
Constitutional Law - Administrative Searches - Closing the Door on Frank v. Maryland

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CASE NOTES

CONSTITUTIONAL LAW—ADMINISTRATIVE SEARCHES—CLOSING THE DOOR ON *FRANK* *V. MARYLAND*

An inspector of the San Francisco Division of Housing Inspection, while engaged in the required annual inspection for the purpose of licensing apartment houses and issuing permits of occupancy,¹ visited the building in which the defendant, Ronald Camara, resided. The inspector was informed by the manager of the apartment building that Camara, the lessee of the ground floor was using the premises as a residence. The inspector called on Camara who readily admitted he lived there, but refused to permit the inspector to enter and inspect the premises. Two inspectors later returned and requested admittance, informing the defendant that he was required by law to allow entry;² and further, that he was using the ground floor as a residence in violation of the existing permit of occupancy which was restricted to commercial use. Nevertheless, Camara refused to allow their entry.

Camara was arrested and charged with violation of the Municipal Code.³ A demurrer to the complaint in the municipal court was dismissed and the defendant applied for a writ of prohibition in the superior court on grounds that such an ordinance authorizing municipal officials to enter homes without either a search warrant or cause to suspect an existing code violation was unconstitutional. The superior court denied the writ, and the district court of appeals affirmed, holding that the ordinance did not violate the fourth or the fourteenth amendments.⁴ The Supreme Court of California

¹ Under section 86(3) of the San Francisco Municipal Code, the Division of Housing Inspection of the Department of Public Health is required to make an inspection "at least once a year and as often thereafter as may be deemed necessary" of all apartment houses for the purpose of licensing such apartment houses in order that a permit of occupancy may be issued to the building.

² SAN FRANCISCO, CAL., MUNICIPAL CODE § 503: "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."

³ SAN FRANCISCO, CAL., MUNICIPAL CODE § 507, provides in its relevant parts: "[A]ny person, the owner or his authorized agent who violates, disobeys, omits, neglects, or refuses to comply with or who resists or opposes the execution of any provision of this Code . . . shall be guilty of a misdemeanor . . ."

⁴ 237 Cal. App. 2d 128, 46 Cal. Rptr. 585 (1965); See 10 Sr. LOUIS L. REV. 428 (1966).

denied a petition for a hearing. On appeal, the Supreme Court of the United States vacated the judgement and held that the defendant had a constitutional right to demand a search warrant and therefore could not constitutionally be convicted for refusal to consent to an inspection. *Camara v. Municipal Court*, 87 S. Ct. 1727 (1967).

During a similarly required inspection,⁵ an inspector of the Seattle Fire Department, without a warrant or cause to suspect a violation, sought to enter Norman See's locked warehouse. After See refused access, he was arrested, charged and subsequently convicted of an infraction of the Municipal Code⁶ for refusing to submit to an inspection. On appeal, the Supreme Court of Washington affirmed⁷ the conviction, expressly ruling that the city ordinance authorizing fire inspection of all buildings except dwellings⁸ did not violate the search and seizure provisions of the Federal Constitution.⁹ The Supreme Court of the United States reversed, holding that the fourth amendment applies with equal force to commercial structures as well as private dwellings. *See v. Seattle*, 87 S. Ct. 1737 (1967).

In the companion cases of *Camara v. Municipal Court* and *See v. Seattle*, the Supreme Court overruled the precedent set eight years earlier by its decision in *Frank v. Maryland*¹⁰ completely reversing its position. This case note will attempt to analyze the rulings in *Camara* and *See* in light of relevant case law, and discuss their affect on the status of administrative inspections with regard to the fourth and fourteenth amendments of the Constitution, most particularly as the unconstitutionality of warrantless inspections may relate to enforcement of municipal housing codes.

The framers of the fourth amendment could hardly have anticipated the extreme urbanization of modern society or the blight and slums that

⁵ SEATTLE, WASH., MUNICIPAL CODE § 8.01.050: "It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors or dwellings, as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provision of this Title, and of any other ordinance concerning fire hazards."

⁶ SEATTLE, WASH., MUNICIPAL CODE § 8.01.040.

⁷ *Seattle v. See*, 67 Wash. 2d 475, 408 P.2d 262 (1965). *See* 41 WASH. L. REV. 525 (1966).

⁸ In reaching its conclusion, the Supreme Court of Washington noted that section 8.01.050 specifically excepts the interior of dwellings. *Seattle v. See*, *supra* note 7, at 483-84, 408 P.2d at 267.

