### Thought question – can the third-party promise (contractually bind itself) to not give your records to the government?

### Why is the third-party doctrine so pervasive in the modern online world?

### What are examples of third-parties to which law students routinely provide personal information?

## 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 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?

## Administrative subpoenas

### How do you distinguish a reporting requirement from 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 the constitutional test for 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?