

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

Silver Platter Doctrine

What is the Silver Platter Doctrine?

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?

Does the Silver Platter doctrine apply if third parties sell data to the police?

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?

Regulated Industries

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 agency action could not be based on evidence that went beyond the search warrant?

How does the basic rationale 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 – if the third-party contracts to not give your information to the government, does this affect the government's access to the data?

Why is the third-party doctrine so important 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 through a third party report?

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?