⁹ U.S. CONST., amendment IV: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable search and seizure, shall not be violated, and no Warrant 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."

¹⁰ 359 U.S. 360 (1959).

have been the continual growing pains of metropolitan areas. Their bias clearly lay with individual ownership and the inviolability of private property.¹¹ It was against this background with British abuses in mind¹² that the framers conceived the amendment. However, within the course of the last century, it became obvious that certain individual proprietary rights must yield to the general public welfare.¹³

Over a century ago, housing codes of a limited nature existed in several cities.¹⁴ It was, however, the relatively recent emphasis on urban renewal in the forties and the Federal Housing Act of 1949¹⁵ which provided the impetus for the development of the comprehensive housing codes existing in most cities. The Housing Act provided for federal aid for slum clearance and urban renewal, conditional upon local government's undertaking "positive" and "workable" programs for the prevention and elimination of slums.¹⁶ Effective enforcement of such programs could only be accomplished by regular, periodic, often area-by-area, inspection of all structures.¹⁷ It was the cognizance of this fact that led local bodies to promulgate ordinances authorizing warrantless inspections of all buildings, including private dwellings, and making denial of entry a misdemeanor, punishable by fine or imprisonment or both.¹⁸

¹¹ See CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1955); Philbrick, *Changing Conception of Property in Law*, 86 U. PA. L. REV. 691 (1938).

¹² The writs of assistance and the general warrant which had the effect, as James Otis said, of placing "the liberty of every man in the hands of every petty officer" were particularly objectionable to the Colonists. *Frank v. Maryland*, 359 U.S. 360, 364 (1959).

¹³ "The close integration of modern society, particularly its urban portion, made it impossible to have unchecked land's individual use. Hence, the great modern development of the law of nuisances, public and private; and the enormous expansion, almost wholly a creation of the period since the Civil War of the police power, by virtue of which use of property is regulated, or the property may even be destroyed, for the furtherance of public order, safety, health, morality and well-being generally." Philbrick, *supra* note 11, 723-24. See generally FREUND, THE POLICE POWER (1904).

¹⁴ The history of housing and sanitation regulation in America dates from the enactment of a building code in New Amsterdam in 1647. Massachusetts and South Carolina had statutes for the control of housing nuisances by the "1690's." Philadelphia enacted a similar ordinance in 1712. The Baltimore Code, construed in *Frank*, remains essentially unchanged since its enactment in 1801. BALTIMORE, MD., ORDINANCES (1801-1802), no. 23, § 6. The first modern housing code was enacted by the City of New York in 1849. See Guandolo, *Housing Codes in Urban Renewal*, 25 GEO. WASH. L. REV. 1 (1956).

¹⁵ 63 Stat. 413 (1949).

¹⁶ 42 U.S.C. §§ 1450-60 (1964).

¹⁷ *Camara v. Municipal Court*, 377 U.S. 421, 434 (1964); *Frank v. Maryland*, 359 U.S. 360, 372 (1959). See GREER, URBAN RENEWAL AND AMERICAN CITIES 174 (1965); Schwartz, *Crucial Areas in Administrative Law*, 34 GEO. WASH. L. REV. 401, 423 (1966); 28 GEO. WASH. L. REV. 421, 430 (1959).

¹⁸ A 1953 survey of local health departments disclosed that all state legislatures had

Notwithstanding the relatively long history of warrantless code inspections, no case concerning the constitutionality of statutes empowering entry or making failure to submit to such inspections a misdemeanor reached the appellate level until 1949.¹⁹ In other areas of the law, search and seizure and its relation to the prohibitions expressed in the fourth amendment and inherent in the "due process" clause of the fourteenth amendment had already been extensively considered by the courts. In these areas the fourth amendment has been interpreted by the courts as demanding law enforcement officers to procure a search warrant when searching for evidence to be used in a criminal proceeding.²⁰ These cases treat warrantless searches as presumptively unreasonable with the burden of demonstrating exigencies sufficient to make reasonable a search without a warrant falling heavily on the searcher.²¹

In the area of administrative law, the courts have distinguished criminal searches from regulatory inspections.²² The case law generally accords ad-

granted the specific power of sanitary inspections to both state and local health authorities. Also, of a random sample of fifty cities having health codes, thirty-one had ordinances specifically empowering inspectors to enter private dwellings. A 1956 survey of fifty-six cities having comprehensive housing codes found forty-three permit or require inspection. None of these ordinances requires a warrant for entry and most of them make non-compliance with the ordinances generally, or denial of entry specifically a punishable offense. 28 GEO. WASH. L. REV. 421, 423 (1959).

¹⁹ District of Columbia v. Little, 178 F. 2d 13 (D.C. Cir. 1959), *aff'd on other grounds*, 339 U.S. 1 (1950).

²⁰ See, e.g., MacDonal v. United States, 335 U.S. 451 (1948); Johnson v. United States, 333 U.S. 10 (1948); Go-Bart Importing Co. v. United States, 282 U.S. 334 (1931).

²¹ See, e.g., United States v. Jeffers, 342 U.S. 48, 51 (1951); MacDonal v. United States, 335 U.S. 451, 456 (1948). The general classes of situations in which a search warrant is not required have developed as well defined exceptions delimited by judicial interpretations of reasonableness. They are: (a) searches incident to a lawful arrest, (b) cases involving movable vehicles, (c) situations where the suspect is fleeing or likely to flee, and (d) cases where evidence or contraband is threatened with removal or destruction. United States v. Jeffers *supra*; Johnson v. United States, *supra* note 19; Carol v. United States, 267 U.S. 132 (1925); 50 CORNELL L. Q. 282 (1965). See generally 17 BAYLOR L. REV. 312 (1965); 108 U. PA. L. REV. 265 (1959).

²² Generally, the courts have used four broad types of rationales in justifying the regulatory searches; (a) Where any building is opened by the owner to the members of the public, the consent of the owner will be implied to search places and seize articles that are plainly visible to the public. Reinhart v. State, 193 Tenn. 15, 241 S.W.2d 854 (1951); (b) When a business owes its existence to governmental license and the business is opened to inspection by statute, the owner, by doing business under the license, has impliedly consented to such inspections. Silber v. Bloodgood, 177 Wis. 608, 188 N.W. 84 (1922); City of St. Louis v. Evans, 357 S.W.2d 984 (Mo. 1960); (c) It is within the general police power to regulate the health and public welfare, and a search enforcing such a statute is likewise within the police power of the state and is not unreasonable. Keiper v. City of Louisville, 152 Ky. 691, 154 S.W. 18 (1913), City of St. Louis v. Evans, *supra*; (d) The search is civil in nature as distinguished from searches instituted for criminal law enforcement and does not come under the protection of the fourth amendment. Boyd v. United

ministrative agencies the limited power to inspect the premises of businesses which engage in activities subject to regulation as essential to the public interest,²³ and Congress has invested most federal agencies with this method of enforcement.²⁴

An inspection of private dwellings or non-regulated businesses is of a decidedly different character. Such an inspection can not be distinguished from a criminal search by the fact that it seeks, as the regulatory inspection, to look at property privately owned but public in nature.²⁵ It must involve, however hedged by statutory safeguards, an invasion of the individual's right of privacy; that same right of privacy the Supreme Court has so often found central to the fourth amendment.²⁶

The first case to consider inspection laws lent support to the thesis that the standard of the fourth amendment would be applied to noncriminal administrative searches of homes. The court in *District of Columbia v. Little*²⁷ affirmed the lower court's reversal of a conviction for "hindering, obstructing, and interfering with a health officer."²⁸ The defendant had refused entrance to a health inspector who sought to inspect her premises pursuant to a complaint of unsanitary conditions. The state contended that the purview of the fourth amendment extended only to searches for evidence of crime: that the fourth amendment had to be considered in conjunction with the fifth amendment, and thus, where the possibility of self-incrimination does not exist, the protection of the fourth amendment cannot be invoked.²⁹

States, 116 U.S. 616 (1885); *City of St. Louis v. Evans*, *supra*; Comment, *Administrative Searches and the Fourth Amendment*, 30 Mo. L. Rev. 612 (1965).

²³ See, e.g., *United States v. Crescent-Kelvin Co.*, 164 F.2d 582 (3rd Cir. 1948) (food and drug laws); *Albert v. Milk Control Board*, 210 Ind. 283, 200 N.E. 688 (1936); *Hubbel v. Higgins*, 148 Iowa 36, 126 N.W. 914 (1910) (hotels); *State v. Nolan*, 161 Tenn. 293, 30 S.W.2d 601 (1930) (barber shop).

²⁴ For example, under 21 U.S.C. § 374(a) (1964) of the Food, Drug, and Cosmetic Act, FDA agents have the authority "to enter, at reasonable times, any factory, warehouses or establishment in which food, drugs, devices, or cosmetics are manufactured, processed, packed or held . . . and . . . to inspect . . . such factory, warehouse or establishment." Similar powers to enter and inspect are granted to Interstate Commerce Commission agents by 49 U.S.C. § 320(d) (1964).

²⁵ It was undoubtedly regulated companies whose premises were "of a public nature" that Professor Ernst Freund referred to when he wrote: "[T]he power of inspection is distinguished from the power of search; the latter is exercised to look for property which is concealed, the former to look at property which is exposed to public view . . . and in nearly all cases accessible without violation of privacy." FREUND, *supra* note 13, at 42.

²⁶ *Schmerber v. California*, 384 U.S. 757, 767 (1966); *MacDonald v. United States*, 335 U.S. 451, 453 (1948); *Agnello v. United States*, 269 U.S. 20, 32 (1925).

²⁷ *Supra* note 19.

²⁸ *District of Columbia v. Little*, *supra* note 19, although the Supreme Court considered the case on appeal, the Court avoided the constitutional question by asserting Little's resistance was not the kind of interference prohibited by the regulation.

²⁹ *Supra* note 19, at 15.

Judge Pettyman, speaking for the majority in *Little*, answered that a search was a search regardless of whether it was for "gambling equipment" or "garbage." In other words, the seriousness of the invasion of a citizen's right to privacy did not vary according to the intent of the invading officer.

The basic premise of the prohibition against searches was not protection against self incrimination, it was the common-law right of a man to privacy in his home. . . . [This right] belongs to all men, not merely to criminals, real or suspected. To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection is a fantastic absurdity.³⁰

Foreshadowing the opinion of the Supreme Court in *Frank*, the dissent in *Little* asserted that the fourth amendment applied only to searches for criminal evidence, and that no judicial document consistent with the probable cause requirement of the fourth amendment was capable of conferring authority merely to inspect premises in order to ascertain whether there were possible code violations.³¹

In 1956 in *Givner v. State*³² the Maryland Court of Appeals held that an empowering ordinance similar to the one considered in the *Little* case was not repugnant to the constitutional prohibition against "unreasonable search and seizure" as applied to the state. The court held such inspections were "primarily protective, not punitive," and when conducted in a reasonable manner, the conflict between an individual's privacy and the public health and safety could only be resolved in favor of the latter. Three years later, the Supreme Court of South Carolina upheld the power of its cities to enact such ordinances.³³

Against this dearth of case law, the United States Supreme Court considered the constitutional question for the first time in *Frank v. Maryland*.³⁴ A health inspector, in response to neighborhood complaints about rats, attempted to find the source. He knocked on Aaron Frank's door, but receiving no answer, proceeded to inspect the outside premises. When Frank accosted the inspector, the officer answered he had strong evidence of rodent infestation and wished to inspect his basement. Frank refused. The inspector returned the next day accompanied by two policemen. Receiving no response to his knock, he swore out an arrest warrant for violation of the Baltimore

³⁰ *Supra* note 19, at 16-17.

³¹ *Supra* note 19, at 25.

³² 210 Md. 484, 124 A.2d 764 (1956).

³³ *DePass v. City of Spartanburg*, 234 S.C. 198, 107 S.E.2d 350 (1959).

³⁴ 359 U.S. 360 (1959). See 10 DEPAUL L. REV. 166 (1960); 9 DEPAUL L. REV. 81 (1959).

City Health Code.³⁵ Frank appealed the subsequent conviction, challenging the constitutionality of the ordinance empowering entry with respect to the due process clause of the fourteenth amendment.

The Supreme Court determined that the right invaded by the code inspection was merely the right of personal privacy, not the more cogent right of self-protection; that this lesser or "peripheral" right must yield to the public welfare; and that in such cases, a reasonable search may be made without a warrant.

As has been noted by commentators, the Court could have upheld the conviction simply by ruling that the right involved was not fundamental to the fourth amendment, and therefore, did not apply to the states through the fourteenth amendment. But the majority was prepared to demonstrate the validity of the ordinance in terms of the fourth amendment.³⁶ Mr. Justice Frankfurter, speaking for the majority, first discussed the historical abuses that produced the fourth amendment, concluding that history did not require the court to find warrantless code inspections unreasonable:

Against this background two protections emerge from the broad constitutional proscriptions of official invasion. The first of these is the right to be secure from intrusions into personal privacy, the right to shut the door on officials of the state unless their entry is under proper authority of law. The second . . . is self-protection: the right to resist unauthorized entry which has as its designs the securing of information to fortify the coercive powers of the state against the individual . . . to effect a further deprivation of life or liberty. . . . [H]istory makes plain, that it was on the issue of the right to be secure from searches for evidence to be used in criminal prosecution or for forfeitures that the great battle of fundamental liberty was fought.³⁷

Next, Justice Frankfurter examined the history of similar inspection laws and found many statutes providing for warrantless inspection had been in existence for more than two hundred years.³⁸ Cautioning that history is not controlling on such an issue, he reiterated, "There is a total want of important modification in the circumstances or the structures of society which calls for a disregard of so much history."³⁹ After cursory examination of the search warrant cases, the Court concluded that a search warrant is not re-

³⁵ BALTIMORE, MD., CITY CODE, art. 12, § 120.

³⁶ Thus, the Court in *Camara* and *See* was forced to completely overrule the holding in *Frank* rather than merely dismiss it by the advent of *Mapp v. Ohio*, 367 U.S. 643 (1961). See also, *Ker v. California*, 374 U.S. 23 (1962); LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT, 245-62 (1966); 28 U. CHI. L. REV. 664, 669 (1961).

³⁷ *Frank v. Maryland*, 359 U.S. 360 (1959).

³⁸ *Id.* at 367-370. At least one author has noted these statutes for the most part related to the inspection of private property other than homes. LANDYNSKI, *supra* note 36 at 251, n. 23.

³⁹ *Frank v. Maryland*, *supra* note 37.

quired where an inspection only results in civil proceedings; and that any such requirement would greatly "hobble" the maintenance of community health.

Mr. Justice Douglas, dissenting, gives a lesson in the elasticity of historical analysis. After a discussion of historical formative factors, he decided that the fourth amendment has "a much wider frame of reference than mere criminal prosecution."⁴⁰ The main thrust of the amendment is the protection of the home from official intrusion. Nonetheless, the proof required for a warrant to inspect would not be the same as that required for a search for criminal evidence.

The test of "probable cause" can take into account the nature of the search that is being sought. This is not to sanction synthetic search warrants but to recognize that the showing of probable cause in a health case may have quite different requirements than one required in graver situations.⁴¹

Any conjecture that the *Frank* Court had defined minimal statutory requirements for what should qualify as a "reasonable inspection"⁴² were soon laid to rest. Within the same term, the Court had occasion to consider a similar Ohio case. In *Ohio ex rel. Eaton v. Price*,⁴³ however, the statute empowering entry⁴⁴ did not demand any grounds for suspicion, nor did the city inspectors have, in fact, any grounds for entry. Nevertheless, an equally divided Court found the decision in *Frank* to be "completely controlling."⁴⁵ Speaking in dissent, Mr. Justice Brennan, without admitting the constitutionality of the warrantless inspections, pointed out the differences between the two cases, and reminded the Court that factual differences should be of prime importance in determining the reasonableness of searches.⁴⁶

Prior to the two noted cases, there had been no successful challenge to the constitutionality of empowering ordinances since *District of Columbia v. Little*.⁴⁷

⁴⁰ *Supra* note 37, at 377.

⁴¹ *Supra* note 37, at 383.

⁴² One student note prematurely asserts that the *Frank* Court demands "three elements for a proper inspection: (1) there must be valid grounds for suspicion of a nuisance; (2) the inspection must be made in the daytime; (3) the inspection can use no force." 9 DEPAUL L. REV. 81, 85 (1960). See also 28 GEO. WASH. L. REV. 421, 447-52 (1959).

⁴³ 364 U.S. 263 (1959).

⁴⁴ DAYTON, OHIO, CODE OF GENERAL ORDINANCES, § 806-30(a).

⁴⁵ 360 U.S. 246 (1958).

⁴⁶ *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1959), citing *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931).

⁴⁷ *Supra* note 19. The cases below all reached the appellate level on the question, but the constitutionality of the empowering ordinances was consistently upheld. *State v. Rees*, 139 N.W.2d 406 (Iowa 1966); *Commonwealth v. Hadley*, 222 N.E.2d 681 (Mass.

The *ratio decidendi* of the *Camara* and *See* cases, more than any other one point, is a reevaluation of the status of the right of "pure" privacy with relation to the fourth amendment. The *Frank* Court had weighed the conflicting interests, and had decided that the requirement of a warrant was too high a price to pay where the only right infringed upon was the merely "peripheral" right of "personal privacy." The presently constituted Court finds the protection of that same right is fundamental to the guarantees of the fourth amendment. Therefore, since the requirement of a warrant procedure is not likely to frustrate the goals of code inspection programs, the constitutional prohibitions against unreasonable search and seizure demand that a warrant be procured.

The basic argument for overruling *Frank* is developed in the *Camara* opinion. Mr. Justice White, finds that, while members of the Supreme Court have often differed on the practical application of the abstract prohibitions to individual cases, two basic principles have emerged:

- (1) Excluding certain concisely defined exceptions, and absent proper consent, a warrantless search of private property is "unreasonable."⁴⁸
- (2) The question of whether there is sufficient cause to justify an invasion of privacy is one for judicial determination.⁴⁹

The *Frank* case had been interpreted as creating a new exception to these general principles. But re-balancing interests, Justice White explains, the Court cannot subordinate the right of "personal privacy" to an ancillary position:

But we cannot agree that the Fourth Amendment interests at stake in these inspections are merely "peripheral." It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.⁵⁰

Having determined that the interest of "personal privacy" demands the requirement of a warrant, Justice White suggests the nature of such a

1966); *City of St. Louis v. Evans*, 337 S.W.2d 948 (Mo. 1960); *People v. La Verne*, 14 N.Y.2d 304, 200 N.E.2d 44 (1964). It should be noted that in *People v. La Verne supra*, the Court held that when as a result of a warrantless inspection, the evidence found is the foundation of a conviction, that evidence should be inadmissible as the product of an unlawful search and seizure. *Contra*, *State v. Rees*, 139 N.W.2d 406.

⁴⁸ *Camara v. Municipal Court*, 377 U.S. 420, 84 S. Ct. 1727, 1730-31 (1967).

⁴⁹ *Id.*

⁵⁰ *Id.* at 1731-32. Here, the Court seems in complete harmony with the contention of the appellant that the fourth amendment should not be limited to operation within the scope of the fifth amendment. See Brief for Appellant p. 4, wherein it is stated: "There is scant basis upon which to conclude—as did *Frank* and as now does appellee—that the Fourth Amendment is a procedural constitutional right designed only to protect substantive rights appearing in other provisions of the Constitution. The Fourth Amendment was intended to have and does have constitutional content in and of itself."

process. Except in cases of emergencies or inspections initiated by a complaint, the officer need only obtain a warrant where entry is denied him. The magistrate, without delving into the efficacy of the administrative discretion to survey a given area, may determine the legitimate interest in inspecting a certain premise with respect to an enforcement program, delimit the area and extent of search, and verify the authority under which the individual inspecting officer acts. The existence of "reasonable legislative or administrative standards" will bear singularly on the determination of probable cause, and such standards could characterize an entire area or neighborhood. In summation, there is probable cause to issue a warrant, if and only when a valid public interest justifies the intrusion occasioned by the inspection.

In the *See* case, the Court by the process of judicial extrapolation extends the rule in *Camara* to include commercial property.⁵¹ The Court relies on the already established case law supporting the proposition that a business premise is a protected area within the meaning of the fourth amendment.⁵² Mr. Justice White emphasizes that the majority holds "only that the basic component of a reasonable search under the Fourth Amendment—that it not be enforced without a suitable warrant procedure—is applicable in this context, as in others, to business as well as other residential premises."⁵³

In *Frank v. Maryland*, the Court sought to demonstrate that warrantless code inspections were not unreasonable within the meaning of the fourth amendment. The *Frank* majority's argument, and ultimately the validity of its ruling, turned on two essential suppositions. First, that the inspection procedure is civil in nature, and thus, does not demand the stricter limitations placed upon criminal searches. Second, requiring enforcement officials to procure a warrant would greatly "hobble" the range and effectiveness of inspection programs.

The distinction between "inspections" and "searches" is not in actuality so clear cut. Police have used the inspection procedure as a front for searches for criminal evidence,⁵⁴ and conversely, administrative inspectors are often

⁵¹ The Supreme Court of Washington, in affirming the conviction below, relied upon the false belief that the United States Supreme Court had applied different standards of reasonableness to searches of dwellings than to places of business. *Seattle v. See*, 67 Wash. 2d 475, 483, 408 P.2d 262, 267 (1966).

⁵² *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1930); *Amos v. United States*, 255 U.S. 313 (1921); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). See also *Lanza v. New York*, 370 U.S. 139 (1962); *Gouled v. United States*, 255 U.S. 298 (1921).

⁵³ See *v. Seattle*, 87 S. Ct. 1737, 1741. The Court earlier adds some caveats that the opinion should not be interpreted as meaning business premises may not be more susceptible to reasonable inspection, nor does it take issue with accepted regulatory techniques which require inspection. *Supra* at 1740-41.

⁵⁴ See *Abel v. United States*, 362 U.S. 217 (1960); *State v. Pettiford*, 28 U.S.L.W.

given authority to investigate for evidence of crime.⁵⁵ The failure to obey an administrative order to abate a nuisance will normally result in criminal sanctions, and the mode of discovering noncompliance is a warrantless re-inspection specifically seeking evidence for such prosecution.⁵⁶ Yet, prior to *Camara*, the only method by which an occupant could challenge such administrative fiat was by risking criminal conviction.

If the *Frank* Court can be seen as relinquishing the maintainance of the fourth amendment protections to legislatures, it did not provide definite constitutional guidelines, nor did it eliminate the legal impasse that the ultimate judge of reasonableness was still the officer in the field. Presently, the majority of empowering statutes fail to meet even the minimum safeguards so extolled in *Frank*. Many codes fail to limit the time of inspection. Most have no "cause" requirement for entry. In a survey of fifty ordinances, only one demanded that "such entries shall be made in such manner as to cause the least inconvenience to persons in possession."⁵⁷ With the advent of *Camara*, these ordinances are, of course, invalidated.⁵⁸

Camara and *See* have created problems.⁵⁹ They are the problems inherent

2286 (U.S. Dec. 29, 1959); *Parrish v. Civil Service Comm'n*, 51 Cal. Rptr. 589 (1966); 18 HASTINGS L.J. 228 (1966).

⁵⁵ OHIO REV. CODE ANN. § 3737.08 (Page 1966); IOWA CODE ANN. ch. 100, § 100.2 (Supp. 1966); WIS. STAT. § 200.21 (1965). In *State v. Rees*, *supra* note 47, the Supreme Court of Iowa held the exclusionary rule did not apply to evidence obtained from a warrantless fire inspection. *Contra*, *People v. La Verne*, *supra* note 47.

⁵⁶ *Supra* note 29; 28 GEO. WASH. L. REV. 421 (1959); 78 HARV. L. REV. 801 (1965). There is precedent which suggests these inspections might just as well be described as civil in form, but criminal in nature. In *Boyd v. United States*, 116 U.S. 616, 633-34 (1886), the Court said: "We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal."

⁵⁷ 28 GEO. WASH. L. REV. 421, 447-48 (1959).

⁵⁸ England's Public Health Act has, since 1936, provided that an inspector, after being refused entry, obtain a warrant issued upon "reasonable grounds." 26 Geo. 5 & 1 Edw. 8, c. 49, § 287 (1936). Prior to *Camara*, the state of Massachusetts had enacted similar ordinances incorporating a warrant procedure. MASS. GEN. LAWS ANN. ch. 111, § 131 (1954). *See also* DENVER, COLO., HOUSING CODE ORDINANCE no. 27, § 8 (1944).

⁵⁹ Whatever problems may have been occasioned by *Camara*, this author finds hard to believe Mr. Justice Clark's *in terrorem* defense of *Frank*. "[W]hen voluntary inspection is relied upon this 'one rebel' [referring to the Douglas dissent in *Frank*] is going to become a general rebellion. That there will be a significant increase in refusals is certain and, as time goes on, that trend may well become a frightening reality. . . . This boxcar warrant will be identical as to every dwelling in the area, save the street number itself . . . [and] they will be printed up in pads of a thousand or more—with space for the street number to be inserted—and issued by magistrates in broadcast fashion as a matter of course." *Camara v. Municipal Court*, 87 S. Ct. 1737, 1744-45 (1967).

At present, the number of prosecutions for refusal to allow entry in cities making such refusal a crime is about one out of every twenty to thirty thousand attempted inspections. Of course, not all refusals result in prosecutions. A large number of initial refusals

in reconciling two important interests both deserving judicial recognition. The standard of probable cause is inappropos,⁶⁰ insofar as the language of the Court suggests that probable cause will not be the requirement for the issuance of a search warrant, but rather the criterion will be a prior judicial determination of the reasonableness of a given inspection: reasonableness determined by the administrative and legislative standards which initiate a particular inspection. Absent a complaint or an obviously deteriorated premises, there is never "probable cause" in the conventional sense to believe a violation exists on any individual's premises during the initial canvass of an area. Does this mean that the findings of a first inspection cannot be used in a subsequent criminal prosecution regardless of the issuance of a search warrant since this less stringent standard will be used?⁶¹ Upon a reinspection, which admittedly serves the function of searching for criminal evidence of noncompliance, may the officer obtain a warrant upon the showing of the quantum of circumstances which sustain an inference that such inspection is reasonable within the meaning of *Camara* or must the court revert to the traditional standard of "probable cause"? And if the latter, what will be the state of facts *vel non* to warrant an inference that the violator has failed to abate a nuisance after being so ordered?⁶² The answers to these questions can only be resolved in time.

For the present, the inadequacies and expense of rebuilding cities seems obvious. Housing code enforcement is no longer thought to be a staving off of the inevitable, but a significant answer to a long term problem. If enforcement programs have often failed in the past because of politics or general incompetency,⁶³ the blame cannot now be shifted to the occasional recalcitrant occupant who stands on his constitutional right. Administrative officials would do better to strive to develop the very necessary rapport between inspector and occupant rather than trying to coerce compliance,

are eliminated by subsequent follow-up visits. Prior notice of such inspections seem to decrease the incidence of refusals as well as increasing the possibility that someone will be home. 28 GEO. WASH. L. REV. 421 (1959); 78 HARV. L. REV. 801, 807-08, n. 31 (1965).

⁶⁰ Probable cause has traditionally been defined as, "An apparent state of facts found to exist upon reasonable inquiry, (that is, such inquiry as the given case renders convenient and proper,) which would induce a reasonably intelligent and prudent man to believe, in a criminal case, that the accused person had committed the crime charged, or in a civil case, that a cause of action existed." BLACK'S LAW DICTIONARY 1365 (4th ed. 1951) relying on *Cook v. Singer Sewing Machine Co.*, 138 Colo. App. 418, 32 P.2d 430; *Brand v. Hinchman*, 68 Mich. 590, 36 N.W. 664.

⁶¹ Compare *People v. La Verne* with *State v. Rees*, *supra* note 47.

⁶² It appears to this writer that the refusal of entry for a reinspection of substandard premises contributes to the inference of "probable cause." At least one case note writer suggests the difficult problem in this area. See 108 U. PA. L. REV. 265 (1959).

⁶³ See, e.g., Glazer, *The Renewal of Cities*, in CITIES 175-91 (1965).

recognizing the simple fact that the status of man has as much to do with the dignity he can command in his own home as his living conditions.⁶⁴

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⁶⁴ As Professor Thomas Emerson observes: “[P]rotection, in other words, of the dignity and integrity of the individual—has become increasingly important as modern society has developed. All the forces of a technological age—industrialization, urbanization, and organization—operate to narrow the area of privacy and facilitate intrusions into it. In modern terms, the capacity to maintain and support this enclave of private life marks the difference between a democratic and a totalitarian society.” As quoted in the Brief for Appellant at 20, *See v. Seattle*, 87 S. Ct. 1737 (1967), from Emerson. *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 229 (1965).

CONSTITUTIONAL LAW—LIMITATIONS ON PERMISSIVE EAVESDROPPING STATUTES

Checking complaints that ten thousand dollar bribes were the *sine qua non* for obtaining New York State liquor licenses, New York County Rackets Bureau investigators¹ uncovered what appeared to be widespread corruption in the state Liquor Authority. Acting under New York’s permissive eavesdrop statute,² two assistant district attorneys obtained a court order for installation of a surreptitious recording device in the private law office of a former Liquor Authority employee. Leads obtained from this eavesdrop resulted in a second application for permission to eavesdrop, this time in the business office of one Harry Steinman, a prospective liquor license applicant. The order, issued by a New York Supreme Court justice, authorized recording of “any and all conversations, communications and discussions” in Steinman’s business office for a period of two months. Within two weeks, via the eavesdrop, a conspiracy was uncovered involving issuance of a liquor license for

¹ A branch of the District Attorney’s Office of New York County.

² N.Y. CODE CRIM. PROC. § 813-a (1958). “Ex parte order for eavesdropping. An ex parte order for eavesdropping . . . may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions . . . upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department . . . that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective . . . not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest”